



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HD

4

COLUMNS 7219 to 9510
EXECUTED CONTRACTS
TO
INTIMIDATION

LRR

Sts



HARVARD LAW LIBRARY

Received AUG 17 1914

THE DIGEST OF THE DECISIONS

OF THE

COURTS OF OHIO

*From the earliest period to
January 1st, 1914*

With Annotations by Reference to Longsdorf's
Notes to the Ohio and Ohio State Reports

BY

WM. HERBERT PAGE

Author of Page on Contracts, Page on Wills, Editor
of Page & Adams' Annotated General Code,
Professor of Law, Ohio State University

VOLUME FOUR

EXECUTED CONTRACTS—INTIMIDATION

CINCINNATI, OHIO
THE W. H. ANDERSON COMPANY
1914

**COPYRIGHT, 1914,
BY
THE W. H. ANDERSON CO.**

AUG 17 1914

LRR
S to C
6/19/36

LIST OF DEFINITIONS OF WORDS AND PHRASES FOUND IN VOL. IV.

[Those headings in italics are cross references.]

COLUMN	COLUMN
Administrator 7409	<i>Horse-stealing</i> 8547
Bill of Interpleader 9487	<i>House of Ill Fame</i> 8553
Broker 7711	Idiot 9027
Contingent Remainder 8211	Imbecile 9027
Deceit 8001	<i>Incest</i> 8677
Execution 7235	Indictment 8699
Executor 7409	Inheritance Tax 8799
Expenses 7684	Injunction 8813
Explosion 7689	Injury 9013
Extradition 7697	Innkeeper 9015
False Imprisonment 7731	Insanity 9027
False Pretenses 7741	Instrument 9083
Fee Simple 7765	Insurance 9099
Fee Tail 7795	Intent 9391
Fiduciary Relation 7825	Interest 9417
File 7836	Interest in Controversy 9483
First-degree Murder 8503	Interlocutory Decree 9485
Fixture 7881	Intestate 9510
Forfeiture 7927	Lunatic 9027
Forgery 7949	Mandatory Injunction 8814
Franchise 7971	Manslaughter 8504
Fraud 8001	Marriage 8567
Fraudulent Conveyance 8125	Peddler 8463
Gift Inter Vivos 8293	Penalty 7927
Gift Causa Mortis 8293	Prohibitory Injunction 8814
Good Health 8467	Sale "Short" 8232
Good-will 8313	Second-degree Murder 8504
Grant 8343	Sound Health 8467
Guaranty 8355	Temporary Injunction 8814
Guardian Ad Litem 8373	Usury 9419
Guardian of Property 8385	Vested Remainder 8211
Guardian De Facto 8385	Wager 8231
Heir 8483	Writ of Habeas Corpus 8433
Heirs at Law 8483	
Homestead 7340	

LIST OF TOPICS FOUND IN VOLUME IV.

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

COLUMN	COLUMN
Executed Contracts 7219	EXPERTS 7687
Executed Trusts 7219	Expiration of Term of Office 7687
Execution Against the Person 7219	Explanation 7688
Execution Against Property 7219	EXPLOSIONS 7688
Execution Docket 7219	EXPLOSIVES 7689
EXECUTION OF INSTRUMENT 7219	Exposing for Sale 7692
EXECUTION, WRIT OF 7221	Ex Post Facto Laws 7692
Executive 7392	Exposure of Person 7692
Executive Powers 7392	Express Admissions 7692
Executor De Bonis Non 7392	Express Authority 7692
Executor De Son Tort 7392	Express Company 7692
EXECUTORS, ADMINISTRATORS AND	Express Contracts 7693
ADMINISTRATION OF ESTATES 7391	Express Covenants 7693
Executory Contract of Sale 7676	Express Promise 7693
Executory Contracts 7676	Express Ratification 7693
Executory Devises 7676	Express Repeal 7694
Executory Estates 7676	Express Trusts 7694
Executory Sales 7676	Express Waiver 7694
Executory Trusts 7676	Express Warranties 7694
Executrix 7676	Expression of Opinion 7694
Exemplary Damages 7677	Expressions of Pain 7694
Exemplification of Record 7677	Expulsion 7694
Exemption from Execution 7677	Extended Insurance 7694
Exemption from Jury Service 7677	Extension 7694
Exemption from Road Labor 7677	Extension of Lease 7694
Exemption from Taxation 7677	EXTENSION OF TIME 7694
EXEMPTIONS 7677	Extent of Adverse Claim 7696
Exhausted Security 7680	Extent of Jurisdiction 7696
Exhausting Other Remedies 7680	EXTORTION 7696
Exhausting Personalty 7680	Extra Baggage 7696
Exhibition of Person 7680	Extra Compensation 7696
EXHIBITS 7680	Extra Hazardous 7696
Existence of Remedy at Law 7682	Extra Services 7696
Existing Creditors 7682	EXTRADITION 7697
Existing Debt 7682	Extraordinary Remedies 7710
Existing Rights 7682	EXTRAS 7710
Ex Maleficio Trusts 7682	Extraterritorial 7710
Ex Officio 7682	Extraterritorial Jurisdiction 7710
Exoneration 7682	Extreme Cruelty 7710
Exoneration of Real or Personal Estate 7682	Extrinsic Circumstances 7710
EX PARTE 7682	Eye-witnesses 7710
Expatriation 7683	
EXPECTANCY 7683	Fabricated Evidence 7711
Expectation of Immunity 7683	Factories 7712
Expenditure and Appropriation of Municipal corporation 7684	FACTORS AND BROKERS 7711
EXPENSES 7684	FACTORY 7723
Expenses of Action 7686	FACTS 7723
Experience 7686	Facts in Issue and Relevant to Issue 7726
EXPERIMENTS 7687	Facts Putting on Inquiry 7726
Expert and Opinion Evidence 7687	Failure of Consideration 7726
	Failure of Issue 7726

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

	COLUMN		COLUMN
Failure of Proof.....	7726	Farm Products	7753
Failure of Title	7726	Farming on Shares.....	7753
Failure to Answer.....	7727	Father	7754
Failure to Demur.....	7727	Fault	7754
FAILURE TO EXPLAIN.....	7727	Faulty Pleading	7754
Failure to Instruct.....	7727	Favorable Error	7754
Failure to Make Return.....	7727	Favoring Constitutionality	7754
Failure to Pay.....	7727	Favoring Insured	7754
Failure to Prosecute.....	7727	Favoring Grantee	7754
Failure to Provide.....	7727	Favoring Prospective Operation.....	7754
Failure to Qualify.....	7727	Favoring Validity	7754
Failure to Reply.....	7727	Federal Agencies	7754
Failure to Support.....	7727	Federal Constitution	7754
Failure to Testify.....	7728	Federal Courts	7754
Failure to Transmit Telegram.....	7728	Federal Employers' Liability Act.....	7754
Fair	7728	Federal Judgment	7754
Fair Associations	7728	FEDERAL PRACTICE	7755
Fair Criticism	7728	FEDERAL QUESTION	7756
Fair Grounds	7728	Fee	7757
Fair Trial	7728	Fee (Interest in Real Estate).....	7757
Faith and Credit.....	7728	Fee Bill	7758
FAITHFUL PERFORMANCE	7728	Feeble-minded Youth	7758
Fallen Building Clause.....	7730	FEE COMMISSION	7758
Falsa Demonstratio Non Nocet.....	7730	Fee Fund	7758
False Acknowledgment	7730	FEELINGS	7758
False Affidavit	7730	Fee of Streets	7758
False Answers	7730	FEES (COMPENSATION)	7757
False Bill of Lading.....	7730	FEE SIMPLE	7763
False Claims	7730	FEE TAIL	7793
False Coin	7730	Feigned Accomplice	7806
False Evidence	7730	Feigned Controversy	7806
FALSE IMPRISONMENT	7729	Feigned Issue	7806
False Label or Brand.....	7738	Fellow-servants	7806
False Name	7738	Felonious Assault	7794
False Oath	7738	Felonies and Misdemeanors.....	7806
False Pleas	7738	FELONY	7806
FALSE PRETENSES	7739	FEMALE	7808
False Proof of Loss.....	7750	Female Employes	7808
False Registration	7750	FEMALE PUPIL	7808
False Reports	7750	Female Reformatory	7810
False Representations	7750	FEMALE SUFFRAGE	7810
False Return	7750	Feme Covert	7810
False Swearing	7750	FENCES	7809
False Testimony	7750	Ferae Naturae	7818
False Token	7750	Fermented Liquors	7818
False Warranty	7751	FERRETS	7818
False Weights and Measures.....	7751	FERRIES	7818
False Writings	7751	FERTILIZERS	7819
Falsifying Accounts	7751	FICTIONS	7820
Falsifying Records	7751	Fictitious Capitalization	7821
Falsus in Uno, Falsus in Omnibus.....	7751	Fictitious Checks	7821
Familiarity	7751	Fictitious Grantee	7821
Family	7751	FICTITIOUS NAMES	7821
FAMILY ARRANGEMENTS	7751	Fictitious or Frivolous Issues.....	7822
Family Record	7753	Fictitious Price	7822
Family Relics	7753	Fictitious Stock	7822
Family Residence	7753	Fidelity and Guaranty Insurance.....	7822
FAMILY STANDING	7753	FIDELITY AND TRUST COMPANIES.....	7823
Fares	7753	Fidelity Bonds	7825
Farm Leases	7753	Fiduciaries	7826

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

	COLUMN		COLUMN
FIDUCIARY CAPACITY	7825	Fleeing from Justice.....	7890
Fiduciary Relations	7835	Flight	7890
FIELD NOTES, ETC.	7835	Floods	7890
Fieri Facias	7835	Foeticide	7891
Fighting	7835	Following Property	7891
Filiation	7835	Following Statute of Limitations.....	7891
FILING	7836	Following Trust	7891
Filing Claim	7836	FOLLOWING THE LAW FUNDS.....	7891
FILING PAPERS	7836	Food Commissioners	7892
Filius Nullius	7838	FOODS AND DRUGS.....	7891
Filling Blanks	7838	Forbearance	7905
Filling Vacancies	7838	FORBIDDEN BUSINESS	7906
Filum Aquae	7838	Force	7906
Final Accounts	7838	Force of Evidence.....	7906
Final Decree of Distribution.....	7838	Forced Sale	7906
Final Judgment	7839	Forcible Breaking	7906
FINAL ORDERS	7839	Forcible Defilement	7906
Final Process	7839	FORCIBLE ENTRY AND DETAINER.....	7905
Final Record	7839	Foreclosure	7921
FINANCIAL CONDITION	7839	Foreign Acknowledgment	7921
Finder of Lost Property.....	7840	Foreign Administration	7921
FINDING OF FACT	7840	Foreign Assignments	7921
Finding of Indictment.....	7840	Foreign Attachment	7921
FINDINGS BY COURT.....	7839	Foreign Bills	7921
Findings by Jury.....	7852	Foreign Commerce	7921
FINES	7851	Foreign Contracts	7921
Fines and Forfeited Bonds.....	7861	Foreign Corporations	7921
FIREARMS	7861	Foreign Divorce	7921
Fire-damp	7862	Foreign Domicile	7921
FIRE DEPARTMENT	7862	Foreigners	7922
FIRE-ESCAPE	7862	Foreign Exchange	7922
Fire Insurance	7864	Foreign Execution Docket.....	7922
Fire-ladders and Fire-escapes, Standard.....	7864	Foreign Executors and Administrators.....	7922
Fire Lands	7864	Foreign Garnishment	7922
FIRE-LIMITS	7864	Foreign Guardians	7922
Firemen's Pension Fund.....	7865	Foreign Insurance Companies.....	7922
FIRES	7865	Foreign Judgment	7922
Firm Assets	7866	Foreign Judicial Records.....	7922
Firm Liabilities	7866	Foreign Language	7922
Firm Names	7866	Foreign Laws	7922
Firm Powers	7866	Foreign Marriage	7923
Firm Property	7866	Foreign Paupers	7923
Firms	7866	Foreign Practitioners	7923
First in Time Prevails.....	7866	Foreign Railway Companies.....	7923
First Mortgage Bonds.....	7866	Foreign Receivers	7924
First Name Unknown.....	7866	Foreign Records	7924
First Offense	7866	Foreign Residence	7924
Fiscal Officers	7866	Foreign Service	7924
FISH AND GAME.....	7867	FOREIGN STATUTES	7923
FISHERY	7877	Foreign Wills	7926
Fishing Bill	7880	Foreign Witnesses	7926
Fisticuffs	7880	Foreigners	7926
Fixed Opinion	7880	Foreman of Grand Jury.....	7926
Fixing Compensation	7880	Forfeited Lands	7926
Fixing Date	7880	FORFEITURE	7925
Fixing Liability	7880	Forfeiture of Charter.....	7947
Fixing Water Rates.....	7880	Forfeiture of Recognizance.....	7947
FIXTURES	7879	Forged Affidavit	7948
FLAGMAN	7890	Forged Check	7948
Flavoring Extracts	7890	Forged Money	7948

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

	COLUMN		COLUMN
FORGERY	7947	Freshets	8205
Formal Parties	7962	FRIGHT	8205
Formation of Contract	7962	Frivolous Appeal	8206
Formation of Jury	7962	Frivolous Pleading	8206
Former Acquittal	7962	Frivolous Questions	8206
Former Action Pending	7962	Frogs for Railroads	8206
Former Adjudication	7962	Frontage	8206
Former Conviction	7962	Front-foot Rule	8206
Former Decision	7962	Fructus Industriales	8206
Former Evidence	7962	Fugitive from Justice	8206
Former Jeopardy	7962	FUGITIVE SLAVE	8206
Former Recovery	7962	Full Blood	8207
Former Testimony	7963	Full Faith and Credit	8207
Former Trial	7963	Full Indorsement	8207
Form of Actions	7963	Full Paid Stock	8207
FORMS	7963	Full Panel	8207
Fornication	7968	Funds, Public	8207
Forswearing	7968	Funeral Benefit Association	8207
Forthcoming Bonds	7968	FUNERAL EXPENSES	8207
Fortuitous Event	7968	Funeral Insurance	8208
For Value Received	7968	Furnishing Intoxicating Liquor	8208
Forwarding Carriers	7968	Further Assurance	8208
Foul Odors	7968	Furtherance of Common Purpose	8208
Fourteenth Amendment	7968	Furtherance of Justice	8208
Fraction of Day	7968	Future-acquired Property	8208
FRANCHISES	7969	Future Advances	8209
Franchise Taxes	7995	Future Damages	8209
FRANKLIN COUNTY	7995	FUTURE DELIVERIES	8209
Fraternal Insurance	7996	Future Earnings	8210
Fraternal Societies	7996	Future Estates	8210
Fraternities	7996	FUTURE INTERESTS	8209
FRAUD AND DECEIT	7995	Future Pain and Suffering	8230
FRAUDS, STATUTE OF	8071	Futures	8230
FRAUDULENT ACCOUNT	8121	Future Service	8230
FRAUDULENT CONVERSION	8122	Future Support	8230
FRAUDULENT CONVEYANCES	8121		
FRAUDULENT INSTRUMENTS	8202	GAMBLING	8229
Fraudulent Intent	8202	Gambling Apparatus	8260
Fraudulent Preferences	8202	Gambling Contracts	8260
Fraudulent Pretenses	8203	Gambling Device	8260
Fraudulent Removal	8203	Gambling Game	8260
Fraudulent Representations	8203	Gambling Loan	8260
Fraudulent Sales	8203	Gambling Place	8260
Fraudulent Transfer	8203	Game	8260
Fraudulent Wagers	8203	Game Laws	8260
Free Banking	8203	Games of Chance	8260
Freedom of Conscience	8203	Game Warden	8260
Freedom of Speech	8203	Gaming	8260
Freehold Estates	8203	Gaol	8260
FREE-LUNCH LAW	8203	GARBAGE	8261
Free Schools	8204	Garbage Reduction	8261
FREE SPEECH	8204	Garfield Law	8262
FREE TEXT-BOOKS	8204	Garnishee	8262
Free Turnpike	8205	Garnishment	8262
Freight	8205	Gas and Oil	8262
Freight Bill	8205	GAS COMPANIES	8261
Freight Charges	8205	Gas-pipes	8288
Freight Rates	8205	Gas Wells	8289
Freight Trains	8205	Gas Works	8289
French Grant	8205	General Agent	8289

LIST OF TOPICS.

ix

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

COLUMN	COLUMN
General and Local Laws.....8289	GOVERNMENTAL AGENCIES 8319
General and Specific Legacies.....8289	GOVERNMENTAL POWERS 8319
General and Specific Words.....8289	Government Bonds 8324
General Appearance 8289	Government Lands 8324
General Assembly 8289	GOVERNOR 8323
General Assignment 8289	Grace, Days of.....8329
General Average 8289	GRADE 8329
General Benefits 8289	Grade Crossings 8330
General Bequests 8289	Graded Schools 8330
General Challenge 8289	Grade of Offense.....8330
General Character 8290	Grade, Pave, Widen, etc.....8330
General Charge 8290	Graft, Grafting 8330
General Code 8290	GRAIN, ETC. 8331
General Creditors 8290	Grammatical Construction 8332
General Custom 8290	GRAND ARMY 8332
General Damages 8290	GRAND JURY 8331
General Demurrer 8290	Grand Larceny 8342
General Denial 8290	Grandchildren 8342
General Deposits 8290	Grantee 8342
General Description 8290	Grantors 8342
General Devises 8290	GRANTS 8341
General Election 8290	GRATUITIES 8350
General Executor or Administrator.....8290	Gratuitous Bailment 8351
General Guaranty 8290	Gravel-roads 8351
General Guardian 8291	Grave-robbing 8351
General Issue 8291	Gravestone 8351
General Jurisdiction 8291	Graveyards 8351
General Laws 8291	GREENBACKS 8351
General Legacies 8291	Grog-shops 8351
General Partners 8291	GROSS 8351
General Prayer 8291	GROSS IMMORALITY 8352
General Reputation 8291	Gross Neglect of Duty.....8352
General Restraint of Trade.....8291	Gross Negligence 8352
General Statutes 8291	GROSS RECEIPTS 8352
General Traverse 8292	Ground of Action.....8352
General Usage 8292	GROUND-RENT 8353
General Verdict 8292	Grounds for Attachment.....8354
General Warranty 8292	Grounds of Divorce.....8354
General Words 8292	Grouse 8354
Genuineness of Writing.....8292	Growing Crops 8354
Geographical Facts 8292	GUARANTY 8353
German Advertising 8292	Guaranty Company 8373
German Newspaper 8292	Guaranty Credit 8374
Gift Enterprise 8292	Guaranty Insurance 8374
GIFTS 8291	Guard, Ohio National.....8374
GIRLS' INDUSTRIAL HOME.....8306	GUARDIAN AD LITEM.....8373
Glove-fighting 8308	GUARDIAN AND WARD.....8381
Glucose 8308	Guarding Machinery 8429
GOD 8308	GUESSING CONTESTS 8429
Gold Coin 8309	GUILTY 8430
Good Behavior 8309	Guilty Knowledge 8431
Good Character 8309	Gunpowder 8431
Good Conscience 8309	Guns 8431
Good Consideration 8309	Gutters, Curbing, etc.....8432
GOOD FAITH 8309	GYMNASIUM 8432
Good-faith purchases 8312	Gymnast 8432
GOOD-WILL 8311	
Goods and Chattels.....8319	HABEAS CORPUS 8431
Goods Sold and Delivered.....8319	HABENDUM CLAUSE 8456
GOVERNMENT 8319	Habere Facias 8456

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

	COLUMN		COLUMN
Habitation	8456	Hocking Canal	8496
HABITS	8456	Hogs	8496
Habits of Insured	8456	Hoists	8496
HABITUAL CRIMINAL	8457	HOLDER	8496
Habitual Criminal Act	8458	Holder for Security	8497
HABITUAL DRUNKARDS	8458	Holding Out	8497
Habitual Offender	8459	Holding Over	8497
HACKS, HACKMEN, HACKSTAND, ETC.	8459	HOLIDAYS	8497
Half-blood	8460	HOLMES COUNTY	8498
Hallucination	8460	Home	8498
HAMILTON COUNTY	8460	Home for Soldiers	8498
HAMLET	8461	Home, Girls' Industrial	8498
Hand of Another	8462	Home of the Friendless	8498
HANDWRITING	8462	Home, Ohio Soldiers' and Sailors'	8498
Harboring Criminals	8463	Home, Ohio Soldiers' and Sailors' Or- phans'	8498
HARBORING THIEF	8463	Home-rule Charters	8498
Harboring Wife	8463	Homes, Children's	8499
Hard Bargains	8463	Homestead	8500
Hard Labor	8463	HOMICIDE	8499
Harmless Error	8463	Honor, Acceptance for	8543
Harvest Home Festival	8463	Honor, Payment for	8543
HAWKERS AND PEDDLERS	8463	Hope	8543
Hawking	8464	Horse-railway	8543
HAY, STRAW, ETC.	8464	HORSE	8543
Hazard	8466	HORSE-STEALING	8545
Hazardous Occupation	8466	HOSPITAL	8548
Hazardous Risks	8466	Hospital Associations	8550
Head of Family	8466	Hospital for Insane	8550
HEALTH	8465	Hospital, Longview	8550
Health Board	8481	Hospital, Municipal	8550
Health Insurance	8481	Hostile Possession	8550
Health Officer	8481	Hostile Witness	8550
Health, State Board of	8481	Hotel	8550
HEARINGS	8481	Hours of Labor	8550
Hearsay	8482	Housebreaking	8550
HEAT AND POWER	8482	HOUSEHOLD GOODS	8550
Heat of Passion	8483	House of Assignment	8552
Height of Fence	8483	House of Correction	8552
Heir-at-law	8483	HOUSE OF ILL FAME	8551
HEIRLOOMS, ETC.	8484	House of Prostitution	8558
HEIRS	8483	HOUSE OF REFUGE	8557
Heirs, Expectant and Reversioners	8491	House of Representatives	8560
Heirs of the Body	8491	House of Worship	8560
Hendley Law	8491	Houses, School	8560
HEREDITAMENTS	8492	HOWLAND ACT	8560
HERON	8492	Huckster	8560
Hidden Dangers	8492	HUMANE SOCIETY	8560
High Explosives	8492	Human Life	8562
HIGH SCHOOLS	8492	Humiliation	8562
Highest Bidders	8493	HUNTING	8562
Highroads	8493	HUSBAND AND WIFE	8561
HIGHWAY-CROSSINGS	8493	Hydrants	8562
Highway Robbery	8493	HYDRAULIC COMPANIES	8562
HIGHWAYS	8493	Hydraulic Rights	8563
Hindering Creditors	8495	Hypothecation	8563
HIRING	8495	Hypothesis	8563
Historical Books	8496	Hypothetical Opinion	8564
Historical Facts	8496	Hypothetical Questions	8564
HISTORY	8496	HYSTERICIS	8564

LIST OF TOPICS.

xi

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

COLUMN	COLUMN
Ice-cream Parlor 8653	Impediments 8662
Idem Sonans 8653	Imperative Statutes 8662
Identification 8653	Implements of Labor and Trade 8662
IDENTITY 8653	IMPLICATIONS 8662
Identity of Offenses 8656	Implied Agency 8666
Idiot 8656	Implied Amendment 8666
Idle and Truant Children 8656	Implied Bequests 8666
Idle Persons 8656	Implied Conditions 8666
IGNORANCE 8656	Implied Contracts 8666
Ignorance of Facts 8657	Implied Covenants 8666
Ignorance of Law 8657	Implied Dedication 8666
Illegal Acts 8657	Implied Devises or Legacies 8666
Illegal Arrest 8657	Implied Easement 8666
Illegal Assessments 8657	Implied Lien 8666
ILLEGAL BUSINESS 8657	Implied Malice 8666
Illegal Conditions 8658	Implied Notice 8667
Illegal Contracts 8658	Implied or Quasi-contracts 8667
Illegal Fees 8658	Implied Powers 8667
Illegal Imprisonment 8658	Implied Promise 8667
Illegal Loan 8658	Implied Ratification 8667
Illegal Marriage 8658	Implied Repeal 8667
Illegal Sales 8658	Implied Suretyship 8667
Illegal Speculation 8658	Implied Trusts 8667
Illegal Taxes 8658	Implied Waiver 8667
Illegal Votes 8658	IMPLIED WARRANTY 8667
Illegitimacy 8658	Importing Voters 8667
Ill Fame 8659	Imposition 8667
ILL FEELING 8659	IMPOSSIBILITY 8668
ILL REPUTE 8659	Impossible Conditions 8669
Ill Treatment 8659	Impotency 8669
Ill Will 8659	Impounding Animals 8669
Illicit Cohabitation 8659	Impressions of Witnesses 8669
Illicit Intercourse 8659	IMPRISONMENT 8669
Illiteracy 8659	IMPRISONMENT FOR DEBT 8674
Illusions 8660	Improbability of Evidence 8675
Imbecile 8660	Improper Parties 8675
Imitation 8660	Improperly Influencing Jury 8675
Immaterial Averments 8660	Improved Road 8675
Immaterial Errors 8660	Improvement Bonds 8675
Immaterial Evidence 8660	Improvement of Highways 8675
Immaterial Facts 8660	Improvement of Navigation 8675
Immaterial Issue 8660	IMPROVEMENTS 8675
Immemorial Usage 8660	Improvements, Street 8676
Imminence of Danger 8660	Improving Roads 8676
Immoral Books, etc. 8660	Imputable Negligence 8676
Immoral Conduct 8660	Imputed 8676
Immoral Consideration 8660	Inactive Deposit 8676
Immoral Contracts 8660	Inadequacy of Consideration 8676
Immoral Habits 8660	Inadequate Damages 8676
Immoral Literature 8661	Inadequate Remedy at Law 8676
Immoral Publications 8661	Inadvertence 8676
Immovables 8661	INALIENABLE RIGHTS 8676
Immunity 8661	Incapacity 8677
Immunity from Suit 8661	Incapacity to Sue 8678
Impairing Obligation of Contracts 8661	Incendiarism 8678
Impaneling Jury 8661	INCEST 8677
Impartial 8661	Inchoate Dower 8680
Impartial Trial 8661	Incidental Powers 8680
Impeaching Evidence 8661	Incidental Relief 8680
Impeaching Witness 8661	Incidents 8680
IMPEACHMENT 8661	Inciting Crime 8680

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

	COLUMN		COLUMN
INCLINED-PLANE RAILWAYS	8680	Individual Contracts	8760
Inclosure	8681	Individual Liability	8760
INCLUDED OFFENSES	8681	Indorse	8760
INCOME	8684	Indorsement	8760
Incompatible Offices	8684	INDORSERS	8760
Incompetency	8684	Inducement	8761
Incomplete Contracts	8685	Inducing Breach of Contracts	8761
Inconsistent Acts	8685	Inducing Crime	8761
Inconsistent Defenses	8685	Industrial Home	8761
Inconsistent Description	8685	Industrial Policies	8761
Inconsistent Findings	8685	Industrial Schools	8761
Inconsistent Instructions	8685	Inebriate	8762
Inconsistent Offices	8685	Ineffectual Appeal	8762
Inconsistent Position in Legal Proceed- ing	8685	Ineligible Candidates	8762
Inconsistent Provisions	8685	Inevitable Accident	8762
Inconsistent Statements	8685	Inexperienced Employes	8762
Incontinence	8685	Infamous Crime	8762
Incorporation	8686	INFANTS	8761
INCORPOREAL HEREDITAMENTS	8686	Infectious Diseases	8788
Incorrigible Children	8686	INFERENCES	8788
Increase in Value	8686	Inferior Courts	8789
Increase of Stock	8686	Infidelity	8789
Increasing Compensation	8686	Infidels	8789
Incriminating Answer	8686	INFIRMARY	8789
INCUMBRANCES	8686	Infringements	8792
In Custodia Legis	8687	INHERITANCE	8792
Indebitatus Assumpsit	8687	Influence	8792
Indebtedness	8687	Influencing Court	8792
Indecent Assault	8687	Influencing Election	8792
INDECENT CONDUCT	8687	Influencing Legislation	8792
Indecent Exposure	8687	Informality	8792
INDECENT LANGUAGE	8687	INFORMATION	8793
INDECENT PUBLICATIONS	8688	Information and Belief	8797
Indefinite Contracts	8688	Informers	8797
Indefinite Failure of Issue	8688	Infringement	8798
Indefinite Pleadings	8688	Infringement of Jury Trial	8798
INDEMNITY	8688	In Futuro	8798
Indemnity Insurance	8693	In Good Faith	8798
Indenture of Apprenticeship	8693	Ingress and Egress	8798
Independent and Separable Contracts	8693	In Gross	8798
Independent Contractors	8693	Inhabitaney	8798
Independent Covenants	8693	Inhabitants of Admitted Territory	8798
Independent Newspaper	8693	Inhabited Dwelling	8798
INDEPENDENT ORDER OF ODD FEL- LOWS	8693	Inheritable Blood	8798
Independent Sections	8694	Inheritance	8798
INDETERMINATE QUOTIENT VER- DICT	8694	INHERITANCE TAX	8799
Indeterminate Sentence	8694	Inhuman Treatment	8802
INDEX	8694	Initial Carriers	8802
Indicia of Ownership	8696	INITIALS	8802
INDICTMENT	8695	Initiative and Referendum	8804
Indigent	8758	INJUNCTION	8803
INDIGENT PRISONER	8758	INJURIES	9013
Ignities	8760	Injurious Words	9015
Indirect Evidence	8760	Injury from Fraud	9015
Indirect Taxation	8760	Injury Without Damage	9016
Indispensable Parties	8760	Inland Bills	9016
Indisputable Presumptions	8760	Inland Fishing District	9016
Individual Banker	8760	In Loco Parentis	9016
		Inmates of Public Institutions	9016
		INNKEEPER	9015
		Innocence	9021

LIST OF TOPICS.

xiii

[Titles in Capitals are Main Heads covering the Text of this Digest; others are Cross Reference Heads.]

COLUMN	COLUMN
Innocent Party Most at Fault Must Suffer 9021	INSURABLE INTEREST 9088
Innocent Purchaser 9021	INSURANCE 9089
INNUENDO 9021	Insurance Agents 9388
In Pais 9023	Insurance Fund, State 9388
In Pari Delicto 9023	Insurance, Superintendent of 9388
In Pari Materia 9023	Intemperance 9388
IN PERSONAM 9023	INTENT 9389
Inquest 9023	Intention 9414
Inquest of Damages 9024	Intention of Legislature 9414
Inquiry 9024	Intention of Testator 9414
Inquiry of Damages 9024	Intention to Return 9414
In Rem 9024	Inter County Highways 9415
Insane Asylums 9024	Intercourse 9415
Insane Convict 9024	Interesse Termini 9416
Insane Delusions 9024	Interest 9416
Insane, Hospitals for 9024	INTEREST AND USURY 9415
Insane Paupers 9024	INTEREST, CONCERN OR SHARE 9483
INSANE, IMBECILES AND IDIOTS 9023	Interested Parties 9483
Insecure Buildings 9060	Interest in Contracts 9483
Insecurity Clause 9060	Interest in Lands 9483
INSOLVENCY 9060	INTERFERENCE WITH BUSINESS 9483
Insolvency Court 9062	Interference with Contract 9484
Insolvent Commissioner 9062	Interference with Justice 9484
Insolvent Corporation 9062	Interference with Officer 9484
Insolvent Debtors 9063	INTERLINEATION 9484
Insolvent Estates 9064	Interlocking Devices 9484
INSOLVENT LAWS 9063	Interlocutory Costs 9484
Insolvents 9069	INTERLOCUTORY DECREES AND
INSPECTION 9069	JUDGMENTS 9485
Inspection and Admission of Documents 9072	INTERPLEADER 9485
Inspection and Physical Examination 9072	Interlocutory Injunction 9486
Inspection and Supervision of Public Offices 9072	Interment 9486
INSPECTION LAWS 9071	Intermixture of Goods 9486
INSPECTION OF BOOKS, ETC. 9078	Internal Revenue 9486
Inspection of Documents 9081	INTERNAL REVENUE CERTIFICATES 9486
Inspection of Public Officers 9081	International Extradition 9486
Inspector of Buildings 9081	International Law 9486
Inspector of Elections 9082	Interpolation 9500
Inspector of Food 9082	Interpretation 9501
Inspector of Gas-meters 9082	INTERPRETER 9501
Inspector of Health 9082	Interrogatories 9501
Installments 9082	Interruption 9501
Instigation 9082	Interstate Boundaries 9501
Institutes, Teachers 9082	Interstate Bridge 9501
INSTITUTION FOR FEEBLE-MINDED YOUTH 9082	Interstate Comity 9501
Institutions, Correctional 9083	INTERSTATE COMMERCE 9501
Institutions of Learning 9083	Interstate County Ditch 9503
Institutions, Penal 9083	Interstate Extradition 9503
Institutions, Reformatory 9083	Interstate Railroad 9503
Instructing Jury 9083	Interurban Railroads 9503
Instructing Servant 9084	Intervening Cause 9503
INSTRUCTIONS 9084	INTERVENOR 9503
Instructors 9084	INTERVENTION 9507
Instruments for Counterfeiting 9084	Inter Vivos 9509
Instruments for Money 9084	Intestacy 9509
INSTRUMENTS IN WRITING 9083	INTESTATE 9509
Instruments, Negotiable 9088	Intestate Succession 9510
Insulting Language 9088	INTIMIDATION 9510
	Intoxicated Person 9510

EXECUTED CONTRACTS.

See **CONTRACTS**.

EXECUTED TRUSTS.

See **CONTRACTS**.

EXECUTION AGAINST THE PERSON.

See **ARREST**.

EXECUTION AGAINST PROPERTY.

See **EXECUTION, WRIT OF**.

EXECUTION DOCKET.

See **CLERK OF COURT; EXECUTION, WRIT OF**.

EXECUTION OF INSTRUMENT.

For execution of instruments, see also **DEEDS; LANDLORD AND TENANT; MORTGAGES; NEGOTIABLE INSTRUMENTS; WILLS, LEGACIES AND DEVISES**.

For acknowledgment of execution, see **ACKNOWLEDGMENT**.

For execution of deeds, see **DEEDS**.

For evidence of acts dispensing with execution, see **EVIDENCE**.

For necessity of evidence of execution in case of ancient documents, see **EVIDENCE**.

For evidence of execution by subscribing witnesses, see **EVIDENCE**.

For execution of leases, see **LANDLORD AND TENANT**.

For execution of mortgages, see **MORTGAGES**.

For witnesses to execution, see **WITNESSES ATTESTING**.

As between the parties to an instrument, the date raises a presumption of the time of execution, but not against a defendant who was neither party nor privy: *Pugh v. Holliday*, 3 O. S. 284, II Longsdorf's Notes, 28.

The best and most accurate mode for an agent to adopt in signing a bill or note for his principal is to sign the same "A. B., by his agent C. D.," or "A. B., by C. D." This is not absolutely essential, however, to the validity of the instrument: *Aungst v. Creque*, 72 O. S. 551, IV Longsdorf's Notes, 993.

Where an agent signs a negotiable instrument without adding the name of his principal, the agent is himself personally bound, although he affixes to his signature

the word "agent": *Aungst v. Creque*, 72 O. S. 551, IV Longsdorf's Notes, 993.

An officer of a corporation subscribing a promissory note in his own name and affixing his official title, but not signing the corporate name of the company, is personally bound on such instrument: *Aungst v. Creque*, 72 O. S. 551, IV Longsdorf's Notes, 993.

A promissory note reading "we promised to pay" and signed "The Akron White Sand & Stone Co., L. K. Mihills, Secy. and Treas., D. B. Aungst, Pres.," is on its face the note of the company, and not that of Mihills and Aungst, and the latter are not personally bound thereon: *Aungst v. Creque*, 72 O. S. 551, IV Longsdorf's Notes, 993.

In an action upon a promissory note, a denial of its execution and delivery is consistent with a separate ground of defense that the note is without consideration: *Booco v. Mansfield*, 66 O. S. 121, IV Longsdorf's Notes, 900. See also **NEGOTIABLE INSTRUMENTS**.

If, instead of proving the execution of an executor's bond by the sureties by offering a certified copy under G. C., § 4, the original is offered, the signatures must be proved; and a charge that the bond produced from the custody of the probate court makes a *prima facie* case of its execution is error: *Newberger v. Finney*, 17 O. C. C. 215, 9 O. D. (N.P.) 720. See also **BONDS, SURETY**.

An instrument purporting to be a lease for operating land for natural gas and petroleum, for a term exceeding three years, having but one attesting witness, conveys no interest in the land: *Langmede v. Weaver*, 65 O. S. 17, IV Longsdorf's Notes, 879.

Where possession has not been taken under an oil and gas lease the execution of which was not valid, it will not be reformed in equity, nor enforced against a third person who acquires the title to the land by conveyance from the owner, nor against the tenant in possession, although both took subsequent to the record of such defective instrument and with knowledge thereof: *Langmede v. Weaver*, 65 O. S. 17, IV Longsdorf's Notes, 879 [disapproving *Oil Co. v. Snyder*, 45 Bull. 53]. See also **OIL AND GAS**.

Where an act providing as to the record of certain classes of leases is silent as to the mode of their execution, such execution is controlled by and must be in accordance with the requirements of the general provisions of law in regard thereto: *Langmede v. Weaver*, 65 O. S. 17, IV Longsdorf's Notes, 879. See also **LANDLORD AND TENANT**.

G. C., § 8822, authorizing record of a grant of a right of way to a railroad to be recorded in the record of leases, and

making a certified copy thereof evidence, applies to a contract for a right of way executed before the passage of the statute: *Railway Co. v. Reid*, 4 O. N. P. 127, 6 O. D. (N.P.) 273.

A certified copy is evidence, though the record was not made in the books of leases, but by mistake is in a book of miscellaneous records: *Railway v. Reid*, 4 O. N. P. 127, 6 O. D. (N.P.) 273. See also **RECORDING ACTS**.

Execution in a legal sense means signing, sealing, and delivering. It is the delivery which completes the execution and gives validity: *Tierman v. Fenimore*, 17 O. 545, I Longsdorf's Notes, 827. See also **DEEDS**.

The execution of a special power to convey land by a public officer must pursue the power strictly, or no title is conveyed: *Tiffin v. Shawhan*, 43 O. S. 178, IV Longsdorf's Notes, 157.

Under a city ordinance requiring the city clerk to execute "a proper deed of conveyance under the corporate seal of the city" for land sold by the city, a deed signed by

the clerk with his private scroll seal and his official seal is ineffectual to convey title: *Tiffin v. Shawhan*, 43 O. S. 178, IV Longsdorf's Notes, 157. See also **SPECIFIC PERFORMANCE**.

Whether a city can invest the clerk with power to execute a deed of city property may be doubted, considering that at common law corporations signed by their seal, and that the mayor has by G. C., § 4550, charge of the city seal, the clerk's seal, R. S., § 1764 (repealed 96 v. 96; for analogous section see G. C. § 4282), being to authenticate and not to execute papers: *Tiffin v. Shawhan*, 43 O. S. 178, IV Longsdorf's Notes, 157. See also **CORPORATIONS**.

A conveyance defective in its execution does not pass any legal estate even though duly recorded: *Langmede v. Weaver*, 65 O. S. 17, IV Longsdorf's Notes, 879.

The teller of a bank can testify to the genuineness of the president and cashier's signature to a check, though they could have been called as witnesses. It is not secondary evidence: *Hess v. State*, 5 O. 5, I Longsdorf's Notes, 241. See also **EVIDENCE**.

EXECUTION, WRIT OF.

Scope Note.—Includes execution against person and property; classes of property subject to execution; priority of execution; methods and order of levy; its effect and abandonment; relief against execution; sales under execution; distribution; title acquired by purchaser at sale on execution; exemption from execution; homestead law generally; and exemption in lieu of homestead. Excludes judgments and liens generally; mortgages and foreclosure.

Cross References.

For the effect on lien of judgment of failure to issue a writ of execution for more than one year, see **JUDGMENT**.

For the effect on lien of judgment of failure to issue a writ of execution for five years, see **JUDGMENT**.

For the necessity of a writ of execution to preserve priority of lien, see **JUDGMENT**.

For order of sale, appraisal, sale, deed, confirmation, distribution, etc., see also **JUDICIAL SALES**.

For sale of mortgaged property in foreclosure, see **MORTGAGES**.

For execution against the person, see also **ARREST**.

For proceedings in aid of execution, see **PROCEEDINGS IN AID OF EXECUTION**.

For sale under writ of execution, see also **JUDICIAL SALES**.

For the necessity of an actual seizure to a levy on chattels, see also **ATTACHMENT**.

For proceedings supplementary to writ of execution, see **PROCEEDINGS IN AID OF EXECUTION**.

For questions of marshalling liens, see **MARSHALLING ASSETS, LIENS AND SECURITIES**.

For assignments for the benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.

For setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.

For attachment, see **ATTACHMENT**.

For the right to dower as against execution, see also **DOWER**.

For sales by executors or administrators, see **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES**.

For a creditor's bill in equity, see **CREDITOR'S BILL**.

For questions of bankruptcy, see **BANKRUPTCY**.

For questions of amercement, see **AMERCEMENT**.

For costs on execution, see also **COSTS**.

For execution on a decree for alimony, see also **DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**.

For stay of execution pending error proceedings, see **ERROR**.

For rights of subrogation, see **SUBROGATION**.

For execution against the curtesy of the husband, see also **CURTESY**.

For interference with service of a writ of execution, see also **CONTEMPT**.

For injunction as a remedy against execution, see **INJUNCTION**.

For the duties of specific orders, see **CLERK OF COURT; CONSTABLE; CORONER; SHERIFF**.

For the right of the sheriff to have interpleader, see **INTERPLEADER**.

For the subject of liens, see **LIENS**.

ANALYTICAL OUTLINE.

I. Definition and Nature, 7235.

II. Classes, 7236.

A. *Against property*, 7236.

B. *Against person*, 7236.

C. *For delivery of real property*, 7237.

III. Judgment or Decree on which Execution may Issue, 7237.

A. *Execution on dormant judgment*, 7237.

B. *Judgments of what courts*, 7238.

IV. Execution Against Property, 7239.

A. *Property subject to levy and sale*, 7239.

1. *Lands*, 7239.

2. *Equitable estates*, 7241.

3. *Realty conveyed in fraud of creditors*, 7244.

4. *Property devoted to public use*, 7244.

5. *Unassigned dower*, 7245.

6. *Leaseholds*, 7245.

7. *Devise subject to election*, 7246.

8. *Franchises*, 7246.

9. *Chattels*, 7246.

10. *Partnership property*, 7247.

11. *Choses in action before taking effect*, 7247.

12. *Bailments*, 7248.

13. *Property in hands of receiver*, 7248.

14. *Property in hands of sheriff*, 7248.

15. *Property in hands of plaintiff*, 7249.

B. *Form of execution*, 7249.

1. *In general*, 7249.

2. *Endorsement on execution*, 7251.

C. *Alias execution*, 7251.

D. *Foreign execution*, 7253.

E. *Equality of executions*, 7254.

F. *Duty to issue execution*, 7256.

G. *Stay of execution*, 7257.

1. *In what cases execution may be stayed*, 7257.

2. *Bond for stay*, 7259.

a. *Who may sign*, 7259.

b. *Contents*, 7259.

c. *Effect*, 7260.

d. *Action upon*, 7262.

V. Levy, 7263.

- A. *Scope and effect of statutory provisions, 7263.*
- B. *Order of levy, 7264.*
 - 1. *Personalty, 7264.*
 - 2. *Realty, 7265.*
 - 3. *Partnership property, 7265.*
- C. *Method of levy, 7266.*
 - 1. *Personalty, 7266.*
 - a. *Actual, 7266.*
 - b. *Constructive, 7267.*
 - 2. *Realty, 7267.*
 - a. *Actual, 7267.*
 - b. *Constructive, 7268.*
- D. *Excessive levy, 7268.*
- E. *Effect of levy, 7269.*
 - 1. *Generally, 7269.*
 - 2. *After death of party, 7270.*
- F. *Right to compel levy, 7270.*
- G. *Contempt as enforcement of levy, 7271.*
- H. *Effect of leaving defendant in possession of property, 7272.*
- I. *Abandonment of levy, 7273.*
- J. *Liability for wrongful execution and levy, 7274.*

VI. Relief Against Execution and Levy, 7275.

- A. *Injunction, 7275.*
- B. *Motion to discharge, 7275.*
- C. *Trial of right of property, 7276.*
 - 1. *Scope and purpose of statutory provisions, 7276.*
 - 2. *Jurisdiction of justice of peace, 7277.*
 - 3. *Effect of finding, 7277.*
 - 4. *Action as bar, 7278.*
 - 5. *Promise of indemnity, 7278.*

VII. Bond for Delivery of Goods, 7279.**VIII. Return, 7280.**

- A. *Necessity, 7280.*
- B. *Contents, 7280.*
- C. *Amendments, 7282.*
- D. *Correction, 7283.*
- E. *Extension of time, 7283.*
- F. *Effect, 7284.*

IX. Appraisement, 7284.

- A. *Scope and effect, 7284.*
- B. *Who may act as appraisers, 7285.*
- C. *Actual view, 7285.*
- D. *Mistake and irregularity, 7286.*
- E. *Mortgaged property, 7286.*
- F. *Description, 7286.*
- G. *Objection to appraisement, 7286.*
- H. *Sale without appraisement, 7287.*
- I. *Sale under several levies, 7287.*
- J. *Return, 7288.*
- K. *Omission of appraisement, 7288.*
- L. *Other questions, 7288.*
- M. *Filing copy with clerk, 7288.*
- N. *Fees of appraisers, 7289.*
- O. *Re-appraisement, 7289.*

- X. Satisfaction without Sale, 7289.
- XI. Notice of Sale, 7290.
 - A. *Personality*, 7290.
 - B. *Realty*, 7290.
 - 1. In what newspaper, 7290.
 - 2. Effect of publication, 7290.
 - 3. Time of commencement of notice, 7291.
 - 4. Same day of week, 7291.
 - 5. Mistake in advertisement, 7291.
 - 6. Effect of non-compliance with statute, 7292.
- XII. Sale on Execution, 7292.
 - A. *In general*, 7292.
 - B. *Time*, 7293.
 - C. *Terms*, 7293.
 - D. *Bid*, 7293.
 - E. *Private sale*, 7293.
- XIII. Liability for Purchase-money, 7294.
- XIV. Confirmation, 7296.
 - A. *Necessity*, 7296.
 - B. *Discretionary power of court*, 7296.
 - C. *Grounds for refusal to confirm*, 7296.
 - 1. Defect in advertisement, 7296.
 - 2. Prevention of competition in bidding, 7297.
 - 3. Sale for less than minimum price, 7297.
 - 4. Redemption by debtors, 7297.
 - 5. Mistake in description, 7297.
 - D. *Motion to confirm and hearing*, 7298.
 - E. *Effect of confirmation*, 7298.
 - F. *Review*, 7299.
- XV. Setting Sale Aside, 7300.
- XVI. Sale, 7300.
 - A. *Order of sale*, 7300.
 - 1. From what court to issue, 7300.
 - 2. Mistake and irregularity, 7301.
 - 3. Construction of order, 7301.
 - 4. Real property, 7302.
 - a. Subdivision, 7302.
 - b. Undivided interest, 7302.
 - 5. Personal property, 7302.
 - 6. Determination of liens, 7303.
 - 7. Perishable goods, 7304.
 - B. *Sale for cash*, 7304.
 - C. *Deposit of money*, 7304.
 - D. *Time of sale*, 7304.
 - E. *Death of defendant*, 7304.
 - F. *Sale to appraiser*, 7304.
- XVII. Distribution, 7306.
- XVIII. Taxes and Assessments, 7308.
 - A. *In general*, 7308.
 - B. *Delinquent taxes*, 7309.
 - C. *On partition*, 7309.
 - D. *Street assessments*, 7310.
 - E. *Failure of sheriff to pay*, 7310.
 - F. *Payment by mortgagee*, 7310.

XIX. Deed, 7310.

- A. *Grantor*, 7310.
- B. *Description*, 7311.
- C. *Nature of estate*, 7311.
- D. *Recital of authority*, 7311.
- E. *Execution and acknowledgment*, 7312.
- F. *Revenue stamp*, 7312.
- G. *When deed takes effect*, 7312.
- H. *Reformation*, 7312.

XX. Rights and Title of Purchaser, 7313.

- A. *In general*, 7313.
- B. *Interest of parties acquired by purchaser*, 7314.
- C. *Interests of persons not parties*, 7315.
- D. *Effect of irregularities*, 7316.
- E. *Caveat emptor*, 7316.
- F. *Right to rents and profits*, 7317.
- G. *Right to possession*, 7317.
- H. *Subrogation*, 7317.
- I. *Other questions*, 7318.
- J. *Rights in case of invalid sale*, 7318.
- K. *Effect of reversal of judgment*, 7320.

XXI. Liability of Sheriff for Purchase-money, 7322.**XXII. Index to Execution Docket, 7324.****XXIII. Trial Docket, 7324.****XXIV. Exemption from Execution, 7324.**

- A. *Purpose and scope of statutory provisions*, 7324.
- B. *Beneficiary insurance funds*, 7326.
- C. *Exemption to head of family and widow*, 7328.
 - 1. *Person who has family*, 7328.
 - 2. *Widow*, 7328.
 - 3. *Who may take advantage of exemption laws*, 7329.
 - 4. *What property is exempt*, 7330.
 - a. *Wearing-apparel*, 7330.
 - b. *Provisions*, 7330.
 - c. *Household furniture*, 7330.
 - d. *Personal earnings*, 7331.
 - aa. *In ordinary actions*, 7331.
 - bb. *In actions for necessities*, 7332.
 - e. *Other questions*, 7334.
- D. *Selection*, 7335.
- E. *Waiver of exemption*, 7336.
- F. *Exemptions to certain occupations*, 7336.
- G. *Claims against which exemptions do not apply*, 7337.
- H. *Set-off*, 7338.
- I. *Alimony*, 7339.
- J. *Appeal*, 7339.
- K. *Law controlling*, 7339.

XXV. Homestead, 7340.

- A. *Definition*, 7340.
- B. *Scope and purpose*, 7340.
- C. *Who is entitled to homestead*, 7341.
 - 1. *Husband and wife living together*, 7341.
 - 2. *Widow*, 7342.

3. Widower, 7343.
4. Family of decedent, 7344.
5. Non-residents, 7344.
- D. *Nature of Homestead*, 7344.
 1. What estate constitutes homestead, 7344.
 2. When homestead may be acquired, 7346.
 3. How homestead may be lost, 7346.
 4. When homestead may be claimed, 7348.
 5. Effect of homestead, 7348.
 6. Mortgaged realty, 7348.
 7. Partition, 7349.
 8. Homestead belonging to spouse, 7349.
- E. *Demand by wife*, 7350.
- F. *Law controlling*, 7350.
- G. *Assignment for benefit of creditors*, 7350.
- H. *Other questions*, 7351.
- I. *Method of allowing homestead*, 7351.
- J. *Effect of allowing homestead*, 7352.

XXVI. Allowance in Case of Lien Paramount to Homestead, 7353.

- A. *Who may claim*, 7353.
 1. Head of family, 7353.
 2. Wife, 7353.
 3. Husband, 7353.
 4. Widow, 7354.
 5. Assignor for benefit of creditors, 7355.
 6. Personal privilege, 7356.
- B. *Time to claim*, 7356.
- C. *Date of marriage*, 7356.
 1. After levy, 7356.
 2. After attachment, 7357.
 3. Before sale, 7357.
- D. *When rights fixed*, 7357.
- E. *Property exempt*, 7357.
 1. Undivided interest, 7357.
 2. Proceeds of personalty, 7357.
 3. Insurance money, 7357.
 4. Rents of mortgaged realty, 7358.
- F. *Against what claims*, 7358.
 1. Fraudulent mortgage, 7358.
 2. Fraudulent transfer, 7358.
 3. Mortgage, 7359.
 4. Executor's sale, 7360.
 5. Garnishment, 7361.
 6. Proceedings in equity, 7361.
 7. Labor-claims, 7361.
- G. *Adjudication of claims*, 7361.
- H. *Enforcement*, 7362.
- I. *Presumptions*, 7362.
- J. *Abandonment and waiver*, 7362.
- K. *Retroactive effect of statute*, 7363.

XXVII. Allowance in Lieu of Homestead, 7363.

- A. *Construction of statutory provisions*, 7363.
- B. *Scope and effect of statutory provisions*, 7363.
- C. *Prior legislation*, 7363.

- D. *Property exempt*, 7364.
 - 1. Personal property, 7364.
 - 2. Pension money, 7364.
- E. *Who may claim exemption*, 7365.
 - 1. Husband and wife living together, 7365.
 - a. Actual cohabitation, 7365.
 - b. Separation, 7365.
 - 2. Residents, 7366.
 - a. Removal, 7366.
 - b. Non-residents, 7366.
 - 3. Widower, etc., 7366.
 - 4. Widow, 7367.
 - a. Without family, 7367.
 - b. Widow of assignor, 7367.
 - 5. Divorced woman, 7367.
 - 6. Not the owner of a homestead, 7367.
 - a. Ownership, 7367.
 - aa. By either, 7367.
 - bb. Undivided interest owned by wife, 7368.
 - b. Removal, 7368.
 - c. Mortgage, 7368.
 - 7. Partnership, 7368.
 - a. Before dissolution, 7368.
 - b. After dissolution, 7369.
 - 8. Assignor for benefit of creditor, 7369.
- F. *Date of determination*, 7370.
- G. *Proceedings in which exemption may be claimed*, 7370.
 - 1. Partition, 7370.
 - 2. Assignment for benefit of creditors, 7371.
 - 3. Administrator's sale, 7373.
 - 4. Attachment, 7374.
 - 5. Bankruptcy, 7374.
 - 6. Proceedings against a boat, 7375.
- H. *Against what claims enforceable*, 7375.
 - 1. Judgment lien, 7375.
 - 2. Mortgage, 7375.
 - 3. Executor's sale, 7376.
 - 4. Set-off, 7376.
 - 5. Garnishment, 7376.
- I. *Necessaries*, 7377.
- J. *Time to claim*, 7377.
- K. *Form of demand*, 7379.
- L. *Nature of the interest*, 7379.
- M. *Necessity of selection*, 7380.
- N. *Successive exemptions*, 7380.
- O. *Procedure*, 7381.
- P. *Waiver*, 7383.
- Q. *Presumptions*, 7385.

XXVIII. Execution Against Person, 7385.

- A. *Issuing execution*, 7385.
- B. *Discharge*, 7386.
- C. *Prison bounds*, 7386.

D. *Liability of sheriff*, 7387.

E. *Privilege from arrest*, 7388.

1. Purpose of statutory provisions, 7388.
2. Who are exempt, 7388.
 - a. Members of general assembly, 7388.
 - b. Suitors, 7388.
 - aa. Non-residents of state, 7388.
 - bb. Non-residents of county, 7389.
3. Effect of violation of privilege, 7390.

I. DEFINITION AND NATURE.

An execution is the obtaining of actual possession of any thing acquired by judgment of law. The right to execution follows every final judgment: *Darby v. Carson*, 9 O. 149, I Longsdorf's Notes, 471.

An order of sale issued in a proceeding to foreclose a mortgage is not an execution within the purview of G. C., § 11710: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

Orders of sale issued on decrees of chancery, either final or interlocutory, are executions. In Ohio, sales of real estate under decrees are to be conducted as upon execution at law: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

An execution can not be issued upon an oral judgment: *Wiley v. Lewis*, 4 O. N. P. 212; *sub nomina*, *Willey v. Lewis*, 6 O. D. (N.P.) 242; *Willey v. Lewis*, 23 Bull. 104.

A party who is entitled to an execution on a judgment may, by mandamus, compel the clerk of the court to issue the writ, if he refuses to do so after a legal demand therefor: *State, ex rel., v. Eager*, 3 O. C. C. 581, 2 O. C. D. 335.

An execution issued to any constable of either of two townships, though not strictly in accordance with statutes, is not therefore void: *Lyon v. Fish*, 20 O. 100, I Longsdorf's Notes, 898.

A town marshal who acts as constable makes himself liable for the debt if he leave the property in the possession of the judgment debtor and it is removed: *State, ex rel., v. Fuller*, 14 O. 545, I Longsdorf's Notes, 687.

Real estate in another county which is not part of a tract in this county can not be declared by the decree subject to a lien for alimony, and if the decree does so declare, and a sale is had thereunder, the sale can not be sustained as an execution sale, for a *fiore facias* runs against chattels, and in default thereof against real estate generally and not specifically. Hence, no title is acquired: *Wilmot v. Cole*, 10 Dec. Rep. 777, 23 Bull. 339. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

II. CLASSES.

A. AGAINST PROPERTY.

Orders of sale issued on decrees of chancery, either final or interlocutory, are executions. In Ohio, sales of real estate under decrees are to be conducted as upon execution at law: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

Paragraph 1 of G. C., § 11654, does not make an order of sale the same as an execution for all purposes, as under G. C., § 11710: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

Where a sale is made and confirmed *pendente lite*, leaving undetermined the liens of parties claiming them, such parties may bring suit in error to reverse such sale: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

The satisfaction or dormancy of a judgment are the only contingencies under which a judgment lien created under favor of G. C., § 11656, ceases to exist against the real estate of the debtor. The effect of satisfaction or dormancy is to relieve the land of the judgment debtor, both in the county wherein the judgment was rendered and in those into which it has been extended by the issuing and levying of a foreign execution: *Steel v. Katzenmeyer*, 5 O. C. C. (N.S.) 25, 16 O. C. D. 400. See also JUDGMENT.

B. AGAINST PERSON.

A decree for alimony is a debt collectible by execution: *Coffman v. Finney*, 65 O. S. 61, IV Longsdorf's Notes, 880; *Conrad v. Everich*, 50 O. S. 476, IV Longsdorf's Notes, 508; *Moore v. Rittenhouse*, 15 O. S. 310, II Longsdorf's Notes, 730.

The plaintiff ought not to have a more summary remedy than their own creditor had. A justice's order to a garnishee to pay into court can not be enforced by execution, but only by action: *Rice v. Whitney*, 12 O. S. 358, II Longsdorf's Notes, 568.

Unless, perhaps where he admits the debt: *Martin v. Gayle*, 12 Dec. Rep. 55, 2 D. 86; *Mill Co. v. Fanger*, 8 Dec. Rep. 71, 5 BuH. 441. See also ATTACHMENT.

C. FOR DELIVERY OF REAL PROPERTY.

The sheriff must put the plaintiff in peaceable possession of real estate under writ of *habere facias*, in condition in which he finds it. He is not required to remove a wall standing on the land: *Brewing Co. v. McGuire*, 8 O. N. P. 300, 11 O. D. (N.P.) 343.

A purchaser at a sheriff's or a master's sale under a decree of foreclosure is entitled in the same action to an equitable writ of execution, to put him in possession as against defendants or those who have come into possession under defendant's *pendente lite*: *Tetterbach v. Meyer*, 10 Dec. Rep. 212, 19 Bull. 221.

III. JUDGMENT OR DECREE ON WHICH EXECUTION MAY ISSUE.

A. EXECUTION ON DORMANT JUDGMENT.

Execution issued on a dormant judgment will be set aside on motion and the goods and money levied restored to the judgment debtor: *Lytle v. Manufacturing Co.*, 4 O. 459, I Longsdorf's Notes, 236.

It was queried but not decided whether a judicial sale of real estate upon process upon a dormant judgment can be impeached on that ground except by a petition in error to reverse the order of confirmation: *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

Execution on dormant judgment is voidable, not void; a sale under it will pass title: *Green v. Outright*, W. 728, I Longsdorf's Notes, 58.

An Ohio court, having jurisdiction of the parties to an Ohio judgment which has become inoperative, can enjoin the judgment creditor from proceeding against property of the judgment debtor in such state: *Manohan v. Hart*, 2 O. C. J. (N.S.) 606, 14 O. C. D. 527.

Where a judgment has become dormant during the pendency of a provisional injunction against execution thereon, the court will on dissolution of the injunction, order execution to issue for the balance equitably due: *Welsh v. Childs*, 17 O. S. 319, II Longsdorf's Notes, 836.

When the judgment debtor sold and conveyed the land to a purchaser without notice, who paid the purchase money, and the judgment became dormant because of an injunction preventing the issuing of an execution, the purchaser took the land discharged of the lien: *Tucker v. Shade*, 25 O. S. 355, III Longsdorf's Notes, 238.

Execution may issue upon a judgment which was formerly dormant after it has been revived by a conditional order of revivor and before such conditional order has

been made absolute: *Van Nover v. Eshleman*, 14 O. C. C. (N.S.) 348.

When a conditional order of revivor of a dormant judgment is made, the judgment is revived for all purposes for which a judgment may be revived and will sustain an order of execution issued thereon, subject to the condition that if the judgment debtor, within a time fixed in the order of revivor, can show cause why said judgment ought not to have been revived, the order of revivor will be set aside: *Van Nover v. Eshleman*, 14 O. C. C. (N.S.) 348.

B. JUDGMENTS OF WHAT COURTS.

Federal courts have power to enforce satisfaction of their judgments by execution: *Corwin v. Benham*, 2 O. S. 36, I Longsdorf's Notes, 1019.

In a suit to foreclose an equity of redemption the court may so frame its decree as to award execution for the balance due after the proceeds of the sale of mortgaged premises have been exhausted, if it has obtained jurisdiction of the person of the debtor; and such execution may issue on a finding of the amount due even though no personal judgment has been rendered: *Myers v. Hewitt*, 16 O. 449, I Longsdorf's Notes, 774; *Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987; *Maholan v. Marshall*, 29 O. S. 611, III Longsdorf's Notes, 503; *Giddings v. Barney*, 31 O. S. 80, III Longsdorf's Notes, 563.

It has been held that a decree in chancery, merely finding an amount due, and subjecting securities to be sold in payment, without decreeing defendant to pay anything, is *in rem*, and attains its whole object by the sale, and is not a decree for the balance due, nor can an execution therefor issue: *Hamilton v. Jefferson*, 13 O. 427, I Longsdorf's Notes, 646.

Equity may find an amount due on foreclosure which, though not a general lien, like a judgment, will be a debt of record: *Myers v. Hewitt*, 16 O. 449, I Longsdorf's Notes, 774.

A deficiency judgment against one who has assumed a mortgage debt is void and no execution can issue thereon if such promise to assume and pay such debt was not alleged in the petition and if no summons against him issued on the cross-petition in which such promise was alleged: *Southward v. Jameson*, 66 O. S. 290, IV Longsdorf's Notes, 906.

In ejectment, if an execution and a sheriff's deed recite a judgment of the common pleas, the record of a judgment and execution of the supreme court must be rejected. Although the case was remanded to the common pleas for execution, the judgment remains that

of the supreme court. The objection is fatal, for this court can not correct the process of another court: *Bisbee v. Hall*, W. 59, I Longsdorf's Notes, 5.

After affirmance of the judgment by the supreme court, execution can be issued without waiting for a mandate: *Howard v. Abbey*, 2 Dec. Rep. 64, I W. L. M. 278.

A transcript of a judgment of a justice of the peace, which is filed in the court of common pleas, has the same effect as a judgment rendered in that court at the same term, and executions issued on such judgments are equal in priority: *Rauh v. Acknovitch*, 59 O. S. 483, IV Longsdorf's Notes, 769 [affirming *Rauh v. Acknovitch*, 36 Bull. 302; *Rauh v. Acknovitch*, 11 O. C. D. 826].

In an action in attachment against a non-resident who has not been summoned nor entered his appearance, no valid judgment *in personam* can be rendered, on which an execution can issue for the collection of any balance remaining unpaid on the debt after exhausting the attached property, nor which can operate as a bar to a subsequent suit for the collection of such balance, although service was made by publication in conformity with the statute: *Supply Co. v. Koen*, 64 O. S. 422, IV Longsdorf's Notes, 874. See also ATTACHMENT.

Past due installments of alimony are in legal effect a judgment on which an execution may be issued: *Breen v. Breen*, 14 O. N. P. (N.S.) 219.

The order of maintenance is a judgment enforceable by execution. The remedy on the bond securing it is merely cumulative: *Darby v. Carson*, 9 O. 149, I Longsdorf's Notes, 471. See also BASTARDY.

Execution may issue on the judgment for costs against defendant in a criminal case. It is in effect a civil judgment: *Smith v. Perry*, 18 O. C. C. 826, 9 O. C. D. 778. See also COSTS.

IV. EXECUTION AGAINST PROPERTY.

A. PROPERTY SUBJECT TO LEVY AND SALE.

1. Lands.

One in possession of land has such an interest as may be sold on execution: *Miner v. Wallace*, 10 O. 403, I Longsdorf's Notes, 523; *Dietrich v. Folk*, 40 O. S. 635, IV Longsdorf's Notes, 45.

D, owning a certificate from the state, entitling him to purchase land, sold it to S for \$3,000, B being surety for the payment, and S agreed to sell it to B, deliverable when B paid D. B assigned the agreement to F and W, but retained possession of the land, with a right to repurchase within a year by refunding the purchase money. D

then got judgment against S and B for the balance due and levied on the land, and afterwards sued on the levy, making S, B, F and W parties, and asking sale. It was held that the levy only held B's interest as it was when the levy was made, which was possession with right to buy, which expired in a year: *Dietrich v. Folk*, 40 O. S. 635, IV Longsdorf's Notes, 45.

All vested interests in lands or tenements may be levied upon and sold upon execution to pay debts: *Bank v. Railroad*, 62 O. S. 564, IV Longsdorf's Notes, 842.

An easement attached to a judgment debtor's land is subject to the lien of the judgment as much so as the land and may be levied upon and sold thereunder: *Morgan v. Mason*, 20 O. 402, I Longsdorf's Notes, 915.

The vendor's interest in land before deed is subject to judgment lien and levy thereunder to extent of unpaid purchase money: *Coggshall v. Bank*, 63 O. S. 88, IV Longsdorf's Notes, 849.

The freehold of husband in wife's lands may be sold on execution: *Canby v. Porter*, 12 O. 79, I Longsdorf's Notes, 597.

The words "lands and tenements of the debtor," as used in G. C., § 11656, include a vested remainder held by the debtor under legal title: *Lawrence v. Belger*, 31 O. S. 175, III Longsdorf's Notes, 572.

Lands mortgaged may be sold on judgment and execution against the mortgagor: *Bank v. Bank*, 10 O. 71, I Longsdorf's Notes, 489.

The interest of devisee in lands under will giving executor power to sell, is subject to a judgment lien the same as other real estate: *Barkman v. Hain*, 5 O. N. P. 508, 5 O. D. (N.P.) 474.

A husband's estate by the curtesy is not protected after the death of his wife by the act of March 23, 1866 (S. & S. 391) from sale on execution to pay his debts: *Baird v. Van Evra*, 8 Dec. Rep. 8, 5 Bull. 26.

After sale, confirmation and deed, it is too late to raise the question as to what lands should be first seized in execution: *Roads v. Symmes*, 1 O. 281, I Longsdorf's Notes, 82.

Award of execution against land upon a justice's judgment is no lien before levy unless a transcript is filed: *Babbett v. Morgan*, 31 O. S. 273, III Longsdorf's Notes, 582.

Award of execution against land upon a justice's judgment is no lien before levy: *Jackman v. Hallock*, 1 O. 318, I Longsdorf's Notes, 84.

An unacknowledged five-year lease by a husband and wife of her farm, being void as to her, is not a valid reduction into possession of the rents by him as against her, hence, his creditors can not reach the rents. Nor would a valid lease, unless the rents

be expressly payable to the husband, be a reduction to possession: *McLeary v. Snider*, 2 Dec. Rep. 59, 1 W. L. M. 270.

A husband could not encumber his estate by the curtesy as long as any of the children survived, under the act of 1869 (for present statute, see G. C., § 7998), and his mortgage can not be enforced during that time: *Robert v. Sliffe*, 41 O. S. 225, IV Longsdorf's Notes, 58.

An execution levied on the debtor's estate by the curtesy, while children of the wife survived, was valid prior to 1884, although it could not be enforced during the life of any heir. But the amendment of 1884, giving such life tenant a right to sell, enabled the levy to be enforced. Such act does not affect any vested right: *Hulick v. Higden*, 1 O. C. C. 332, 1 O. C. D. 185.

A limit on an estate by the curtesy that it can not be sold, encumbered or taken on execution during the life of any of the children is for the benefit of the remainder, and the repeal of such restriction, in 1884, infringing on the vested rights of the children and was void as to then existing estates: *Cameron v. Goebel*, 20 O. C. C. 268, 11 O. C. D. 118.

The provision that curtesy can not be sold during the life of any of the children is for the children's benefit. Such provision may be waived by them and they therefore may cause levy of execution under a judgment owned by them. This is not a waiver in favor of other person's levies. Accordingly, to protect all parties the proceeds of sale under the children's levy must be invested and the income paid to the children, and if the father survives all the children then the principal can be applied to the executions of such other persons: *Cameron v. Goebel*, 20 O. C. C. 268, 11 O. C. D. 118. See also CURTESY.

2. Equitable Estates.

A judgment does not create a lien upon the equitable estates of the judgment debtor and they are not subject to levy and sale: *Haynes v. Baker*, 5 O. S. 253, II Longsdorf's Notes, 179; *Gorrell v. Kelsey*, 40 O. S. 117, IV Longsdorf's Notes, 10; *Warner v. York*, 1 O. C. C. (N.S.) 73, 15 O. C. D. 310 [affirmed, without opinion, *York v. Warner*, 75 O. S. 595].

Lands in which the debtor had an equitable interest, as by contract of purchase, if without legal title and without possession, are not subject to levy, and the purchaser at execution sale does not become assignee of the contract. Whether the rule would apply if he had possession was discussed but not decided: *Haynes v. Baker*, 5 O. S. 253, II Longsdorf's Notes, 179.

Judgments against a trustee do not create liens upon estates held in trust by such person and does not subject them to levy and sale: *Manley v. Hunt*, 1 O. 257, I Longsdorf's Notes, 77; *Morris v. Way*, 16 O. 469, I Longsdorf's Notes, 776; *Wright v. Bank*, 59 O. S. 80, IV Longsdorf's Notes, 759.

An equity of redemption is subject to the judgment lien, and may be sold on execution: *Phelps v. Butler*, 2 O. 224, I Longsdorf's Notes, 119; *Moore v. Rittenhouse*, 15 O. S. 310, II Longsdorf's Notes, 730.

Where a person receives a note and mortgage on land here, and then moves to New Jersey, and on absconding from there in debt, a creditor attaches the notes there and they are sold and the proceeds applied to the debt, and the notes are taken up by the maker, and the payee now seeks to foreclose the mortgage. It was held, no property in the note and mortgage passed by such seizure and sale; the situs of the debt was where the maker resides and plaintiff can foreclose. Nor can there be any subrogation to the amount used to pay plaintiff's debts out of the proceeds of the attachment sale, for the plaintiff not being served can contest such debts: *Owen v. Miller*, 10 O. S. 136, II Longsdorf's Notes, 421.

Possessory rights are legal rights, and the right of a person in possession may be levied and sold on execution, but whether this carries his equitable interests in addition to possession, is not decided: *Scott v. Douglass*, 7 O. (pt. 1) 227, I Longsdorf's Notes, 376; *Baird v. Kirtland*, 8 O. 21, I Longsdorf's Notes, 408; *Miner v. Wallace*, 10 O. 403, I Longsdorf's Notes, 523; *Huntington v. Rogers*, 9 O. S. 511, II Longsdorf's Notes, 395.

A judgment and levy on land does not reach equitable interests of the debtor who had no legal title, though he afterwards got the title: *Roads v. Symmes*, 1 O. 281, I Longsdorf's Notes, 82; *Jackman v. Hallock*, 1 O. 318, I Longsdorf's Notes, 84; *Cutler v. Brinker*, T. 291.

It was queried whether a sale on execution carried any equities of the debtor not subject to levy: *Huntington v. Ziegler*, 2 O. S. 10, I Longsdorf's Notes, 1016; *Scott v. Douglass*, 7 O. (pt. 1) 227, I Longsdorf's Notes, 376.

Executions against a husband, levied on property bought by him in his wife's name, are not void as being on a mere equitable interest: *Shorten v. Drake*, 38 O. S. 76, III Longsdorf's Notes, 958.

A mortgagor's interest in mortgaged premises may be levied on and sold on execution, for the legal title is in him: *Ely v. McGuire*, 2 O. 223, I Longsdorf's Notes, 118; *Phelps v. Butler*, 2 O. 224, I Longsdorf's Notes, 119;

Exporting Co. v. Bank, W. 249, I Longsdorf's Notes, 21; *Moore v. Rittenhouse*, 15 O. S. 310, II Longsdorf's Notes, 730; *Bank v. Bank*, 10 O. 71, I Longsdorf's Notes, 489.

A deed absolute, intended as security, with a separate covenant to reconvey on payment, leaves no legal title in the mortgagor, and if he has parted with the possession, his equity can not be sold on execution. Nor is the judgment a lien unless the debtor have a legal title: *Baird v. Kirtland*, 8 O. 21, I Longsdorf's Notes, 408; *contra*, if he is in possession: *Exporting Co. v. Bank*, W. 249, I Longsdorf's Notes, 21.

A deed was made in fee to a trustee to secure a debt to a third person, with a condition of avoidance if the debt is paid at maturity, otherwise the trustee to sell and pay it. It was held that (1) the deed was in the nature of a mortgage and not an absolute conveyance in trust to secure the debt; (2) the title remains in the grantor in possession after default, subject to the trustee's right to sell; (3) that the conveyance was to a trustee with power of sale did not alter this; (4) a judgment against the grantor in possession after default was a lien subject to the mortgage: *Martin v. Alter*, 42 O. S. 94, IV Longsdorf's Notes, 93.

If trusts in land under a will may require the entire legal estate, but the legal title is left to descend to the heirs, who have a contingent beneficial interest after the trusts end, the heirs hold the title as trustees, and a judgment creditor of one heir acquires no lien on the land entitling him to have a *bona fide* conveyance by such heir set aside: *Birchard v. Edwards*, 11 O. S. 84, II Longsdorf's Notes, 481.

Realty held by the trustee of a resulting trust is not liable for the personal debts of such trustee or for judgments rendered against him: *Leibig v. Grosskopp*, 20 O. D. (N.P.) 38.

If a judgment in tort has been recovered against a trustee of a resulting trust and he conveys such realty to the beneficiary, such conveyance can not be set aside upon suit of the judgment creditor, since such property could not have been levied upon while in the hands of the trustee to satisfy such judgment: *Leibig v. Grosskopp*, 20 O. D. (N.P.) 38.

A purchase in the form of a lease, or on condition that the title shall remain in the vendor until payment in full, passes no interest in the buyer which is subject to execution: *Sage v. Sleutz*, 23 O. S. 1, III Longsdorf's Notes, 109. See also **CONDITIONAL SALES**.

3. Realty Conveyed in Fraud of Creditors.

Land conveyed in fraud of creditors is not subject to levy and sale on execution against the grantor after suit is begun by creditor to set such conveyance aside: *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

If property is conveyed to defraud creditors and no suit is brought to set such conveyance aside, judgment creditors of the grantor may treat such conveyance as a nullity and cause executions to be levied on such realty: *Clark v. Hubbard*, 8 O. 382, I Longsdorf's Notes, 443; *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256.

A judgment against a grantee in a deed made to defraud creditors, binds the estate, and a purchaser under such judgment acquires a good title as against the defrauding parties: *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501; *McVeigh v. Ritenour*, 40 O. S. 107, IV Longsdorf's Notes, 7.

Sale of land on execution against one in possession, who had previously voluntarily conveyed the title to another in fraud of creditors, passes the possession to the buyer, and the debtor or his heirs can not gainsay the buyer's title: *Gray v. Tappan*, W. 117, I Longsdorf's Notes, 9.

4. Property Devoted to Public Use.

Property which a municipal corporation holds, devoted to public purposes, is exempt from execution, although not at present so used; see *Cincinnati v. Frost*, 8 Dec. Rep. 107, 5 Bull. 684; *Cincinnati v. Cameron*, 7 Dec. Rep. 584, 4 Bull. 75.

The levy of an execution upon railroad property in actual use is invalid: *State v. Brimson*, 46 Bull. 275.

Real estate held for the sole purpose of the exercise of a franchise, as that acquired by eminent domain powers for a railroad's right of way, is not subject to levy on execution: *Coe v. Railroad*, 10 O. S. 372, II Longsdorf's Notes, 442.

Cordwood for use in operating a railroad not to an amount beyond reasonable necessity is not subject to levy, and a sale is void: *Carey v. Railroad*, 2 Dec. Rep. 85, 1 W. L. M. 338.

G. C., § 4759, exempting school property from sale on execution or other writ in the nature of an execution, does not apply to foreclosure of a mortgage on the property made by an earlier owner, and the property and subsequent improvements by the school board are subject to the sale: *Board of Education v. Stephenson*, 39 Bull. 75 [without opinion in supreme court].

Claims due to a county can not be subjected by a creditor's bill to the payment of

judgments against the county. Counties are political subdivisions of the state, and such interference, if practicable, would only endanger the plan of their government: *Boalt v. Commissioners*, 18 O. 13, 1 Longsdorf's Notes, 834. See also CREDITOR'S BILL.

5. Unassigned Dower.

Unassigned dower, is not subject to levy and sale: *Moore v. Moore*, 7 O. N. P. 320, 6 O. D. (N.P.) 154; *Maclaren v. Stone*, 18 O. C. C. 854, 9 O. C. D. 794; *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11.

Under G. C., § 11760, the dower interest of the judgment debtor may be subjected to the payment of his debt, notwithstanding such interest has not been assigned: *Gildehaus v. Building Co.*, 3 O. C. C. (N.S.) 598, 14 O. C. D. 110. See also PROCEEDINGS IN AID OF EXECUTION.

On executor's selling to pay debts the widow's dower is one-third of the whole realty and not merely of the residue after assigning homestead to her: *Wanzer v. Smith*, 2 Dec. Rep. 323, 2 W. L. M. 426. See also DOWER.

6. Leaseholds.

Leasehold property is subject to levy and sale; see *Treasel v. Longworth*, 7 Dec. Rep. 685, 4 Bull. 961; *Cunningham v. Simpson*, 7 Dec. Rep. 154, 1 Bull. 173; *Acklin v. Waltermier*, 19 O. C. C. 372, 10 O. C. D. 629.

A devise of the rents of a house for ten years does not give the devisee an interest in the house subject to execution: *Cunningham v. Simpson*, 7 Dec. Rep. 154, 1 Bull. 173.

Judgments are liens, without levy for one year, on perpetual leaseholds as upon other real estate. Such estates are subject to levy and execution: *Bank v. Roosa*, 13 O. 334, 1 Longsdorf's Notes, 642; *Loring v. Melendy*, 11 O. 355, 1 Longsdorf's Notes, 565; *St. Bernard v. Kemper*, 60 O. S. 244, IV Longsdorf's Notes, 784; *Oliver v. Jones*, 3 O. N. P. 129, 6 O. D. (N.P.) 194.

The common law incidents of leasehold estates, so far as dower is concerned, yet obtain in Ohio: *Kampmann v. Schaaf*, 8 Dec. Rep. 351, 7 Bull. 159. See also *Oliver v. Jones*, 3 O. N. P. 129, 6 O. D. (N.P.) 194.

Leasehold interest or chattel created by oil and gas lease is not within the term "lands or tenements" as used in G. C., §§ 11655, 11656, 11666, and such interest must therefore be levied upon in order that the lien of a judgment may be acquired: *Acklin v. Waltermier*, 19 O. C. C. 372, 10 O. C. D. 629.

An oil and gas lease is subject to levy and sale as a chattel: *Acklin v. Waltermier*, 19 O. C. C. 372, 10 O. C. D. 629.

Either the interest of the landlord or of his tenant in growing crops may be levied upon and sold on execution: *Case v. Hart*, 11 O. 364, 1 Longsdorf's Notes, 566.

An estate for years created by lease granting privilege of purchase in fee and becomes subject to lien only from time of levy and seizure in execution: *Powder Co. v. Loomis*, 13 Dec. Rep. 333, 2 D. 544.

A lease for years (99 years) can be levied on and sold as a chattel: *Bisbee v. Hall*, 3 O. 449, 1 Longsdorf's Notes, 182. And see *Buckingham v. Reeve*, 19 O. 399, 1 Longsdorf's Notes, 884.

7. Devise Subject to Election.

The devise of a right to receive rent is not subject to levy and sale upon execution, at least if such devisee has a right to elect between such devise and his curtesy: *Cunningham v. Simpson*, 7 Dec. Rep. 154, 1 Bull. 173.

A devise of a right to receive rent is not subject to levy and sale, though there is an option to purchase in it: *Powder Co. v. Loomis*, 13 Dec. Rep. 333, 2 D. 544.

8. Franchises.

A franchise, as right to take toll, is not the subject of execution: *Seymour v. Turnpike Co.*, 10 O. 476, 1 Longsdorf's Notes, 531; *Ludlow v. Hurd*, 12 Dec. Rep. 791, 1 D. 522.

A franchise giving a right to take is the subject of execution by act of 1826: *Seymour v. Turnpike Co.*, 10 O. 476, 1 Longsdorf's Notes, 531.

So much of a consolidated road as is within the jurisdiction of the court can be ordered sold for failure to pay debts of one of the constituent companies which it had assumed: *Compton v. Railway*, 45 O. S. 592, IV Longsdorf's Notes, 298. See also RAILROADS.

9. Chattels.

Chattels conveyed by debtor to third person in fraud of creditors are subject to levy and sale at suit of such creditors against the transferor: *Bailey v. Swain*, 45 O. S. 657, IV Longsdorf's Notes, 301.

Securities transferred to indemnify a surety may be subjected to levy and sale upon execution of judgment creditor: *Lithograph Co. v. Shillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870.

A judgment on a claim for necessities is a debt for necessities, for the satisfaction of which ten per cent. of the personal earnings of the debtor can be subjected under proceedings in aid of execution upon such judgment: *Esman v. Roller*, 17 O. C. D. 712, 3 O. L. R. 116 [reversing, *Roller v. Esman*, 15

O. D. (N.P.) 579, 2 O. L. R. 448]; *Sweet v. Bar-num*, 8 O. C. C. (N.S.) 108, 18 O. C. D. 380.

A mortgagor's equity of redemption in chattel property mortgaged is subject to levy and seizure under an attachment order against him, and the surplus from sale after mortgage debt is paid may be subjected to satisfaction of the attachment judgment: *Carty v. Fenstermaker*, 14 O. S. 457, II Longsdorf's Notes, 674; *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

Personal property which becomes exempt from execution only when selected by the judgment debtor, is, until such selection be made, subject to levy and sale: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

If court has jurisdiction of the parties in a foreclosure sale upon a chattel mortgage, the property need not be within the territorial jurisdiction: *Means v. Worthington*, 22 O. S. 622, III Longsdorf's Notes, 107.

Sheriff may levy on money in his own hands collected by a former execution in favor of the debtor: *Renner v. Burke*, 11 O. C. C. 268, 5 O. C. D. 361.

Goods and chattels are bound from the time they are seized in execution: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

A debtor's family can be frugal in the expenditure of ordinary and reasonable allowances for household expenses without having their savings subject to the payment of his creditors: *O'Hara v. Bell*, 8 O. N. P. (N.S.) 352, 20 O. D. (N.P.) 55.

10. Partnership Property.

A partner's undivided interest in partnership goods may be levied upon, under an execution against such partner for his separate debt, but sale may be enjoined till the interest of such partner is ascertained: *Place v. Sweetzer*, 16 O. 142, I Longsdorf's Notes, 756; *Sutcliffe v. Dohrman*, 18 O. 181, I Longsdorf's Notes, 841; *Nixon v. Nash*, 12 O. S. 647, II Longsdorf's Notes, 592.

The whole debt may be made out of the property of one of several joint and several promissors the same as if they were partners: *Harris v. Clark*, 10 O. 5, I Longsdorf's Notes, 481; *Dunn v. Springmeier*, 7 Dec. Rep. 339, 2 Bull. 127; *Billingheimer v. Rickey*, 13 Dec. Rep. 1028, 2 C. S. C. R. 492.

11. Choses in Action Before Taking Effect.

Unissued bank bills are not subject to levy on execution: *Goodenow v. Duffield*, W. 455, I Longsdorf's Notes, 36.

Unissued bonds of railroad companies are not subject to levy on execution or sale by

proceedings in aid of execution: *Means v. Railroad*, 13 Dec. Rep. 285, 2 D. 465.

A levy on and sale of the mere paper certificates of stock is a nullity and passes no title unless the owner assent thereto: *Lee v. Bank*, 5 Dec. Rep. 21, 1 Am. L. Rec. 385, 13 Dec. Rep. 913, 2 C. S. C. R. 298.

12. Bailments.

Property in hands of a bailee is not subject to levy and sale upon execution: *Johnson v. Miller*, 16 O. 431, I Longsdorf's Notes, 773.

Pledged property is not subject to levy and sale upon execution: *Lee v. Bank*, 13 Dec. Rep. 913, 2 C. S. C. R. 298.

Securities placed by the principal in the hands of the surety for payment of a judgment recovered on a debt or for his indemnity against its payment, may be subjected to the payment of such judgment either by execution or proceedings in aid of execution: *Lithographic Co. v. Skillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870. See also SUBROGATION.

13. Property in Hands of Receiver.

Property in the custody of a receiver is not subject to levy and sale without leave of court appointing him: *Coe v. Railroad*, 10 O. S. 372, II Longsdorf's Notes, 442; *Murphy v. Holbrook*, 20 O. S. 137, II Longsdorf's Notes, 984.

14. Property in Hands of Sheriff.

Chattels levied on by the sheriff, though not removed, are in the custody of the law, and not subject to levy by another officer, as by a constable: *Smead v. Diss*, 1 Dec. Rep. 219, 4 W. L. J. 528 [affirmed *Smead v. Diss*, 1 Dec. Rep. 200, 4 W. L. J. 4].

Even though the plaintiff is the same in all the cases he can not validate the second levies unless he abandons the first: *Smead v. Diss*, 1 Dec. Rep. 200, 4 W. L. J. 4.

Where a sheriff holds property greatly in excess of the amount on his writs, a constable does not make a valid levy by copying the sheriff's inventory into his return and obtaining a promise from the sheriff to hold the excess for him, and a subsequent levy by the sheriff must be paid out of the proceeds: *Townsend v. Corning*, 40 O. S. 335, IV Longsdorf's Notes, 27.

The rule against seizing property in the custody of the law is for the officer's protection and to avoid collision and conflicts of title, and if the first officer submits or consents to actual levy by another officer, the second levy is good: *Davidson v. Kuhn*, 12 Dec. Rep. 699, 1 D. 405; *Benedict v.*

Deckand, 4 Dec. Rep. 163, 1 Clev. L. Rep. 83 [reversed *Benedict v. Deckand*, 7 Dec. Rep. 231, 1 Bull. 354].

A declaration of an intent to attach, subject to the prior levy, and making an appraisal and return of levy is an actual levy and not a mere declaration of intent to levy: *Davidson v. Kuhn*, 12 Dec. Rep. 699, 1 D. 405.

Where a sheriff has possession of property under a writ, a second writ does not require a second seizure, but a simple indorsement of a levy on it makes a levy from the receipt of the writ. The former custody supports the second levy. If the property was not in the sheriff's possession, omission of a second seizure leaves the second levy as ineffectual as the first: *Root v. Railroad*, 45 O. S. 222, IV Longsdorf's Notes, 270.

A constructive levy by mere indorsement may be made on property already in the officer's hands by a valid levy. But if the first levy was a mere paper one the constructive levy of the later executions will not bind the property against other actual levies: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

A second writ delivered to the same officer, who held the goods under another writ on another creditor's judgment, does not require a new levy to hold the same goods, but the first seizure enures to the later writ and it makes no practical difference on which writ the money is made: *Ryan v. Root*, 56 O. S. 302, IV Longsdorf's Notes, 690.

Where a sheriff, when collecting money on execution, has an execution in his hands against the judgment creditor, he may apply the money collected to the last execution: *Renner v. Burke*, 11 O. C. C. 268, 5 O. C. D. 361 [reversing *Burke v. Renner*, 2 O. N. P. 306, 1 O. D. (N.P.) 93].

15. Property in Hands of Plaintiff.

Property in the plaintiff's own hands, as merchandise sold by him, retaining possession until payment, may be levied on by him under a judgment for the price as the property of the vendee: *Rhodes v. Mooney*, 43 O. S. 421, IV Longsdorf's Notes, 174.

B. FORM OF EXECUTION.

1. In General.

An informality in an otherwise good execution out of the common pleas court, in that it refers also to a judgment of the supreme court, is good: *Matthews v. Thompson*, 3 O. 272, I Longsdorf's Notes, 166.

An execution issued "to any constable of Brooklyn or Parma townships," though irregular as not being directed to one or the

other, yet the defect, being merely formal, will not, after it has been acted upon, render the process void, and the officer who levies will be protected, as if it had been directed to him alone: *Lyon v. Fish*, 20 O. 100, I Longsdorf's Notes, 898.

The omission of a defendant's name does not render the writ wholly void, and it can not be attacked by injunction: *Dunn v. Springmeier*, 7 Dec. Rep. 339, 2 Bull. 127.

A decree in chancery in the supreme court of the county was remanded to the common pleas for execution, and the clerk of that court issued merely a certified transcript of the decree, containing no description of the land except by reference to other parts of the record. A sale made under such writ was not void but irregular and was rightfully set aside: *Rhonemus v. Corwin*, 9 O. S. 366, II Longsdorf's Notes, 381.

Execution must follow the judgment and run against all the joint defendants. If the judgment is against several, execution against less will be set aside, though if it run against all, it may be levied or enforced against one or more only: *Billingheimer v. Rickey*, 13 Dec. Rep. 1028, 2 C. S. C. R. 492; *Dunn v. Springmeier*, 7 Dec. Rep. 339, 2 Bull. 127.

G. C., § 11665, which provides that "when two or more writs of execution against the same debtor are sued out during the term in which judgment was rendered * * * no preference shall be given to either of such writs, * * * applies alike to executions issued on transcripts of justices of the peace filed in the office of the clerk of the court of common pleas under G. C., § 11659, and to those issued on judgments of the court of common pleas: *Rauh v. Aknovitch*, 59 O. S. 483, IV Longsdorf's Notes, 769; see also *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98; *Meier v. Bank*, 55 O. S. 446, IV Longsdorf's Notes, 668.

The taking of an execution from the clerk's office by the plaintiff or his attorney and returning the same without delivering it to the sheriff, is not suing out execution within G. C., § 11663. The writ must actually or constructively be delivered to the sheriff: *Kelley v. Vincent*, 8 O. S. 415, II Longsdorf's Notes, 354.

Execution is not required to be levied but only to be sued out, unlike G. C., § 11708: *Bank v. Coal Co.*, 11 O. C. C. 412, 5 O. C. D. 421 [affirmed *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660].

Two executions of the same kind may be issued on the same judgment: *Elliott v. Elmore*, 16 O. 27, I Longsdorf's Notes, 747.

An execution on a judgment is issued within the meaning of the statute when the

writ is placed in the hands of the sheriff: *Steel v. Katzenmeyer*, 5 O. C. C. (N.S.) 25; *sub nomine, Steel v. Katzenmyer*, 16 O. C. D. 400.

An order of sale on foreclosure is not an execution within the purview of G. C., § 11710: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

A judgment for the same sum, but for a less amount of costs than the *vendi*, is presumably not the judgment on which the sale was had: *Bank v. White*, W. 51, I Longsdorf's Notes, 4.

The clerk's certificate that it was the same judgment is not competent, though he could testify personally: *Bank v. White*, W. 51, I Longsdorf's Notes, 4.

An execution without a seal is void, and the sheriff would be excused for not obeying it. The defect is not cured by an order of sale, for its predicate is a valid seizure by levy, and the sheriff's deed thereunder is no proof of title: *Boal v. King*, 6 O. 11, I Longsdorf's Notes, 315 [affirming *Boal v. King*, W. 223, I Longsdorf's Notes, 19].

Want of seal on process is waived as to a judgment revived without making the objection: *Highway v. Pendleton*, 15 O. 735, I Longsdorf's Notes, 742.

If a deputy clerk signs a summons in his own name instead of the clerk's name by him, this satisfies the statute requiring the clerk to sign, for the deputy being appointed by statute is an officer, and not an agent of the clerk: *Walke v. Bank*, 15 O. 288, I Longsdorf's Notes, 712. See also SUMMONS.

2. Endorsement on Execution.

The exact amount of the judgment must be indorsed on the execution: *Monaghan v. Monaghan*, 25 O. S. 325, III Longsdorf's Notes, 233.

A levy will not be set aside for mistake of an officer in making his indorsement on the execution: *Cook v. Dinsmore*, 5 O. C. C. 385, 3 O. C. D. 180.

C. ALIAS EXECUTION.

If property which is easily removable is seized in execution, but left in the possession and use of the defendant, a delay for an unreasonable time to offer the property for sale, with the sanction and assent of the plaintiff, will have the effect of postponing such levy to one made upon a junior execution: *Acton v. Knowles*, 14 O. S. 18, II Longsdorf's Notes, 632.

The question whether the delay, if any, was reasonable or unreasonable, depends on the circumstances surrounding the parties and the property seized in execution, and is

a question for the jury, under the instructions of the court: *Acton v. Knowles*, 14 O. S. 18, II Longsdorf's Notes, 632.

A writ of sale under G. C., § 11669, must be based upon a prior valid levy. If there is a mere paper levy, which is void, or when there has been a valid levy, which has become fraudulent and void as against subsequent creditors, such an order of sale is inoperative as against subsequent executions actually levied on the property: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

When a writ of sale, founded on such void levy contains a clause authorizing an additional levy under G. C., § 11671, it is valid as a *fieri facias* execution only, which may be levied upon the property specified in the original void levy, as well as upon other property: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

It is the sheriff's duty to levy executions in the order in which they are delivered to him, even though holder of second execution points out property whereon to levy: *Weber v. King*, 8 Dec. Rep. 346, 7 Bull. 148; *Burke v. Renner*, 2 O. N. P. 306, 1 O. D. (N.P.) 93.

An execution without a levy on the real estate within one year of rendition of judgment, but with return *nulla bona*, will not preserve priority of a senior judgment lien over a *bona fide* junior judgment with execution and levy on real estate: *Sullivan v. Hart*, 2 O. D. (N.P.) 592, 32 Bull. 185.

The conversion, by a justice of peace, of a first execution on a judgment before him into an *alias* writ, by altering its date, is irregular but does not render the writ void, or destroy the protection due the constable to whom it is delivered: *Faris v. State*, 3 O. S. 159, II Longsdorf's Notes, 12.

An *alias* execution can not lawfully issue when property enough has been taken on the first, but not sold. An order of sale should issue: *Cutler v. Brinker*, T. 291.

An officer by giving time to the debtor and failing to levy, does not make an *alias* writ illegal, nor give anyone a right to resist it: *Faris v. State*, 3 O. S. 159, II Longsdorf's Notes, 12.

Two executions at the same time may be issued on the same judgment and sent to different counties. The statute expressly authorizes a second in the same county: *Elliot v. Elmore*, 16 O. 27, I Longsdorf's Notes, 747.

A levy on land must be disposed of before another levy on the same judgment is made. If the land is sold on the second levy the sale might, perhaps, be referred to the first levy, treating the second as a nullity, but this can not be if the second was not by the

same officer but by his successor: *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94.

A second execution from another county levied on land while the first levy, made nearly five years before, subsists, is unauthorized, and will not prevent dormancy or preserve the lien of the judgment: *Sturgeon v. Mason*, 8 O. C. C. 118, 4 O. C. D. 353; *Sturgeon v. Hull*, 8 O. C. C. 269, 4 O. C. D. 457.

A levy and sale of land was made before a former levy on the same land, under the same judgment, was disposed of. It was held that the plaintiff's attorney, who had bought at the sale, was entitled to have the satisfaction of the judgment on such void sale set aside, so as to proceed on his judgment anew: *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94.

D. FOREIGN EXECUTION.

The court in a county where a suit was brought has no jurisdiction to declare a lien for alimony upon, and issue an order of sale of, real estate situated in another county, to the sheriff of such other county: *Wilmot v. Cole*, 10 Dec. Rep. 777, 23 Bull. 339.

A foreign execution is levied when endorsed on the writ: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997.

Though a *scire facias* can only be issued from the court where the record is, it can not be directed to another county for service: *Cowden v. Stevenson*, W. 116, I Longsdorf's Notes, 9; *Heath v. Tyson*, W. 442, I Longsdorf's Notes, 35.

A foreign execution which has been levied on land is not waived or abandoned by levying another execution on the same land under the same judgment in order to keep it alive. The rule is the same as in case of other executions: *Mason v. Hull*, 55 O. S. 256, IV Longsdorf's Notes, 661 [reversing *Sturgeon v. Mason*, 8 O. C. C. 118, 4 O. C. D. 353]; *Sturgeon v. Hull*, 8 O. C. C. 269, 4 O. C. D. 457.

The sheriff's entry in his foreign execution docket of his levy of a foreign execution is constructive notice of the lien to subsequent buyers and creditors: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

The lien of a foreign execution lasts as long as the lien of a judgment rendered in the county and a stay of proceedings by order of the judgment plaintiff does not discharge the lien, and this rule applies to buyer without actual notice: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660 [affirms *Bank v. Coal Co.*, 11 O. C. C. 419, 5 O. C. D. 421].

The issuing of a second execution and placing it in the hands of the sheriff of a county other than that wherein the judgment was rendered within five years of the issue and levy of the first execution, will prevent the judgment from becoming dormant, as a lien against the real estate of a judgment debtor in such county. Whether issuing the execution to the sheriff of the county wherein the judgment was rendered, and having it there returned, instead of to the sheriff of the county wherein the land was situate, would keep the lien alive, *quaere*: *Steel v. Katzenmeyer*, 5 O. C. C. (N.S.) 25, 16 O. C. D. 400. See also JUDGMENT.

E. EQUALITY OF EXECUTIONS.

Where two executions from the same court are on an equality by virtue of G. C., § 11665, but an intervening execution is superior to one of them and inferior to the other, the amount of the first must be set aside, then the intervening lien must be paid, then the balance which would belong to the remaining execution must, if not sufficient to satisfy it, be added to the first amount and the sum divided between the executions that are on an equality: *Meier v. Bank*, 55 O. S. 446, IV Longsdorf's Notes, 668 [reversing *Bank v. Stiles*, 8 O. C. C. 532, 4 O. C. D. 481].

The equality of executions sued out during the term of the judgments, or within ten days thereafter, applies only to judgments of the same court. The equality is not defeated by an intervening lien prior to one of the executions and inferior to another: *Meier v. Bank*, 55 O. S. 446, IV Longsdorf's Notes, 668.

The equality between executions on judgments rendered at the same term can not be observed when such a levy was made, and then two levies on judgments of a prior term and then three levies on judgments of that term, but the first execution must be paid in full, then the next two, and what remains on the last two: *Benedict v. Deckland*, 4 Dec. Rep. 163, 1 Clev. L. Rep. 83 [reversing *Benedict v. Deckland*, 7 Dec. Rep. 231, 1 Bull. 354].

Judgments rendered at the same term and levied within the year, one does not gain a preference from the fact that it was first levied: *Bank v. Roosa*, 13 O. 334, I Longsdorf's Notes, 642.

A justice's judgment on which a transcript was filed and execution levied out of common pleas participates in the equality required by G. C., § 11665, between other judgments levied during the term of rendition: *Rauh v. Aknovitch*, 59 O. S. 483, IV

Longsdorf's Notes, 769 [affirming *Raugh v. Akmovitch*, 11 O. C. D. 826, which affirmed judgment of court of common pleas, *Raugh v. Akmovitch*, 36 Bull. 302] [affirmed, *Raugh v. Akmovitch*, 59 O. S. 483, IV Longsdorf's Notes, 769].

The statute that the execution first delivered to the officer shall be first satisfied, means between creditors of equal rights, and does not destroy the priority of the lien of the earlier judgment: *Patton v. Sheriff of Pickaway Co.*, 2 O. 395, I Longsdorf's Notes, 136; *Waymire v. Staley*, 3 O. 366, I Longsdorf's Notes, 178; *Riddle v. Bryan*, 5 O. 48, I Longsdorf's Notes, 246. G. C., § 11665, now enacts this.

G. C., § 11665, that if two or more executions issued at the same term, in which judgment is rendered against the same debtor, no preference shall be given to either, does not apply if the judgments were by different courts, but the first shall be first satisfied: *Derckson v. Reid*, 12 Dec. Rep. 380, 2 H. 159.

The sheriff is liable if he does not levy executions against the same person in the order in which he gets them. Where the first execution creditor told the sheriff he knew of no property to levy on, but said that a later creditor would point out property, and that he must levy the first one first, and the second creditor, who had, by employing detectives, found property, overpersuaded the officer by urging the hardship, and the second execution was levied first and made in full, the sheriff is liable for the deficiency on the earlier execution: *Weber v. King*, 8 Dec. Rep. 346, 7 Bull. 148.

Preference among executions sued out during the term or ten days thereafter in which the judgments were rendered being forbidden by G. C., § 11665, later executions in the term after sale on the earlier executions are entitled to share, although neither levied on the debtor's property nor in the officer's hands, and if the officer has distributed the proceeds to the executions in his hands, he is liable to the later execution creditors: *Doll v. Barr*, 58 O. S. 113, IV Longsdorf's Notes, 734.

G. C., § 11665, that if several executions are issued during the term at which judgment is rendered, no preference shall be given to either but they shall pro rate, is not affected by an intervening assignment for creditors, nor is a levy on the later writs necessary. Thus, where F got judgment against M and at the same term issued execution on which the chattels were seized; then M assigned for creditors; then R got judgment in adversary proceedings against M and execution thereon was issued and delivered to the same officer; the seizure in

favor of F enures to R without another levy; F and R's executions must pro rate, only sufficient having been realized to pay F's writ, the sheriff refusing to pay R anything and returning his writ *nulla bona* is liable, and an action for false return by R is proper action: *Ryan v. Root*, 56 O. S. 302, IV Longsdorf's Notes, 690.

A levy under a junior judgment subject to the lien of a prior one is good, and if the latter is discharged the buyer holds the land free: *Stuble v. Walpole*, W. 447, I Longsdorf's Notes, 35.

If judgment is rendered in an action against two defendants, one of whom is primarily liable, execution should run first against the defendant who is primarily liable and second against the other defendant in case of failure to realize the amount of the judgment upon the execution against the first defendant: *Leech v. Paving Co.*, 83 O. S. 454.

The priority of a lien of a senior judgment by confession upon the lands of the judgment debtor, over the lien of a junior judgment acquired under a foreign execution and levy, is lost by failure of the owner of the senior judgment to issue execution on his judgment and levy thereon within one year from its rendition: *Charbonneau v. Roberts*, 4 O. C. C. (N.S.) 574, 14 O. C. D. 707. See also JUDGMENT.

F. DUTY TO ISSUE EXECUTION.

Mandamus will not lie to compel a magistrate to issue an execution before the expiration of ten days after entering the judgment, and within which the judgment debtor has the right to file an appeal bond: *State v. Smedes*, 17 O. D. (N.P.) 757, 5 O. L. R. 94.

A justice is not bound to issue without order until expiration of the time allowed for stay: *Sharpless v. Taylor*, 12 O. 243, I Longsdorf's Notes, 606.

Where the justice has failed to collect money on promissory notes, through neglect, and indorser pays them, taking an assignment of the owner's right, he can not hold the justice on his bond; the holder or owner of the notes alone has a right of action against the justice: *Dehn v. Heckman*, 12 O. S. 181, II Longsdorf's Notes, 556.

For the neglect of a justice to issue execution when required by law, he and his sureties are liable on his official bond, and the measure of damages is the loss suffered by the creditor, and not necessarily the amount of the judgment: *Gaylor v. Hunt*, 23 O. S. 255, III Longsdorf's Notes, 122.

For neglect to issue execution, the amount of the judgment is *prima facie* the measure

of damages, but the amount may be reduced by showing that the judgment debtor did not possess property subject to levy and sale, sufficient to satisfy the judgment. There is no presumption that a debtor has selected or will claim to hold particular property exempt from execution: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

If the clerk of the court, under a misapprehension of the effect of a bond tendered and accepted, declines to issue an execution, or recalls one issued, the judgment creditor has his remedy, not only in his own right to appeal to the court but also under the concluding provisions of G. C., § 2899, providing that the clerk shall be under the direction of the court: *Leeds v. Peaslee*, 8 O. N. P. 105, 10 O. D. (N.P.) 567.

Where a decree of foreclosure has been entered, finding the amount due and ordering that the property be sold in satisfaction of the debt, an execution can not legally issue until the mortgaged property has been exhausted by public sale and a new action has been brought for the balance due: *Harrison v. Kirkbride*, 16 O. D. (N.P.) 389, 3 O. L. R. 440, 1 Hosea, 505. See also MECHANIC'S LIEN.

G. STAY OF EXECUTION.

1. In What Cases Execution May be Stayed.

On judgment rendered against a constable, under the third sub-division of G. C., § 10403, there is no stay: *Hornbuckle v. State*, 37 O. S. 361, III Longsdorf's Notes, 919.

Where judgment is reversed and remanded to the trial court, if proceedings in error to such reversal are pending, the trial court can continue the case until they are terminated, and then dismiss or proceed according to the result: *Schaeffer v. Marienthal*, 17 O. S. 183, II Longsdorf's Notes, 825.

On error to review the circuit court's reversal of an ejectment case and remand to the common pleas, an application to stay the judgment of the circuit court should not be made in this court, but the application to continue should be made in the common pleas, and if refused, an exception can be taken: *Neubert v. Phillips*, 46 O. S. 559, IV Longsdorf's Notes, 347.

Where a judgment is reversed and the cause remanded for a new trial, a motion to stay execution will not lie under G. C., § 12278, except for good cause shown: *Brewing Co. v. Frank*, 5 O. L. R. 577.

Error lies to the appointment of a receiver. It is a final order, execution of which may be stayed by the circuit court under G. C., § 12278, until final hearing:

Railway Co. v. Duckworth, 2 O. C. C. 518, 1 O. C. D. 618 [affirmed, without opinion, by supreme court, *Duckworth v. Railway Co.*, 21 Bull. 36].

Such stay is not granted as of course on filing a petition in error, nor on the other hand is a full discussion and showing of error necessary, but it is sufficient if difficult and important questions are involved. So if all the creditors and nearly all the stockholders protest against a receiver, stay will be granted: *Railway Co. v. Duckworth*, 2 O. C. C. 518, 1 O. C. D. 618 [affirmed, by supreme court, without opinion, *Duckworth v. Railway Co.*, 21 Bull. 36]. See also RECEIVERS.

Where the general term in a case reserved to it renders a final decree but suspends its operation for six months, with leave to apply for a further stay, and this decree is affirmed by the supreme court and remanded to the general term for execution, the general term has no power to remand to the special term for further proceedings, and the special term has no jurisdiction to grant further extension: *Cincinnati v. Railway Co.*, 56 O. S. 675, IV Longsdorf's Notes, 700 [reversing *Cincinnati v. Railway Co.*, 4 O. N. P. 57, 6 O. D. (N.P.) 81]. See also COURTS.

Where a final decree provides that its operation be suspended for a certain time, with leave to apply for a further extension, the application must be made within the time of the original suspension. The court has no power to entertain an application made after that time, the term having gone by, for this is modifying its judgment after term, which can only be done as provided by statute: *Cincinnati v. Railway Co.*, 56 O. S. 675, IV Longsdorf's Notes, 700 [reversing *Cincinnati v. Railway Co.*, 4 O. N. P. 57, 6 O. D. (N.P.) 81]. See also JUDGMENT.

Time within which a thing must be done and time beyond which it may be done are much different, and the Ohio rule as to the former includes the first day. Hence, on a consent judgment entered April 2d, stipulating against execution for ten months, execution on February 2 thereafter is not premature, for the first day may be counted as one of those for which stay was given: *Voorhees v. Minor*, 19 O. C. C. 560, 10 O. C. D. 681. See also TIME.

An order by the superior court of Cincinnati, that a default judgment rendered by the same court at a previous term be suspended and execution thereon stayed until the case should be tried on its merits, and granting leave to defendant to file answer, is an order affecting a substantial right in a summary application after judgment, and is

a final order within the meaning of G. C., § 12258, from which error may be prosecuted: *Van Ingen v. Berger*, 82 O. S. 255. See also ERROR.

A pending action on a note signed by a firm of three persons is not stayed by a discharge of two of them in bankruptcy, for they are necessary parties. The remedy is to stay execution: *White v. Francis*, 5 Dec. Rep. 323, 4 Am. L. Rec. 501. See also BANKRUPTCY.

2. Bond for Stay.

(a) Who May Sign.

If a person for the purpose of becoming bail for stay, signs his name on the docket in blank, and the undertaking be written afterwards over his signature, he is bound. The bond need not be written before the bail signs his name: *Herig v. Nougaret*, 7 O. S. 480, II Longsdorf's Notes, 319.

Where a bail for stay of execution signed his name to the docket, and the justice neglected to write over his signature an undertaking for stay, the justice is not liable on his bond for such neglect: *Gaylor v. Hunt*, 23 O. S. 255, III Longsdorf's Notes, 122.

Where the bail is an infant, the undertaking is not void but voidable and may be ratified by the infant upon becoming of age: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562.

(b) Contents.

In a petition on an undertaking for stay before a justice, it is necessary to aver execution issued after stay expired, notwithstanding other executions may have been issued before such expiration, under proceedings to obtain additional security by virtue of G. C., § 10414: *Murphy v. Flowers*, 27 O. S. 468, III Longsdorf's Notes, 369.

A supersedeas bond does not vacate an execution levied on land: *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94..

A stay bond thus, "K v. S. E appears and acknowledges himself bail on the above case," is void for informality: *Kerns v. Schoonmaker*, 4 O. 331, I Longsdorf's Notes, 223.

Where the surety signed the justice's docket and the justice then added the words "for stay," evidence that he wrote out the undertaking for stay over the signature after his office had expired is properly rejected in an action on the undertaking: *Herig v. Nougaret*, 7 O. S. 480, II Longsdorf's Notes, 319.

It was queried, but not decided whether a bail for stay of execution over whose name in blank the justice has not written out the

bond is liable: *Gaylor v. Hunt*, 23 O. S. 255, III Longsdorf's Notes, 122.

Bail for stay of execution before a justice, put in with plaintiff's consent after the ten days, is valid and the surety liable: *Whalon v. Glenn*, 1 Dec. Rep. 57, 1 W. L. J. 396.

A stipulation in a consent judgment staying execution for a time, except that it could issue and be levied in order to preserve priority of lien, is not violated by filing a creditor's bill in the interval. This is not an execution, as the parties have used the term being filed to acquire a lien: *Voorhees v. Minor*, 19 O. C. C. 560, 10 O. C. D. 681.

A bond executed under the requirements of G. C., § 12269, providing for the immediate collection of judgments in certain classes of cases, should require payment of interest on the amount it is sought to collect, in the event of its becoming necessary to make restitution: *Haunts v. Lanman Co.*, 2 O. N. P. (N.S.) 405, 15 O. D. (N.P.) 64. See also ERROR.

(c) Effect.

The undertaking, even though signed after the ten days, may be valid as a common law contract, though not available under the statute, if based upon sufficient consideration. And the release of levy and stay of execution for the statutory period is a sufficient consideration. The execution of such undertaking on the justice's docket is sufficient delivery, if no other delivery was contemplated by the parties: *Duckwall v. Rogers*, 15 O. S. 544, II Longsdorf's Notes, 747.

The giving of the undertaking provided for in G. C., § 10401, does not operate as a release of errors in the judgment, or a waiver of the right to prosecute proceedings in error for its reversal: *Russell v. Giles*, 31 O. S. 293, III Longsdorf's Notes, 585.

On proceedings in error by a judgment debtor to reverse the judgment, it will be presumed that the stay of execution was at his instance: *Shafer v. Hockheimer*, 36 O. S. 215, III Longsdorf's Notes, 842.

In such proceeding, the fact that the debtor caused an undertaking for stay of execution was a waiver of any defect in the service of the summons in the action. (*Russell v. Giles*, above distinguished): *Shafer v. Hockheimer*, 36 O. S. 215, III Longsdorf's Notes, 842.

The undertaking provided for in G. C., § 10401, if executed after the time allowed by law is valid as a common law contract, if supported by sufficient consideration, though not effective as a statutory undertaking. A surety on the judgment is discharged by such contract made without his consent. And

payments made by him to prevent sale of his goods on execution may be recovered back. Such compulsory payment is not satisfaction of judgment or undertaking so that an action may not be maintained on the undertaking by the judgment creditor: *Boling v. Young*, 38 O. S. 135, III Longsdorf's Notes, 961.

The remedy given by G. C., § 10423, on undertakings for stay of execution, is not exclusive, but cumulative only: *Duckwall v. Rogers*, 15 O. S. 544, II Longsdorf's Notes, 747.

The right to appeal is not waived by giving bail for stay of execution: *Nealy v. Sexton*, W. 314, I Longsdorf's Notes, 24; *Alban v. Evans*, 2 Dec. Rep. 298, 2 W. L. M. 325.

Bail for stay of execution are, like other sureties, not released by delay not given by binding contract, hence, instructions to a justice not to issue execution until further orders does not release, though the debtor become insolvent in the meantime: *Whiton v. Ripley*, 1 Dec. Rep. 133, 2 W. L. J. 406.

Bail for stay of a justice's judgment is to pay if the debtor does not; and that the debtor is dead, and left assets, is not good cause why judgment should not go against the bail: *Hall v. Kerr*, W. 446, I Longsdorf's Notes, 35.

G. C., § 12269, gives the court discretion to grant or refuse the leave to have execution, notwithstanding a supersedeas bond: *Gardner v. Cline*, 2 Dec. Rep. 301, 2 W. L. M. 329.

Execution should be granted if no reasonable ground for the proceedings in error appear, and they seem to be for delay. This is determined from the record, and the motion should be accompanied by a copy of the record, and proof of notice upon the other party: *Gardner v. Cline*, 2 Dec. Rep. 301, 2 W. L. M. 329.

On motion for leave to levy execution, notwithstanding a supersedeas bond (G. C., § 12269), if the amount admittedly due is large as compared to that litigated in error, and they are separable, execution for the former may be allowed, but an agreement to stay the execution as to the latter may be required from plaintiff: *Bank v. West*, 12 Dec. Rep. 329, 2 H. 60.

Leave to enforce a judgment, notwithstanding a supersedeas bond, which leave can be given by the "court below," G. C., § 12269, is to be asked of the district court and not of trial court, if the supersedeas was in the district court, in order to go to the supreme court: *Going v. Schnell*, 6 Dec. Rep. 932, 8 Am. L. Rec. 739, 8 Dec. Rep. 69, 5 Bull. 423.

An undertaking given to a claimant of attached property under the provisions

of G. C., § 11743, takes the place of the property to the extent of the interest therein which the claimant may establish in his suit on the undertaking; and the value of said interest in said property, with interest thereon from the date of the delivery of the undertaking to the claimant is the measure of his damages: *Adamson v. Izor*, 76 O. S. 64, IV Longsdorf's Notes, 1022.

A justice's judgment in *scire facias* against the bail for stay of execution, without previous execution against the debtor, is not void, but is binding until reversed: *Moore v. Robison*, 6 O. S. 302, II Longsdorf's Notes, 242. See also JUDGMENT.

A restitution bond annuls a supersedeas bond; thus, if a supersedeas is given, but the circuit court affirms, and another supersedeas is given for error in the supreme court, pending which the judgment creditor obtains leave to enforce his judgment, giving a restitution bond under G. C., § 12269, but on execution no property is found, he can not resort to the supersedeas bonds: *Young v. Spencer*, 2 O. C. C. 459, 1 O. C. D. 587. See also ERROR.

(d) Action Upon.

As between the bail for stay of execution and a surety on the judgment, not consenting, the former is primarily liable on the judgment: *Boling v. Young*, 38 O. S. 135, III Longsdorf's Notes, 961.

Under such circumstances as are provided for in G. C., § 10405, the surety may, upon execution being issued against him and the principal at the expiration of the period of stay, pay the money under protest, and sue to recover same from the bail for stay: *Denier v. Myers*, 20 O. S. 336, II Longsdorf's Notes, 998.

Action on the stay bond on a justice's docket may be brought in the common pleas. The remedy by G. C., § 10423, is cumulative: *Duckwall v. Rogers*, 15 O. S. 544, II Longsdorf's Notes, 747.

The stay of execution bond before a justice can not be sued without averring execution issued against the debtor after stay expired, although other executions were issued before to obtain additional security under G. C., § 10414: *Burr v. Moody*, W. 449, I Longsdorf's Notes, 35; *Murphy v. Flowers*, 27 O. S. 468, III Longsdorf's Notes, 369.

A bond under the statute by an execution debtor to obtain a stay to redeliver the property within six months to the officer having the execution, does not mean to an officer with an execution at the time of redelivery, but at the date of the bond. Hence, the creditor is not compelled to issue execution

at the end of six months to get the benefit of the bond, but nondelivery by the debtor is a breach: *Wright v. Lepper*, 2 O. 297, I Longsdorf's Notes, 127.

Return of execution unsatisfied at the expiration of the stay is sufficient to entitle the plaintiff to enforce on the stay bond. It is no defense to the surety to state that there was property, but by collusion was not levied on: *Gockel v. Averment*, 3 Bull. 894.

Bond for stay of execution of a justice's judgment is a specialty under G. C., § 11221, and action thereon is barred in fifteen years: *Bobo v. Norton*, 10 O. S. 514, II Longsdorf's Notes, 459. See also LIMITATION.

V. LEVY.

A. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

Provisions like those of G. C., § 11666, are for the benefit of the debtor, and may be waived by him, and they are directory in their nature: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

The levy of a foreign execution is complete when indorsed on the execution and before entry thereof as required by G. C., § 2837: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997.

An action in mandamus will not lie to compel a sheriff to levy a writ of execution where there is a plain and adequate remedy by due course of law: *State, ex rel., v. Chambers*, 5 O. C. C. (N.S.) 57, 16 O. C. D. 404.

Interfering with property levied upon is contempt: *State, ex rel., v. Holden*, 12 O. D. (N.P.) 91.

Waiver of exemption in property levied on execution, *quaere*: *State, ex rel., v. Holden*, 12 O. D. (N.P.) 91.

The rule that an officer is justified by his process, not void upon its face, is one of protection only; and although the officer may execute such process, yet if it is in fact void for want of jurisdiction in the court or officer issuing it, he may refuse to execute it, and no action will lie against him for such refusal: *Newburg v. Munshower*, 29 O. S. 617, III Longsdorf's Notes, 504.

Where the constable has taken security for his own indemnity, and leaves the property levied upon in possession of the debtor, the debtor's possession is to be regarded as the possession of the constable, and as against a sheriff who afterwards levies upon the property, the constable has the right to the immediate possession, and may maintain an action therefor, without a demand for the redelivery of the property: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

An additional levy is not contemplated unless additional goods or chattels are desired to be reached: *Ryan v. Root*, 56 O. S. 302, IV Longsdorf's Notes, 690.

A constructive levy of a subsequent execution may be made by indorsement merely, where a valid levy has been made. But where there is but a mere paper levy which is void, or where there has been a valid levy which has become fraudulent and void as against subsequent creditors, such order of sale is inoperative as against subsequent executions actually levied: *Murphy v. Swademer*, 33 O. S. 85, III Longsdorf's Notes, 659.

Levy and execution for a balance due on foreclosure is not authorized until after public sale and a new action is brought to recover a balance due, where the decree provides only for sale of property: *Harrison v. Kirkbride*, 16 O. D. (N.P.) 389, 3 O. L. R. 440.

Possession by the sheriff's keeper is possession by the sheriff: *Hicks v. Grussel*, 8 O. N. P. 73, 10 O. D. (N.P.) 532.

The purpose of the legislature in enacting G. C., §§ 10371, *et seq.*, relating to the trial of the right of property levied on or attached, was to relieve the constable and advise the judgment creditor of the rights of the claimant in the property so taken, but such a proceeding is not conclusive as to the ownership of the property, and does not disturb the title, and title may be enforced by a civil action in any court of competent jurisdiction, notwithstanding the finding of the justice of the peace: *Berkowitz v. Brewing Co.*, 7 O. L. R. 244.

The code as to trial of right of property levied on does not apply to levies by constables, because the justices' code has special provisions for them: *Armstrong v. Harvey*, 11 O. S. 527, II Longsdorf's Notes, 527.

Where a debtor here gives a note to a creditor in another state payable in such state, the *situs* of the debt is here, and the debt can be garnished here: *Wilson v. Gifford*, 12 O. C. C. 597, 5 O. C. D. 680.

B. ORDER OF LEVY.

1. *Personalty.*

Personal property in the possession of the mortgagor, until condition broken, may be seized on execution: *Curd v. Wunder*, 5 O. S. 92, II Longsdorf's Notes, 162.

An officer by levy on chattels acquires a special property therein which will sustain replevin: *Massie v. Long*, 2 O. 287, I Longsdorf's Notes, 125; *Wright v. Lepper*, 2 O. 297, I Longsdorf's Notes, 127; *Wadsworth v. Parsons*, 6 O. 449, I Longsdorf's Notes, 361; *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

A redelivery of the property to the debtor on his giving bond under G. C., § 10432, makes him bailee of the constable and the property is constructively still in the constable's possession and not subject to levies by other officers: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

2. Realty.

It is not necessary that the debtor be without chattel property to make a levy of an execution on land valid as against creditors and subsequent creditors: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660; see *Cook v. Dinsmore*, 5 O. C. C. 385, 3 O. C. D. 189.

If personalty is insufficient, a levy on real estate can be made before sale: *Cook v. Dinsmore*, 5 O. C. C. 385, 3 O. C. D. 189.

When a judgment creditor levies on only a part of the debtor's land, he loses his preferences as to other lands first levied on by other execution creditors: *Walpole v. Ink*, 9 O. 142, I Longsdorf's Notes, 471.

A surety's property may be levied on under G. C., § 11713, if the sheriff can find no property of the principal without searching the records—which he is not bound to do—or if the only property of the principal he can find is covered with liens and in litigation. He can abandon a levy on such property if he makes one: *Mueller v. Bates*, 3 Dec. Rep. 174, 4 W. L. Gaz. 145, 13 Dec. Rep. 195, 2 D. 318; *Mueller v. Bates*, 3 Dec. Rep. 14, 2 W. L. Gaz. 121.

3. Partnership Property.

The sale of partnership property for a partner's separate debt may be restrained by injunction until the interest of the partner be ascertained. The interest of the partner is his share after all the demands against the firm, including those of the individual partners, are paid: *Place v. Sweetzer*, 16 O. 142, I Longsdorf's Notes, 756.

Execution on judgment against a partnership in its firm name may be satisfied out of the partnership property: *Bank v. Cochran*, 8 O. N. P. 696, 12 O. D. (N.P.) 27.

When a partnership and several members of the firm are insolvent and there are no partnership funds for distribution among its creditors, the creditors of the firm are entitled to share equally with the creditors of each partner in the distribution of his individual assets; the amount so distributed to the creditors of the firm, however, not to exceed the amount of their claims: *Brock v. Bateman*, 25 O. S. 609, III Longsdorf's Notes, 270.

A judgment lien of separate creditor must be postponed to the equity of a firm creditor,

whose claim accrued during continuance of partnership though subsequent to time such lien attached: *Page v. Thomas*, 43 O. S. 38, IV Longsdorf's Notes, 143.

A partner's interest in partnership goods is his share of the surplus after all demands against the firm are paid: *Sutcliffe v. Dohrman*, 18 O. 181, I Longsdorf's Notes, 841; *Nixon v. Nash*, 12 O. S. 647, II Longsdorf's Notes, 592.

Partnership goods may be levied on under execution against one partner for his separate debt: *Place v. Sweetzer*, 16 O. 142, I Longsdorf's Notes, 756.

C. METHOD OF LEVY.

1. Personality.

(a) Actual.

A secret levy without reasonable notoriety does not constitute a valid levy of personality as against a mortgagee taking a mortgage between such levy and its publicity: *Minor v. Smith*, 13 O. S. 79, II Longsdorf's Notes, 599.

An omission by an officer to indorse no goods will not render the levy invalid or ineffectual to create a lien: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

The inventory is no part of the levy, and its omission does not invalidate the levy: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

Where the constable copied the inventory taken by a sheriff and made it a part of his return and it stated a levy, it is not a valid levy on goods then in hands of sheriff on execution: *Townsend v. Corning*, 40 O. S. 335, IV Longsdorf's Notes, 27.

Actual seizure of personal property so far as it is capable thereof, or such open, unequivocal dominion as it admits of, is necessary to a proper levy: *Minor v. Smith*, 13 O. S. 79, II Longsdorf's Notes, 599; *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659; *Root v. Railroad*, 45 O. S. 222, IV Longsdorf's Notes, 270.

Possession by the officer is necessary to the validity of a levy: *Root v. Railroad*, 45 O. S. 222, IV Longsdorf's Notes, 270.

Merely indorsing a paper levy on the writ and leaving the property is not sufficient: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

An execution against a church is not properly levied on the organ as against a late bona fide mortgagee of it by indorsing the levy in view of the organ while the sexton is ringing the bell: *Minor v. Smith*, 13 O. S. 79, II Longsdorf's Notes, 599.

A valid levy may be made on six hundred tons of iron, part of a larger quantity, and

the sheriff may take possession of the whole in order to separate such part, and an unreasonable delay in making the separation will not invalidate the levy, though it may create a liability to the owner of the rest: *Morgan v. Spangler*, 14 O. S. 102, II Longsdorf's Notes, 639.

Where an execution against A is levied by mistake upon the property of B the property can not be held under any form of procedure; but where the property must ultimately be liable, although the manner of reaching it may be questioned the levy is valid: *State v. Brimson*, 46 Bull. 275.

(b) Constructive.

When a valid levy has been made upon goods and chattels in the hands of the officer, a constructive levy of subsequent executions coming into his hands before sale, may be made by indorsement merely; but when the original levy is a mere paper levy and therefore void, a constructive levy of actual executions will not bind the property against subsequent executions actually levied upon: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659; *Townsend v. Corn-ing*, 40 O. S. 335, IV Longsdorf's Notes, 27.

Actual seizure, whether omitted or not, is immaterial after a forthcoming bond is given, for this admits a levy not only as against the debtor, but also in replevin by the officer against another officer levying on the property in the debtor's hands: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

2. Realty.

(a) Actual.

Entry on real estate is not necessary to constitute a valid levy thereon: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997; *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

A valid levy on real property is made if such levy be indorsed on the writ, with a proper description of the land: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

Failing to continue in actual possession releases the lien of a levy only if amounting to an abandonment, or making it inequitable against subsequent buyers: *Moore v. Powell*, 12 Dec. Rep. 538, 1 D. 144.

The debtor's possession is possession of the officer: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

A levy on land is not lost because not followed up with diligence, if enforced during the five years before dormancy of judgment: *Cook v. Dinmore*, 5 O. C. C. 385, 3 O. C. D. 189.

Order of sale under a void levy will not operate against later actual levies: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

The failure of the judgment creditor to sue out and levy execution on property after assignment does not affect the priority of the judgment lien: *Scott v. Dunn*, 26 O. S. 63, III Longsdorf's Notes, 286.

Merely making a levy on land on a foreign execution and not following it up by appraisement and sale creates no lien against subsequent mortgages: *Sturgeon v. Mason*, 8 O. C. C. 118, 4 O. C. D. 353; *Sturgeon v. Hull*, 8 O. C. C. 269, 4 O. C. D. 457.

Ordering a return after levy on real estate and without appraisement or sale is not an abandonment of the levy and does not impair the lien. In fact, when other processes are in motion which will accomplish the purpose, as here a partition case pending, it is the creditor's duty to call in the writ and cease unnecessary expense: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588.

Where a sheriff has levied on property before the debtor assigns for creditors and submits to an order of the probate judge requiring him to deliver it to the assignee for sale subject to his lien, he does not abandon his levy as by a voluntary surrender on a void order, for it was involuntary, as by a species of duress or by implied agreement, and the order of the probate court will not be vacated: *Carson's Assignment*, 1 Dayton Term Rep. (Iddings) 107.

A foreign execution levied on land is not waived or abandoned by levying another execution on the same land under the same judgment in order to keep it alive. The rule is the same as in case of other executions: *Mason v. Hull*, 55 O. S. 256, IV Longsdorf's Notes, 661 [reversing *Sturgeon v. Mason*, 8 O. C. C. 118, 4 O. C. D. 353; *Sturgeon v. Hull*, 8 O. C. C. 269, 4 O. C. D. 457].

Levy on "all of C M's interest in the real estate," describing the land but not the debtor's interest, is not void for uncertainty for purposes of effecting a lien: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588.

(b) Constructive.

Entry on real estate is not necessary to constitute a valid levy: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997; *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

D. EXCESSIVE LEVY.

Excessive levy and sale renders constable responsible: *Sparkling v. Todd*, 27 O. S. 521, III Longsdorf's Notes, 372.

Prior excessive levy does not in itself render it invalid as against a subsequent levy upon the same property: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

As against a subsequent levy, a prior levy is not invalid because it was excessive: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

E. EFFECT OF LEVY.

1. Generally.

Where a sheriff after having levied upon property consisting of a patrol wagon, horse and harness belonging to a municipal corporation left the same in the possession of a third party, and the latter upon the demand of the mayor and policeman of such corporation seeking to obtain possession of the same, expressly notified them that his express instructions from the sheriff were not to let anybody have them, and they were conscious of the fact that he had no power or authority to surrender them, it can not be held that the action of such party in surrendering the property was the act of or in any manner bound the sheriff: *State, ex rel., v. Holden*, 12 O. D. (N.P.) 91.

Where an execution against A is levied by mistake upon the property of B, the property can not be held in any form of procedure; but where the property must ultimately be liable, although the manner of reaching it may be questioned, the levy is valid: *State v. Brimmon*, 46 Bull. 275.

A levy upon railroad property in actual use is voidable but not void: *State v. Brimmon*, 46 Bull. 275.

An action to enforce the collection of a debt by attachment of the property of a non-resident of this state who has not been summoned nor entered his appearance, is essentially a proceeding *in rem*; and the judgment rendered therein can have no effect beyond the appropriation of the attached property to the satisfaction of the debt and costs: *Oil Well Supply Co. v. Koen*, 64 O. S. 422, IV Longsdorf's Notes, 874.

Before assignment for creditors a sheriff is entitled to possession of goods taken on execution: *Mack v. Steinau*, 10 O. D. (N.P.) 701.

Levy on chattels is a satisfaction while levy remains in force, but only sale of the lands under levy is a satisfaction: *Reynolds v. Rogers*, 5 O. 169, I Longsdorf's Notes, 258.

Levying an attachment on the property of a third person, under the belief that it belongs to the debtor, does not change the title of the real owner, until he so elects by treating it as abandoned and suing for conversion, and it is too late to do this after its destruction by accidental fire, the offi-

cer not having taken actual custody, so as to deprive the owner of control: *Sammis v. Sly*, 54 O. S. 511, IV Longsdorf's Notes, 646 [reversing *Sammis v. Sly*, 4 O. C. D. 60]. See also ATTACHMENT.

A husband inheriting real property from the estate of his wife, takes it incumbered with all the indebtedness of the wife and the expenses of administering upon her estate. If the estate is insolvent, a judgment creditor of the husband reaches nothing by levying an execution upon the property descended to him: *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11. See also DESCENT AND DISTRIBUTION.

2. After Death of Party.

After the death of defendant, execution on a judgment rendered in his lifetime, issued against him and levied on his lands is void, and the buyer at the sale gets no title to the land: *Massie v. Long*, 2 O. 287, I Longsdorf's Notes, 125; *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94; *Cartney v. Reed*, 5 O. 221, I Longsdorf's Notes, 269.

Death of the defendant after execution has been issued and levied does not affect it, but it proceeds as if death had not taken place. But if defendant die after execution issued, but before levy, it can not proceed: *Massie v. Long*, 2 O. 287, I Longsdorf's Notes, 125.

Though an execution is a single thing, the death of the defendant after levy on land does not vacate it, yet a levy after death is void: *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94.

Death of one party and marriage of the other, a female, after execution or order of sale once begun, does not abate it. And an alias order of sale may issue if the first is returned not sold: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

On death of the fraudulent grantee, after decree setting aside the conveyance and ordering sale, the sale may be had without revivor against the heirs; for the property belongs as to the judgment creditor to the grantor and not to the grantee: *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

Real estate levied on during the debtor's life may be sold under the levy without making his heirs or representatives parties, and G. C., § 11649, does not change this rule: *Bigelow v. Renker*, 25 O. S. 542, III Longsdorf's Notes, 261.

F. RIGHT TO COMPEL LEVY.

An action in mandamus will not lie to compel a sheriff to levy a writ of execution

where there is a plain and adequate remedy by due course of law: *State, ex rel., v. Chambers*, 5 O. C. C. (N.S.) 57, 16 O. C. D. 404.

Where there is no allegation that the defendant is insolvent, or that execution of the writ is likely to be defeated by the removal of property subject to levy beyond the reach of the sheriff during the life of the writ, and the only ultimate purpose is to obtain a satisfaction in money of the judgment previously obtained, an adequate remedy exists at law, and a writ of mandamus to compel the immediate levy of execution will not be granted: *State v. Chambers*, 5 O. C. C. (N.S.) 57, 16 O. C. D. 404.

Mandamus will not issue to compel a magistrate to issue an execution before the expiration of ten days after entering the judgment, and within which the judgment debtor has the right to file an appeal bond: *State v. Smedes*, 17 O. D. (N.P.) 757, 5 O. L. R. 94.

G. CONTEMPT AS ENFORCEMENT OF LEVY.

Interfering with property levied on is a contempt: *State, ex rel., v. Holden*, 12 O. D. (N.P.) 91; *State v. Brimson*, 46 Bull. 275.

Public necessity for use of property levied upon and seized on execution by a sheriff does not render the interfering therewith mere technical contempt: *State, ex rel., v. Holden*, 12 O. D. (N.P.) 91.

One can not be punished as for a contempt in the violation of an order issued in a case to which he is a stranger and of which he has no knowledge; and particularly where he has replevied property previously seized by the sheriff, and there is no showing that the seizure was legal: *Cassidy v. Church Co.*, 21 O. C. C. 197, 11 O. C. D. 461. See also CONTEMPT.

Defendants knowing of an execution against property, the levy thereon, the fact that the sheriff had custody of it, and then taking it away without consent of any proper authority, are bound to know that their acts in removing it, will impede, obstruct, hinder and delay the due and orderly administration of justice, in violation of G. C., § 12137, prescribing the acts constituting contempt of court: *State v. Holden*, 12 O. D. (N.P.) 91.

Courts are imperatively bound to maintain their own dignity and to protect their officers in the execution of its process. Therefore, where a sheriff, as the executive officer of a court, goes forth to execute its mandates he goes with the power of the court behind him, and when property is seized upon its process, it then is in the custody of the law and whoever knowingly interferes with that custody is guilty of contempt and should

be punished: *State v. Holden*, 12 O. D. (N.P.) 91.

The fact that the property rescued from the custody of a sheriff under regular process of court, is the horse and patrol wagon belonging to a city, that there is great public necessity for its use by the city, and that the mayor offered to give bond for the restitution or redelivery of the property, does not render the act a mere technical contempt, especially as there are several remedies that might have been resorted to to have obtained peaceable possession thereof: *State v. Holden*, 12 O. D. (N.P.) 91.

The superintendent of a consolidated railroad company is guilty of contempt of court if he orders a chain cut with which the sheriff has chained a locomotive to the track, having levied on such locomotive under a judgment recovered against one of the constituent companies: *State v. Brimson*, 46 Bull. 275. See also CONTEMPT.

H. EFFECT OF LEAVING DEFENDANT IN POSSESSION OF PROPERTY.

If the officer leave the property in the debtor's possession, and it is removed, he is liable for the debt. So if by agreement with the debtor he substitute other property on the day of sale: *State v. Fuller*, 14 O. 545, I Longsdorf's Notes, 687.

If the sheriff leaves chattels levied on with the debtor on bond to redeliver (G. C., § 11667, is same as then statute), and the goods are not redelivered, the sheriff is liable to the plaintiff on amercement. The bond is for his security: *Wadsworth v. Parsons*, 6 O. 449, I Longsdorf's Notes, 351.

If a constable leave the property levied on in the debtor's possession, taking a forthcoming bond under G. C., § 10432, the debtor's possession is that of the constable. Other officers can not levy on it, and if they do, the constable may replevy from them without making a demand, and may sustain the replevin action by showing his execution, and need not prove the judgment under which it issued: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

The debtor's possession on a forthcoming receipt being constructively the officer's possession, a demand and refusal must be shown by the officer proceeding against him for nondelivery, while his possession was legal: *Bassett v. Baker*, W. 337, I Longsdorf's Notes, 26 [as limited by *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456].

Failing to continue in actual possession releases the lien of a levy only if amounting to an abandonment, or making it inequitable against subsequent buyers: *Moore v. Powell*, 12 Dec. Rep. 538, 1 D. 144.

If the sheriff by direction of plaintiff's attorney, but knowing him to be unauthorized, leaves property levied on with the debtor, and does nothing more he is liable to amercement. But where plaintiff, then knowing these facts, issues another writ commanding the sheriff to sell the property so levied on, he ratifies the attorney's acts, and thus waives the right of amercement: *Pettit v. Ebright*, 2 Dec. Rep. 651, 4 W. L. M. 327. See also **AMERCEMENT**.

I. ABANDONMENT OF LEVY.

A foreign execution levied on land is not waived or abandoned by levying another execution on the same land under the same judgment in order to keep it alive. The rule is the same as in case of other executions: *Mason v. Hull*, 55 O. S. 256, IV Longsdorf's Notes, 661 [reversing *Sturgeon v. Mason*, 8 O. C. C. 118, 4 O. C. D. 353].

A levy on land is not lost because not followed up with diligence if enforced during the five years before dormancy of the judgment: *Cook v. Dinmore*, 5 O. C. C. 385, 3 O. C. D. 189.

Where a sheriff after having levied upon property, consisting of a patrol wagon, horse and harness, belonging to a municipal corporation, left the same in the possession of a third party, and the latter, upon the demand of the mayor and policemen of such corporation, seeking to obtain possession of the same, expressly notified them that his express instructions from the sheriff were not to let anybody have them, and they were conscious of the fact that he had no power or authority to surrender them, it can not be held that the action of such party in surrendering the property was the act of or in any manner bound the sheriff: *State v. Holden*, 12 O. D. (N.P.) 91.

Where a sheriff, in possession of chattel property seized by him upon execution upon a judgment upon a *cognovit* note, delivered the property so seized by him to the assignee of the judgment debtor, upon the order of the probate court appointing such assignee, but reserving (according to the court's entry ordering such delivery) to such sheriff a lien upon the proceeds of the sale of such property for the payment of such judgment, so levied, such a delivery was not a voluntary parting with the property levied upon and therefore did not avoid the lien of the sheriff under such levy: *In re Carson*, 12 O. D. (N.P.) 565, 1 Dayton Term Rep. (Idings) 107.

The assignee of the debtor represents the creditors of the debtor and they are estopped by an agreement of the assignee that the

lien on chattel property seized by the sheriff shall be preserved to the sheriff: *In re Carson*, 12 O. D. (N.P.) 565, 1 Dayton Term Rep. (Idings) 107.

Where a sheriff regularly levies upon certain property of a city and places it in the custody of a third person with instructions not to release or give up the same, it is forcibly rescuing such property, for the mayor of the city and a squad of policemen to take the same from the custody of the bailee upon his refusal to give up the property on demand therefore and protesting his instructions: *State v. Holden*, 12 O. D. (N.P.) 91.

J. LIABILITY FOR WRONGFUL EXECUTION AND LEVY.

The rule of damages where the sheriff levies on plaintiff's store as the property of one G, and holds it closed for a month, is: (1) Interest on the whole property from the taking until restored; (2) Value of articles lost, or if injured, the amount thereof with interest; (3) Decline in the market value of the goods while held by the sheriff, and interest thereon; (4) No recovery for injury to the business, loss of customers, salary of clerks paid, or store rent during the levy, though a different rule might prevail against the execution plaintiff: *Searles v. Abbey*, 4 Dec. Rep. 48, Clev. L. Rec. 63. See also **SHERIFF**.

A writ of execution, valid on its face, though in fact on a judgment without jurisdiction of the person, protects the officers levying it, but does not protect the plaintiff, as he is privy to the proceeding, and being summoned on the constable's posse will not protect him: *Harmon v. Gould*, W. 709, I Longsdorf's Notes, 54. See also **TRESPASS**.

Levy on the property of a third person as that of the defendant, does not make the plaintiff liable unless he ordered a levy on the particular goods or participated in the taking. He may be liable if he ratifies the trespass, but merely receiving the proceeds with knowledge, only makes him liable for the amount he receives: *Coe v. Higdon*, 12 Dec. Rep. 691, 1 D. 393. See also **TRESPASS**.

A voluntary bankrupt has sufficient title, prior to the election of the trustee, to the personal property included in his schedule of assets, to enable him to bring and in case the trustee neither sues nor intervenes, to prosecute to judgment, a suit for damages occasioned by the alleged unlawful judicial sale of a portion of such property after he had filed a claim for exemption: *Johnson v. Collier*, 10 O. L. R. 164.

VI. RELIEF AGAINST EXECUTION AND LEVY.

A. INJUNCTION.

An injunction against an execution on a foreign judgment will not lie unless lack of jurisdiction is shown: *Howard v. Kinney Co.*, 8 O. C. C. (N.S.) 568, 19 O. C. D. 186.

An injunction will lie against sale under execution in hands of sheriff, in case of personal property returned to sheriff upon redelivering bond in replevin: *Uphaus v. Roof*, 68 O. S. 401, IV Longsdorf's Notes, 945.

The fact that an agreement is offered to the sheriff by the assignee that in consideration of the delivery of such goods to him to be sold, the lien of the judgment shall attach to the proceeds as to the original goods, and the proceeds be applied on the execution and that such goods are of greater value than the amount due on the execution and can be sold to better advantage by the assignee, is not sufficient for enjoining the judgment creditor and sheriff from selling the goods: *Mack v. Steinau*, 10 O. D. (N.P.) 701.

On injunction to stay execution, after a levy on chattels, the sheriff is bound to restore the chattels levied on to the owner: *Bisbee v. Hall*, 3 O. 449, I Longsdorf's Notes, 182.

Where a judgment rendered by a justice of the peace is not voidable but void, injunction will lie against the plaintiff and constable restraining the levying of a writ of execution: *Doran v. Collins*, 8 O. N. P. (N.S.) 169, 19 O. D. (N.P.) 406, 54 Bull. 91. See also COURTS.

B. MOTION TO DISCHARGE.

A motion to discharge an attachment before a justice of two horses as exempt from execution being overruled and judgment rendered, the plaintiff brought replevin for them against the attaching officer. It was held that the justice having jurisdiction to decide the motion, his decision while unreversed was conclusive. The defendant, by invoking the action of the justice on the motion, waived his right to a trial by jury: *Strauss v. Cooch*, 47 O. S. 115, IV Longsdorf's Notes, 360.

The refusal of a motion to set aside a levy as being on exempt property is discretionary and not reviewable, for the court below may not deem it prudent to act on *ex parte* testimony, and can leave the party to his action: *Bliss v. Enslow*, 3 O. 269, I Longsdorf's Notes, 165.

An execution on a dormant judgment will be set aside on motion, and the property

taken restored: *Lytle v. Manufacturing Co.*, 4 O. 459, I Longsdorf's Notes, 236.

Courts have inherent power to suspend execution if justice requires it, but pendency of a motion for a new trial will not *per se* effect it: *Grussell v. Poll*, 5 O. N. P. 439, 7 O. D. (N.P.) 428.

G. C., § 12275, authorizing suspension of an execution by the court to which it is made returnable until the matter can be further heard, applies only to executions issued out of a higher court and made returnable to a lower court, and does not apply to executions issued out of the same court to which they are returnable: *Cincinnati v. Railway*, 56 O. S. 675, IV Longsdorf's Notes, 700.

After a discharge in bankruptcy, a judgment creditor levied on subsequently acquired property, claiming it had been fraudulently conveyed away by the debtor before bankruptcy. It was held that a motion to set aside the levy must be granted. The issue could not be tried on the motion: *Thomas v. Shaw*, 13 Dec. Rep. 791, 2 C. S. C. R. 97.

Execution under a judgment against the receiver can not be levied on land claimed to be improperly in the receiver's hands as not necessary to operate a railroad. G. C., § 9064, dispensing with leave of court before suing a receiver, did not enlarge other rights, and his custody can not be interfered with by levy. The remedy is to apply to court to release such property in order that a levy may be made: *Croy v. Marshall*, 3 O. C. C. 489, 2 O. C. D. 280. See also RECEIVERS.

C. TRIAL OF RIGHT OF PROPERTY.

1. Scope and Purpose of Statutory Provisions.

The design of the proceeding provided for by G. C., §§ 11741, *et seq.*, is for the protection of the officer to justify him in proceeding with or abandoning his levy, and not to settle the rights of the claimant as to any one else: *Patty v. Mansfield*, 8 O. 370, I Longsdorf's Notes, 441; *Armstrong v. Harvey*, 11 O. S. 527, II Longsdorf's Notes, 527; *B'Hymer v. Sargent*, 11 O. S. 682, II Longsdorf's Notes, 541; *Ralston v. Oursler*, 12 O. S. 105, II Longsdorf's Notes, 549.

The provisions of G. C., § 11741, do not apply to seizures by constables on executions issued by justices of the peace; they are regulated by the provisions of G. C., §§ 10371-10373: *Armstrong v. Harvey*, 11 O. S. 527, II Longsdorf's Notes, 527.

The trial provided by G. C., § 11741, can only be had at the instance of the claimant, and not at the sole instance of the sheriff, and against the will of the claimant: *Jones*

v. Carr, 16 O. S. 420, II Longsdorf's Notes, 787.

A jury of five in cases under G. C., § 11741, is constitutional: *Jones v. Carr*, 16 O. S. 420, II Longsdorf's Notes, 787.

This trial is not a civil action, but a summary proceeding, and hence not properly triable by a jury: *B'Hymer v. Sargent*, 11 O. S. 682, II Longsdorf's Notes, 541.

The purpose of the legislature in enacting G. C., §§ 10371, *et seq.*, relating to the trial of this right of property levied on or attached, was to relieve the constable and advise the judgment creditor of the rights of the claimant in the property so taken, but such a proceeding is not conclusive as to the ownership of the property, and does not disturb the title, and title may be enforced by a civil action in any court of competent jurisdiction, notwithstanding the finding of the justice of the peace: *Berkowitz v. Brewing Co.*, 7 O. L. R. 244.

2. Jurisdiction of Justice of Peace.

A sale by a constable of property seized on execution, pending a trial under the statute of the right thereto before a justice of the peace, will not oust the jurisdiction acquired by the justice, but he may proceed to final hearing as if such sale had not been made: *B'Hymer v. Sargent*, 11 O. S. 682, II Longsdorf's Notes, 541.

When a trial to determine the right of property was set for the day preceding that fixed for the sale, and the justice continued the hearing until the succeeding day, the cause may still proceed, though not terminated till after the sale: *B'Hymer v. Sargent*, 11 O. S. 682, II Longsdorf's Notes, 541.

3. Effect of Finding.

A sheriff is not liable to the successful claimant for selling the chattels on the writ, when the plaintiff in execution had tendered a bond as provided in G. C., § 11743, and the claimant refused to receive it: *Ralston v. Oursler*, 12 O. S. 105, II Longsdorf's Notes, 549.

If there is a finding in favor of the claimant in the proceedings in which he participated, he can not, by refusing to accept the indemnity bond given under G. C., § 11743, interfere with the sale as by replevin: *Ralston v. Oursler*, 12 O. S. 105, II Longsdorf's Notes, 549; *Moses v. Brashears*, 12 Dec. Rep. 317, 2 H. 36.

An undertaking given to a claimant of attached property under the provisions of G. C., § 11743, takes the place of the property to the extent of the interest therein which the claimant may establish in his

suit on the undertaking, and the value of the interest in the property, with interest thereon from the date of the delivery of the undertaking to the claimant, is the measure of damages: *Adamson Co. v. Tyor*, 76 O. S. 64, IV Longsdorf's Notes, 1022.

4. Action as Bar.

Proceedings in a trial of the right of property which result in an order of restitution, and a return of the property pursuant to the order, are not a bar to an action by the claimant against the officer for the seizure and detention of the property: *Abbey v. Searls*, 4 O. S. 598, II Longsdorf's Notes, 138.

Proceedings in a trial for the right of property, resulting in an order of restitution, are not conclusive of the right of property, in an action by the claimant for the wrongful caption and detention of the property against the claimant, and the constable, who, in disregard of the order, sold the property on execution: *Armstrong v. Harvey*, 11 O. S. 527, II Longsdorf's Notes, 527.

When a third person claims goods levied by a sheriff on execution, and prosecutes his claim under the law regulating judgments and executions, and the finding is against him, the claimant can not afterward have an action of trespass against the sheriff for the same goods: *Patty v. Mansfield*, 8 O. 370, I Longsdorf's Notes, 441.

If the claimant voluntarily resorts to this remedy he can not afterwards complain that it violates his constitutional rights in depriving him of property without a jury trial: *Armstrong v. Harvey*, 11 O. S. 527, II Longsdorf's Notes, 527; *Ralston v. Oursler*, 12 O. S. 105, II Longsdorf's Notes, 549.

If the claimant voluntarily resorts to this remedy neither party can resort to replevin: *Moses v. Brashears*, 12 Dec. Rep. 317, 2 H. 36.

The result of the trial being only to protect the constable concludes the claimant if the finding is against him, from suing the sheriff or constable for levying on his goods: *Patty v. Mansfield*, 8 O. 370, I Longsdorf's Notes, 441.

An action to test the regularity of proceedings under which property is seized by an order of court and held by the sheriff is no longer regarded as an infringement of the prerogative of the court, but is favored as a ready and convenient method to test the legality of the first seizure: *Cassidy v. Church Co.*, 21 O. C. C. 197, 11 O. C. D. 461. See also CONTEMPT.

5. Promise of Indemnity.

Where chattels, which a sheriff is about to take in execution, are claimed by a

stranger to the writ, and there is doubt as to their ownership, his promise to indemnify the officer against loss from leaving them in his possession, and to pay to the officer their value if they shall be found to have been the property of the execution debtor, is not void as being against public policy: *Smith v. Robinson*, 3 O. C. C. 257, 2 O. C. D. 146.

A promise of a claimant of goods about to be taken in execution, to pay to the officer their value if they are found to be the property of the execution debtor is an original promise and not within the statute of frauds: *Smith v. Robinson*, 3 O. C. C. 257, 2 O. C. D. 146.

If the debtor claims certain property as exempt and the judgment creditor agrees to indemnify the officer against loss in case he sells such property on execution, such contract is not contrary to public policy: *Miller v. Rhoades*, 20 O. S. 494, II Longsdorf's Notes, 1013; *Mays v. Joseph*, 34 O. S. 22, III Longsdorf's Notes, 695.

VII. BOND FOR DELIVERY OF GOODS.

A verbal promise to indemnify an officer is not void as against public policy: *Mays v. Joseph*, 34 O. S. 22, III Longsdorf's Notes, 695; *Müller v. Rhoades*, 20 O. S. 494, II Longsdorf's Notes, 1013. See however, *Cumpton v. Lambert*, 18 O. S. 81, I Longsdorf's Notes, 837.

Bond for the redelivery of property taken in execution, and not sold for half the appraisement, under the Act of 1820, and not redelivered or tendered to the officer who made the levy, or his representative, within six months, is forfeited, though no new execution sued out: *Wright v. Lepper*, 2 O. 297, I Longsdorf's Notes, 127.

Actual seizure, whether omitted or not, is immaterial after a forthcoming bond is given, for this admits a levy not only as against the debtor, but also on replevin by the officer against another officer levying on the property in the debtor's hands: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

If sheriff leaves chattels levied on with the debtor on bond to redeliver, and the goods are not redelivered, the sheriff is liable to the plaintiff on amercement. The bond is for his security: *Wadsworth v. Parsons*, 6 O. 449, I Longsdorf's Notes, 351.

A finding of the court below that there was a valid levy will not be disturbed when it appears that the officer, by virtue of a process in his hands, asserts a right in respect of goods within his power, and the debtor had admitted the levy by giving bond for the forthcoming of the property: *Pugh v.*

Calloway, 10 O. S. 488, II Longsdorf's Notes, 456.

A redelivery bond, given under a statute which afterwards expired by its own limitation, is valid and enforceable thereafter, and the common law remedy of debt applies, the statutory remedy being gone: *Darling v. Peck*, 15 O. 65, I Longsdorf's Notes, 697.

VIII. RETURN.

A. NECESSITY.

Failure of the sheriff to file, in the clerk's office, his return on an *alias* order of sale within sixty days from the date of issuing, is not such an irregularity or neglect in the proceedings as will be regarded on error, after a confirmation of a sale thereunder: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

Failure of the sheriff to indorse, no goods, etc., will not render the levy invalid or ineffectual to create a lien: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

A return of an execution is made if the writ is in court, though it did not pass through the clerk's files: *Conkling v. Parker*, 10 O. S. 28, II Longsdorf's Notes, 405.

B. CONTENTS.

The imperfect description of property may be supplied by parol: *Spiller v. Nye*, 16 O. 16, I Longsdorf's Notes, 746; *Morgan v. Spangler*, 14 O. S. 102, II Longsdorf's Notes, 639; *Douglass v. McCoy*, 5 O. 522, I Longsdorf's Notes, 308.

Levy on "all of C M's interest in the real estate" describing the land, but not the debtor's interest, is not void for uncertainty for purposes of effecting a lien: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588.

A foreign execution is levied when indorsed on the writ: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997.

A levy described merely as on 100 acres, in a certain section, is defective, for the purchaser could not identify the land from it, but the defect may be supplied by parol: *Matthews v. Thompson*, 3 O. 272, I Longsdorf's Notes, 166.

If the sheriff's deed describe the land properly it may be shown by parol that the levy was, in fact, on such land, and was so known to be at the time, and the deed will then be sustained: *Matthews v. Thompson*, 3 O. 272, I Longsdorf's Notes, 166.

A levy, sale, and sheriff's deed of 1,000 acres in a tract of 1,700, located in the name of T, is void for uncertainty: *Throckmorton v. Moon*, 10 O. 42, I Longsdorf's Notes, 486.

A return of levy on the whole of a tract (as on a certain quarter section) need not

state the number of acres, nor need the appraisalment by the acre. It will be soon enough to ascertain the quantity when a sale is made: *Sterling v. Emick*, T. 277.

The want of an indorsement of "no goods" on a writ levied on real estate will not affect the validity of the levy if in fact there were "no goods." The return can be amended if necessary, or if the sheriff is not in office, will be considered as amended on proof of the fact: *Cook v. Dinsmore*, 5 O. C. C. 385, 3 O. C. D. 189.

The common pleas may order execution on lands on a justice's transcript though the constable had returned execution *nulla bona* in a few days without holding it thirty days. The court need not make a rule for a plea to the *scire facias* (to show cause why execution should not issue), and may award the execution at the return term of the *scire facias*. The remedy might be valueless if delay is allowed: *Hill v. Kling*, 4 O. 135, I Longsdorf's Notes, 211.

A levy returned as made on land for want of goods and chattels can not be invalidated by the debtor's showing that he had ample personalty: *Morgan v. Kinney*, 38 O. S. 610, III Longsdorf's Notes, 997.

It is too late after several orders for sale, which is finally made, to object for the first time that the execution had not been indorsed *nulla bona* before levy on the land: *Fowble v. Rayberg*, 4 O. 45, I Longsdorf's Notes, 202.

The sheriff's failure to indorse on a levy on land that there were no goods or chattels whereon to levy is not available to subsequent buyers or to creditors. Statutory requirements as to the order to be observed by an officer in levying are directory in their nature and for the debtor's benefit, and he may waive them and will be presumed to have done so unless he objects by a direct proceeding to set aside the levy: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660 [affirming *Bank v. Coal Co.*, 11 O. C. C. 412, 5 O. C. D. 421].

Oral proof may be made of acts of the officer not required by law to be stated in his return: *Darling v. Peck*, 15 O. 65, I Longsdorf's Notes, 697.

Matters in a return not required to be there are not evidence in favor of the sheriff: *Langdon v. Summers*, 10 O. S. 77, II Longsdorf's Notes, 412.

Unnecessary recitals in the return do not bind the party. Thus, where the officer returned that he had levied subject to a former attachment, the creditor may show that by the officer's omission to take into custody on the earlier attachment no such attachment had been in fact made: *Root v. Railroad*, 45 O. S. 222, IV Longsdorf's Notes, 270.

A transcript from a justice will not authorize a *scire facias* from the common pleas to subject lands, unless it show that execution had been returned *nulla bona*, and a suggestion that the debtor owned lands: *Edmiston v. Edmiston*, 2 O. 251, I Longsdorf's Notes, 123.

(But that the title would be good against collateral attack would seem to follow from *Moore v. Robison*, 6 O. S. 302, II Longsdorf's Notes, 242.)

An inventory is not part of the levy, hence, though generally desirable, its omission does not invalidate: *Pugh v. Calloway*, 10 O. S. 488, II Longsdorf's Notes, 456.

The holding of the supreme court in *Green v. Coit*, 81 O. S. 280, as to the necessity for an accurate description in the sheriff's return of the property attached, is not applicable where the property levied on is personalty, and the description of the property attached as "forty car loads of staves" is sufficient: *Daniels v. Taylor*, 13 O. C. C. (N.S.) 116, 21 O. C. D. 611.

C. AMENDMENTS.

A return can not be amended as to description of property levied on so as to prejudice intervening liens: *Insurance Co. v. Insurance Co.*, 13 O. 220, I Longsdorf's Notes, 636.

Where three days before the return day, the debtor gave a check on a bank in another county to the sheriff, who accordingly returned "money made in full," and shortly afterwards another creditor levied on the same land and the check was not paid, the sheriff will be allowed to amend, and the second levy will be inferior to the other, being a mere lien to secure a past debt, without change in the creditor's position: *In re Worstall*, 6 O. N. P. 525, 8 O. D. (N.P.) 264.

The return of a sheriff, as to the description of property levied upon, can not be amended so as to prejudice other liens intervening between the time of levy and the date of the amendment; and if an amendment be made, the lien will only operate, as to third persons, from the date of amendment: *Insurance Co. v. Insurance Co.*, 13 O. 220, I Longsdorf's Notes, 636.

An amendment of the return may be had on motion of a deceased sheriff's representatives in order that such return may state that the property remained unsold for want of bidders: *Fowble v. Rayberg*, 4 O. 45, I Longsdorf's Notes, 202.

An amendment of the return stating an additional reason for not executing it, relates back to the original return: *Bereman v. Bank*, 1 Dec. Rep. 218, 4 W. L. J. 500.

A return being property sold and money made in full, on motion to amerce for not paying it over, the sheriff may amend on leave by showing that by order of parties the sale was on credit, except a sum which he was enjoined from paying over: *Langdon v. Summers*, 10 O. S. 77, II Longsdorf's Notes, 412.

A surety claiming in defense a subsisting levy against the principal, the return showing levy on 200 cords of wood and not sold for want of time, the sheriff can not contradict this by showing sale of 20 cords, and that the other 180 had not been levied on, though if so, amendment of the return might be allowed: *Wells v. Benefield*, W. 201, I Longsdorf's Notes, 17.

D. CORRECTION.

A defect in the description in a levy may be supplied by parol: *Matthews v. Thompson*, 3 O. 272, I Longsdorf's Notes, 186; *Douglass v. McCoy*, 5 O. 522, I Longsdorf's Notes, 308.

The date of a return, indorsed by a sheriff on a writ of execution issued to him, is not conclusive evidence of the time when such writ was returned by him to the court, and such writ may be returned to the court when in session, without passing, in fact, through the hands of the clerk, or being filed in his office: *Conkling v. Parker*, 10 O. S. 28, II Longsdorf's Notes, 405.

A sheriff having two executions, levied them on the same land and sold it and returned the sale on each execution, thus showing he had made double the amount he actually made. It was held that the returns were not conclusive, and the debtor could not claim both sums. A later order of the court making one of the sums a debt of record was conclusive that but one execution was satisfied: *Hammer v. Nevill*, W. 169, I Longsdorf's Notes, 16.

E. EXTENSION OF TIME.

Orders of sale should be returned in sixty days, and it is error for the court, under authority of which they are issued, without any return thereof, to order the same to be extended; and a sale made on such extended writ after the expiration of the sixty days should be set aside: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

If such sale is confirmed, a reviewing court may set aside such sale and confirmation: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

The time of sale may be extended beyond the original sixty days called for in the writ: *Newcombe v. Harland*, 23 Bull. 110.

F. EFFECT.

As between the officer and the parties, or their privies, the return is conclusive, except where the officer is charged with its falsity, else purchasers at sheriff's sales would have no protection: *Hill v. Kling*, 4 O. 135, I Longsdorf's Notes, 211.

The return is conclusive that execution resulted *nulla bona*, so as to authorize a resort to sureties on an injunction bond: *Seymour v. King*, 11 O. 342, I Longsdorf's Notes, 564.

A sheriff's return of no goods as to a principal debtor is conclusive to sustain the levy thereupon made on the surety under G. C., § 11713: *Mueller v. Bates*, 3 Dec. Rep. 174, 4 Gaz. 145, 13 Dec. Rep. 195, 2 D. 318.

The return, though not conclusive as to third persons not connected with the writ, can not be contradicted for the purpose of invalidating the proceedings or defeating any right dependent thereon either by the parties or privies or others connected as bail or indorsers: *Langdon v. Summers*, 10 O. S. 77, II Longsdorf's Notes, 412.

An officer's (constable) return, though conclusive between the parties to the suit and their privies, as to the facts proper to be stated in it, is only *prima facie* evidence against others, and they may dispute it. But only those are privies who could sue the officer for false return. A prior vendee of the attachment debtor is not a privy, and can disprove the return on an attachment against the debtor levied on such property: *Phillips v. Elwell*, 14 O. S. 240, II Longsdorf's Notes, 650.

The return is conclusive only as to such facts as it is in the officer's duty to state, and that is only a pertinent history of what he did in carrying out the writ. Outside matters in the return are not evidence. It is not his duty to determine the existence of liens: *Root v. Railroad*, 45 O. S. 222, IV Longsdorf's Notes, 270.

The date of a return on an execution is not conclusive that it was returned then for the indorsement naturally precedes its return to court: *Conkling v. Parker*, 10 O. S. 28, II Longsdorf's Notes, 405.

IX. APPRAISEMENT.

A. SCOPE AND EFFECT.

The policy of requiring lands sold under execution for debt to be valued, pervades the legislation of this state and has prevailed for many years: *Wiles v. Baylor*, 1 O. 509, I Longsdorf's Notes, 98.

G. C., § 11672, applies to all cases of levies upon land, whether in the county where judgment is rendered or another county: *Bank v. Coal Co.*, 11 O. C. C. 412, 5 O. C. D. 421.

The provisions of the Ohio statutes authorizing the foreclosure of a mortgage and the sale of real estate under execution, do not forbid foreclosure by sale under a power of sale without appraisal: *Coal & Iron Co. v. Steel Co.*, 127 Fed. 32, 61 C. C. A. 396, 14 O. F. D. 325.

There must be an appraisal of the real value of the entire property in money without deduction for incumbrances; and accordingly in Ohio an outstanding claimant of title to mortgaged real estate is a proper party defendant in a proceeding to foreclose the mortgage: *Mortgage & Trust Co. v. Anderson*, 11 O. C. C. (N.S.) 246, 20 O. C. D. 553.

The appraisal is conclusive between the parties unless fraud or collusion is charged: *Levi v. Groves*, 7 Dec. Rep. 508, 3 Bull. 569.

The court having once fixed a price at which property can be sold on execution, under G. C., § 11710, has exhausted its power and can not again direct the amount: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

B. WHO MAY ACT AS APPRAISERS.

A distant relative of one of corporation's creditors whose claim represents only a small portion of its aggregate indebtedness is not disqualified to act as appraiser: *Iron Co. v. Brown*, 44 Fed. 539, 6 O. F. D. 633.

That the appraisers were not eligible, being nonresidents, does not affect the jurisdiction so as to render the sale collaterally impeachable: *Mauarr v. Parrish*, 26 O. S. 636, III Longsdorf's Notes, 335.

C. ACTUAL VIEW.

An appraisal must be on actual view no matter how familiar the appraisers may be, of the land, or the sale will be set aside: *Creditors v. Search*, 2 Dec. Rep. 495, 3 W. L. M. 319.

Appraisers must inspect the interior of the buildings they appraise: *In re Assignment of Slane*, 42 Bull. 89.

An appraisal without going through the house will be set aside if those who have gone through it establish a higher value in consequence: *Mills v. Association*, 6 Dec. Rep. 827, 8 Am. L. Rec. 358, 4 Bull. 935.

It is too late to take advantage of the omission in the commissioner's report to state that it was made upon actual view, after the report has been confirmed: *Tabler v. Wiseman*, 1 Dec. Rep. 497, 10 W. L. J. 207.

D. MISTAKE AND IRREGULARITY.

Parol evidence of mistake in return of the appraisal and deed is admissible in a suit to correct it: *Gill v. Pelkey*, 54 O. S. 348, IV Longsdorf's Notes, 639.

A failure to administer an oath to the appraisers, or verify return, are mere irregularities cured by confirmation: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748.

Mistakes in judicial sales, including land not in fact sold, may be corrected in equity: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809.

The court can set aside but can not modify the sale or its terms: *Insurance Co. v. Goodin*, 10 O. S. 557, II Longsdorf's Notes, 464.

E. MORTGAGED PROPERTY.

In selling mortgagor's interest in the mortgaged premises, upon execution, the valuation must be of the entire estate: *Baird v. Kirtland*, 8 O. 21, I Longsdorf's Notes, 408.

Where a tract is subject to mortgages on specific parts, each part should be appraised separately: *Rhoades v. Raymer*, 6 O. C. C. 68, 3 O. C. D. 353.

In an action to foreclose a mortgage and marshal liens, a court is not authorized to order an appraisal of the property "subject to certain undetermined indebtedness," and an appraisal in accordance with such order is irregular: *Thatcher v. Dickinson*, 3 O. C. C. 144, 2 O. C. D. 82.

F. DESCRIPTION.

A levy upon land must contain a definite description, otherwise it is void: *Throckmorton v. Moon*, 10 O. 42, I Longsdorf's Notes, 486.

Where the appraisers described an improved lot as containing thirty feet and valued it at \$260 per foot, which description is carried into the advertisement and return, and it subsequently appears that the lot is only twenty-seven feet, the court can not modify the terms of the sale and deduct from the aggregate purchase money the price paid per foot front for the deficiency: *Insurance Co. v. Goodin*, 10 O. S. 557, II Longsdorf's Notes, 464.

G. OBJECTION TO APPRAISEMENT.

Where an appraisal is susceptible of two interpretations, if the variance is material, the court may set it aside: *Insurance Co. v. Goodin*, 10 O. S. 557, II Longsdorf's Notes, 464.

An objection to an appraisal as too low will ordinarily be too late after sales under two orders of sale have been had on it: *Campbell v. Corry*, 8 Dec. Rep. 88, 5 Bull. 516.

An appraisal will not be set aside on opinion of witnesses that the property would bring more if parceled into lots: *Hartshorne v. Reeder*, 3 Dec. Rep. 109, 3 Gaz. 245.

An appraisal on actual inspection should be set aside for mistaken judgment only on clear and convincing evidence: *Loan Co. v. Ryan*, 6 O. N. P. 536, 9 O. D. (N.P.) 518.

The legality of appraisal can not be inquired into after the sale and confirmation: *Thompson v. Leinard*, W. 458, I Longsdorf's Notes, 37.

H. SALE WITHOUT APPRAISEMENT.

In directing a sale of real estate, especially where the title is to pass, a court is not at liberty to order a sale without appraisal: *Wiles v. Baylor*, 1 O. 509, I Longsdorf's Notes, 98.

A sale made to one not a party to the action without appraisal vests in him a good title: *Allen v. Parish*, 3 O. 187, I Longsdorf's Notes, 156; overruling *Patrick v. Oosterout*, 1 O. 27, I Longsdorf's Notes, 65.

The provisions of the Ohio statutes authorizing the foreclosure of a mortgage or sale of real estate under execution, do not forbid foreclosure by sale under a power, without appraisal: *Coal & Iron Co. v. Iron & Steel Co.*, 127 Fed. 32, 61 C. C. A. 396, 14 O. F. D. 325.

I. SALE UNDER SEVERAL LEVIES.

If a sheriff has several levies on the same land, he need only appraise and sell under one, and appropriate the surplus to others; independent appraisers might perplex the title: *Douglass v. McCoy*, 5 O. 522, I Longsdorf's Notes, 308.

Where there are two executions and levies of the same date, and an appraisal on each and a second appraisal on one, no valid sale can be made on the other upon such second appraisal: *Daniels v. McBain*, 2 O. S. 406, I Longsdorf's Notes, 1067.

Where an order of sale, founded on a void levy, contains a clause for an additional levy under this section, it is valid as a *feri facias* execution only which may be levied on the property in the original void levy, as well as upon other property: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

J. RETURN.

The return of the sheriff is *prima facie* evidence of the amount and nature of the appraisal. On petition in error to reverse an order of confirmation it can not be assigned for error that the findings of the court were contrary to the evidence: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

A return need not embody or copy the appraisal: *Daniels v. McBain*, 2 O. S. 406, I Longsdorf's Notes, 1067.

The return of a sheriff, as to the description of property levied upon, can not be amended so as to prejudice other liens intervening between the time of levy and the date of the amendment: *Insurance Co. v. Insurance Co.*, 13 O. 220, I Longsdorf's Notes, 636.

The failure of the sheriff to file in the clerk's office his return, on an *alias* order of sale, within sixty days from the date of issuing, is not such an irregularity or neglect in the proceedings as will be regarded on error after a confirmation of a sale thereunder: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

K. OMISSION OF APPRAISEMENT.

A failure to appraise an undivided interest in land levied upon is not an abandonment of levy: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588.

A sale of lands in chancery requires an appraisal: *Wiles v. Baylor*, 1 O. 509, I Longsdorf's Notes, 98.

Where lands sold upon execution are not valued, and the objection was not made at the return of the execution, the purchaser, if a stranger, is not affected: *Allen v. Parish*, 3 O. 187, I Longsdorf's Notes, 156; *Patrick v. Oosterout*, 1 O. 27, I Longsdorf's Notes, 65.

L. OTHER QUESTIONS.

If under a new appraisal, the premises remain unsold for want of bidders after having been twice offered for sale, the court may on motion of either party, order another appraisal, and may, for the same cause, and in the same manner, order additional appraisals: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

There is no fee provided by statute for the officer swearing the appraisers: *Building & Loan Co. v. Hoskins*, 6 O. N. P. 274, 8 O. D. (N.P.) 437.

M. FILING COPY WITH CLERK.

A copy of the appraisal must be deposited with clerk before advertisement or

the sale will be set aside on motion: *Creditors v. Search*, 2 Dec. Rep. 495, 3 W. L. M. 319; *Merritt v. Borden*, 13 Dec. Rep. 308, 2 D. 503.

Failure to deposit copy of appraisement would not impair purchaser's title after confirmation: *Merritt v. Borden*, 13 Dec. Rep. 308, 2 D. 503; *Creditors v. Search*, 2 Dec. Rep. 495, 3 W. L. M. 319.

A copy of an appraisement deposited with the clerk can not be considered by the reviewing court, unless embodied in a bill of exceptions: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

The sheriff's return of a lump sum is *prima facie* evidence of the amount and nature of the appraisement: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

The original appraisement need not be a part of the sheriff's return, but he may recite its substance or refer to the copy on file: *Daniels v. McBain*, 2 O. S. 406, I Longsdorf's Notes, 1067.

N. FEES OF APPRAISERS.

On execution sale of real estate the appraisers' fees, on motion to retax costs, must be reduced to fifty cents each per day. Swearing the appraisers can not be charged for by the officer, for G. C., § 11672, gives none: *Loan Co. v. Hoskins*, 6 O. N. P. 274, 8 O. D. (N.P.) 437.

O. RE-APPRAISEMENT.

The court is not limited to once ordering reappraisement, but may order it any number of times and may order a sale on time under G. C., § 11711, which in this respect is unlike G. C., § 11710: *Brown v. Insurance Co.*, 6 O. C. C. 62, 3 O. C. D. 350.

Injunction will not lie to restrain the execution of a judgment of the justice of the peace if he has jurisdiction of such matter and party, no matter what errors may have been committed in the trial: *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513].

X. SATISFACTION WITHOUT SALE.

After the issuing of execution, any person indebted to the judgment debtor may pay to the constable the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the constable's receipt will be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution: *Hallanan v. Crow*, 15 O. S. 176, II Longsdorf's Notes, 717.

XI. NOTICE OF SALE.

A. PERSONALTY.

Where a statute of the state requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language is not a compliance with the statute: *Cincinnati v. Bickett*, 26 O. S. 49, III Longsdorf's Notes, 284.

B. REALTY.

1. In What Newspaper.

The sheriff has the right to select any paper he pleases so long as it possesses the statutory requirements as to being one printed and of general circulation in the county: *Augustus v. Lynd*, 7 O. N. P. (N.S.) 473, 19 O. D. (N.P.) 143.

The refusal of the sheriff to comply with request by the judgment creditor that the notice of sale be inserted in a particular newspaper is not a ground for the appointment of a special master commissioner to make the sale: *Augustus v. Lynd*, 7 O. N. P. (N.S.) 473, 19 O. D. (N.P.) 143.

Mandamus to compel sheriff to advertise in a paper of general circulation is a mere injunction not to advertise in any other paper and not within the original jurisdiction of the circuit court. The court from which the order of sale issues is the one to control publication: *State, ex rel., v. Tual*, 16 O. C. C. 680, 9 O. C. D. 42.

The language of the statute is specific as to publication and printing within the county: *Miller v. Commissioners*, 9 Dec. Rep. 312, 12 Bull. 152.

Where a statute of the state requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended; and a publication in a paper printed in any other language is not a compliance with the statute: *Cincinnati v. Bickett*, 26 O. S. 49, III Longsdorf's Notes, 284.

2. Effect of Publication.

When a newspaper is printed in the county it is sufficient for the sheriff to advertise sales upon execution in it; and it is not required that he should put up notices on the door of the court house, and at other places: *Fitch v. Dunlap*, 2 O. 78, I Longsdorf's Notes, 110.

3. Time of Commencement of Notice.

In computing the time for which notice of the sale should be advertised, the day on which the notice was first published may be included and the day of sale must be excluded; and when the notice is published in a daily newspaper, it is sufficient if the first publication be thirty days before the day of sale: *Hagerman v. Savings Association*, 25 O. S. 186, III Longsdorf's Notes, 217; *Voorhees v. Minor*, 19 O. C. C. 560, 10 O. C. D. 681.

When notice of the time and place of sale by a sheriff is advertised for thirty days before the day of sale, in a weekly newspaper, it is no objection that the first number containing the notice was printed and published in advance of the day of the week on which the publication was usually made: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

4. Same Day of Week.

Where an advertisement of a judicial sale is published in a semi-weekly newspaper, it is not necessary that each insertion should be on the same day of the week: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

Where it is published in a daily newspaper, and each insertion is not on the same day of the week, this is not a mere irregularity in the proceedings, but is such a defect as that a motion to set aside the sale made thereunder, on that ground, made before confirmation, should be sustained: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

Publication of the preliminary and other ordinances, with respect to a street improvement, in a newspaper of general circulation, in accordance with the terms of the statute, is a valid and legal publication, although such newspaper is published only on Sunday: *Hastings v. Columbus*, 42 O. S. 585, IV Longsdorf's Notes, 132.

5. Mistake in Advertisement.

Mistake in the names of the parties in the advertisement of a foreclosure sale is not ground to set the sale aside; the advertisement is merely to give notice of the sale: *Schneider v. Ferrin*, 41 Bull. 54.

A mistake in the title and number of the case in an advertisement of property to be sold at judicial sale is only an irregularity and will not affect the validity of the sale: *Briekell v. Miles*, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463.

Not stating the time or place of sale in the advertisement was held to make it wholly insufficient: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

6. Effect of Noncompliance With Statute.

Title under a judicial sale is not affected by omission to advertise the sale for the time or in the manner directed by the statute. The statute is directory: *Allen v. Parish*, 3 O. 187, I Longsdorf's Notes, 156; *Stall v. Macalester*, 9 O. 19, I Longsdorf's Notes, 458; *Cadwallader v. Evans*, 12 Dec. Rep. 811, 1 D. 585.

If the court is satisfied that the notice was published in a paper not of general circulation in the county, it may refuse to confirm the sale: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

XII. SALE ON EXECUTION.

A. IN GENERAL.

The law in force at the time of the sale controls the manner of the sale: *Allen v. Parish*, 3 O. 187, I Longsdorf's Notes, 156.

The creditor has a right to have a public sale although nothing can be realized above exemptions: *Jones v. Kaiser*, 12 O. D. (N.P.) 437.

The sheriff is liable for money received: *Brost v. Skillen*, 16 O. S. 382, II Longsdorf's Notes, 783.

A sale under void levy will not operate against later actual levies: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

While oil leases are personal property and subject to levy and sale on execution as ordinary personal property, yet such leases may also be subject to sale under an order of court upon a decree rendered in an action for foreclosure of a mortgage or other lien thereon: *Murphy v. Hardee*, 22 O. C. C. 511, 12 O. C. D. 837.

Parol evidence is admissible to correct a mistake in a judicial sale: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809.

If by an order of the court some one else than the sheriff makes the sale, his compensation is to be determined by a rule similar to that applicable to sheriffs: *Holmes v. Book*, 1 O. N. P. 58, 1 O. D. (N.P.) 665.

A constable can lawfully receive and cry at his official sales only such bids as are offered and received at the time and place of sale: *Sparling v. Todd*, 27 O. S. 521, III Longsdorf's Notes, 372.

The property of a business corporation being levied on, a later judgment creditor also levying obtained the appointment of a receiver, on a showing that a sale piecemeal would sacrifice the property, and if contracts partially carried out were not completed large profits would be lost: *Iron Co. v. Foundry Co.*, 7 O. N. P. 237, 1 O. D. (N.P.) 117. See also RECEIVERS.

B. TIME.

Sales should follow immediately after appraisement. An unreasonable lapse of time coupled with a low appraisement, is ground for setting the sale aside: *Building Association v. Scott*, 1 Hosea, 531.

C. TERMS.

Fixing terms of credit is not authorized in advance of any effort to sell for cash: *Building Association v. Scott*, 1 Hosea, 531.

If the sale by the sheriff was on terms or in a manner different from due execution, by direction or agreement of parties, amercement is not applicable. It is enough for sureties to be liable when execution is not interfered with by the parties: *Webb v. Anspach*, 3 O. S. 522, II Longsdorf's Notes, 62; *Langdon v. Summers*, 10 O. S. 77, II Longsdorf's Notes, 412.

D. BID.

The constable can not take a bid given to him at a different time and place from sale, and if he sells and the buyer receives on such bid, he and the buyer are liable as trespassers for the value of the goods: *Sparling v. Todd*, 27 O. S. 521, III Longsdorf's Notes, 372.

It is the sheriff's duty to sell to the highest bidder: *Thompson v. McManama*, 13 Dec. Rep. 131, 2 D. 213.

Where there is a substituted bid the sheriff's bond is liable for the disbursement of the purchase money: *Sidner v. Alexander*, 31 O. S. 378, III Longsdorf's Notes, 591.

A deposit may be restored on resale: *Feike v. Railway*, 3 O. C. C. 72, 2 O. C. D. 41.

The assignment of bid by bidder is by consent allowed: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

An understanding that the bidder may forfeit his deposit and let the return be made of a sale on the next bid can not be sanctioned: *Thompson v. McManama*, 13 Dec. Rep. 131, 2 D. 213.

Constable is liable to plaintiff in execution for the amount due thereon, in all cases where he suffers thirty days to elapse without making a true return, and also in all cases where he does not, within that time, pay over money collected; and it is not necessary, in order to make him so liable, that both duties be neglected: *Evans v. House*, 26 O. S. 488, III Longsdorf's Notes, 321.

E. PRIVATE SALE.

A sheriff who held wheat under levies, with the consent and at the request of the execution creditors, but without an order

from the court or a judge thereof, to sell at private sale, sold and delivered it. This is not an abandonment of the levies: *Houk v. Condon*, 40 O. S. 569, IV Longsdorf's Notes, 42.

Unless the irregularity goes so far as to show a purpose to abandon the levy, or a degree of neglect to enforce it, inconsistent with the purpose to rely upon it, it is not abandoned: *Houk v. Condon*, 40 O. S. 569, IV Longsdorf's Notes, 42.

XIII. LIABILITY FOR PURCHASE-MONEY.

The judgment creditor to whom the master who made the sale has assigned his interest in the contract of sale, can sue the buyer for the purchase money: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748.

If no assignment has been made, only the officer and not one of the creditors or distributees, can sue the buyer for the purchase money or for loss on a resale: *Galpin v. Lamb*, 29 O. S. 529, III Longsdorf's Notes, 494.

The owner of land incumbered by a judgment lien may recover from the judgment creditor an excess over the balance due on the judgment received by the latter on a sale under a *vendi*; notwithstanding the judgment creditor was the purchaser and the owner was not a party to the judgment: *Sparrow v. Hosack*, 40 O. S. 253, IV Longsdorf's Notes, 22.

In judicial sales of real estate the official making the sale as the representative of the creditors interested therein, has an option upon unreasonable delay of the purchaser, to return "no sale" and prevent confirmation, and proceed to resale and require the first purchaser to pay the damages resulting therefrom; or to return the sale as made and proceed by civil action for the purchase money or by attachment for contempt; but the purchaser has no choice save to pay the money in pursuance of his bid: *Murphy v. Hardee*, 22 O. C. C. 511, 12 O. C. D. 837.

Where the buyer at a guardian's sale of land, which is confirmed by court, fails to pay, and the court authorizes the guardian to readvertise and sell at buyer's risk without a new order of sale, and the resale is at a loss, the first buyer is liable to an action for the deficit, and so though both sales were for only one-third cash, and this right of action passes on the ward's death to his administrator without special assignment thereof by the guardian: *Clawson v. Beatty*, 36 Bull. 214.

Where the buyer at receiver's sale refuses to take the property or pay for it, and a resale is had at a loss, and the receiver is

discharged without having ever collected the loss from first buyer, the creditor or original owner who is beneficial owner of such claim, may sue such buyer for his share as *cestui*. The court will not require another receiver to be appointed merely to bring suit: *Lorenz v. Reynolds*, 7 O. N. P. 17, 9 O. D. (N.P.) 540.

Where after dissolution one partner buys all the assets at the receiver's sale, but refuses to take, and the assets are resold, at a loss at his charge, but he has not paid, and the firm is settled and the receiver discharged, the other partner can sue him for his share of the loss. The principle that a delinquent purchaser at a judicial sale can be sued only by the selling officer does not apply: *Lorenz v. Reynolds*, 7 O. N. P. 17, 9 O. D. (N.P.) 540.

An action for contempt against a buyer who refuses to perform does not merge a cause of action against him for specific performance: *Pierce v. Stewart*, 61 O. S. 422, IV Longsdorf's Notes, 812.

A purchaser named Mary Hynod can not be compelled to pay for a sale returned and confirmed to May and Inott: *Starbuck v. Hynod*, 7 Dec. Rep. 132, 1 Bull. 140.

Overruling the purchaser's motion to set aside a confirmation made without notice to him is *res adjudicata* as to the objections relied on when he is sued for the purchase money: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748 [affirming *Wick v. Mayer*, 2 Dec. Rep. 579, 4 W. L. M. 102].

When the court refused to confirm a sale for the reason that the purchase money had not been paid, and without condition ordered the sheriff to sell as theretofore ordered, it was held that no notice having been given to the purchaser at the first sale, that the resale would be at his risk, he was authorized to regard the sale to him as abandoned: *Galpin v. Lamb*, 29 O. S. 529, III Longsdorf's Notes, 494.

The court ordering a resale at the risk of the purchaser, who had not completed his payments, can not withhold the money paid and have it applied to make up the loss on resale. But the purchaser, though a party to the case, can not sustain error proceedings thereto because he is not a party in the character of purchaser: *Corcoran v. Building Association*, 8 Dec. Rep. 111, 5 Bull. 712.

A long delay between sales and confirmation, causing depreciation and dilapidation of property, where the buyer took no step to hasten the confirmation, is no defense to paying the purchase money: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748.

If the sheriff has become personally liable for the purchase money by allowing the sale to be confirmed, and he has tendered a deed

to the purchaser, and assigned his claim against the purchaser to the plaintiff, the latter may maintain an action against the purchaser for the purchase money: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748.

XIV. CONFIRMATION.

A. NECESSITY.

Confirmation of sale was not required by U. S. bankruptcy act of 1841: *Herbst v. Bates*, 9 Dec. Rep. 444, 13 Bull. 565.

B. DISCRETIONARY POWER OF COURT.

Confirmation may be refused and the sale on execution vacated in the court's discretion, though the proceedings are regular: *Bear v. Bookmiller*, 3 O. C. C. 484, 2 O. C. D. 277; see *Niles v. Parks*, 49 O. S. 370, IV Longsdorf's Notes, 459; *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

Where the return is "sold to W, but that he refuses to pay," the court may treat as a sale and confirm or set aside: *Marshall v. Flinn*, 13 Dec. Rep. 632, 1 C. S. C. R. 415.

C. GROUNDS FOR REFUSAL TO CONFIRM.

1. Defect in Advertisement.

The court may in its discretion refuse confirmation for insufficient advertisement, though the statute has been complied with, as where it only requires one insertion thirty days before sale, or where the paper does not circulate generally: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

A mistake in the names of the parties in the advertisement of a foreclosure sale is not ground to set the sale aside: *Schneider v. Ferrin*, 41 Bull. 54.

A mistake in the title and the number of a case in advertisement will not affect the validity of the sale of real property in a mortgage foreclosure: *Brickell v. Miles*, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463.

The law relating to advertisements of execution sales contemplates such a description as will apprise the public fully of the nature and situation of the property, a description not only of the land but also the tenements thereon, if any, and of the exact situation of the property (if in the city) as related to contiguous streets: *Building Association v. Scott*, 1 Hosea, 531.

If the notice is published in a newspaper not of general circulation in the county, the court can refuse to confirm the sale: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

2. Prevention of Competition in Bidding.

Where land is bid in by one who acted as appraiser, and prevented other bids, the sale may be set aside: *Hurst v. Fisher*, 64 O. S. 530, IV Longsdorf's Notes, 877.

Such sale is not absolutely void; and the deed passes title after confirmation, which is good as against collateral attack: *Terrill v. Achauer*, 14 O. S. 80, II Longsdorf's Notes, 637.

Where there is misapprehension of the terms of sale, preventing competition in bidding, the sale, if to one of the parties, may be set aside: *Hey v. Schooley*, 7 O. (pt. 2) 48, I Longsdorf's Notes, 385.

A combination to avoid competition in bidding will defeat the sale on motion, if the purchaser is a member of the combination: *Seymour v. Turnpike Co.*, 10 O. 476, I Longsdorf's Notes, 531.

Where a buyer at assignee's sale gets property at a lower price by paying a person to abstain from bidding, it is a fraud on creditors and the deed will be set aside at suit of creditors if the assignee refuses: *Saxton v. Seiberling*, 48 O. S. 554, IV Longsdorf's Notes, 429.

3. Sale for Less Than Minimum Price.

Where there is a bid of a fraction of a cent less than two-thirds of appraisement, court is not bound to confirm sale, it being shown that a higher price can be had: (Editorial) 40 Bull. 103.

Where corporation property is bid in at foreclosure sale by a director at much less than its value, and a bondholder offers security that he will bid twenty per cent more if a new sale is ordered, it will be ordered on condition this proposition is put into shape within a week: *Secor v. Rolling Mill Co.*, 1 O. N. P. 100, 1 O. D. (N.P.) 80.

If the appraisement is by the acre, it is best to sell on the same basis. But if the sale is for a gross sum on an estimated acreage, any person interested should be allowed to resist confirmation on showing that the acreage was greater and the price less than two-thirds: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

4. Redemption by Debtors.

Payment by a debtor defeats confirmation: *Reed v. Radigan*, 42 O. S. 292, IV Longsdorf's Notes, 111.

5. Mistake in Description.

Erroneous statements as to location, desirability and value are not sufficient ground to set sale aside. It is the purchaser's duty

to read the advertisement, and not rely on such statements. The purchaser owning the adjoining lots can not resist confirmation on this ground: *Smith v. Ryan*, 1 Dayton Term Rep. (Iddings) 22.

Misdescription of land, not affecting price, is not ground for resisting confirmation: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

D. MOTION TO CONFIRM AND HEARING.

On motion to confirm the court will not inquire as to the evidence on which the judgment was rendered: *Fritsch v. Van Mitten-dorff*, 13 Dec. Rep. 891, 2 C. S. C. R. 261.

On motion to confirm, irregularities in obtaining judgment or awarding execution can not be inquired into: *Buckingham v. Society*, 2 O. 360, I Longsdorf's Notes, 134.

The court can not review the validity of a judgment, e. g., as to whether mechanic's lien therein foreclosed had been filed in time or not: *Fritsch v. Van Mitten-dorff*, 13 Dec. Rep. 891, 2 C. S. C. R. 261.

An unauthorized motion by a purchaser in proceedings to confirm should be stricken from the docket, at his cost: *Building Association v. Scott*, 1 Hosea, 531.

The court can set aside an order of sale and confirmation on a motion filed at such term and continued to subsequent term: *Niles v. Parks*, 49 O. S. 370, IV Longsdorf's Notes, 459.

E. EFFECT OF CONFIRMATION.

Fraud in bidding can not be set up by the purchaser after confirmation: *Beattie v. Boyle*, 13 Dec. Rep. 854, 2 C. S. C. R. 201.

After confirmation a buyer can not set up fraud practiced by co-lienholders: *White v. Raymond*, 4 Dec. Rep. 79, 1 Clev. L. Rep. 6.

Where real estate which has been sold at a judicial sale was, by mistake of the officer, appraised and advertised as dry land, while in fact a part thereof is covered with water, the purchaser, who also believed the property to be dry, but was not misled by the act or misrepresentation of the officer, is bound by the sale: *Loan Association v. O'Conner*, 29 O. S. 651, III Longsdorf's Notes, 508.

Where an order confirming a sale, made under a decree of foreclosure to a mortgagee who is a party, is at the same time vacated and the sale set aside for want of notice, the insurable interest of the mortgagor in possession is the same as if such sale and confirmation had not been made: *Insurance Co. v. Sampson*, 38 O. S. 672, III Longsdorf's Notes, 1001.

Return not being verified or appraisers not sworn, are irregularities cured by confirm-

ation: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748 [affirming *Wick v. Mayer*, 2 Dec. Rep. 579, 4 W. L. M. 102].

F. REVIEW.

An appeal does not lie from an order confirming or refusing to confirm a sale: *Reeves v. Skennett*, 13 O. S. 574, II Longsdorf's Notes, 630; *Aultman v. Seiberling*, 31 O. S. 201, III Longsdorf's Notes, 574.

From a judgment of a probate court or court of insolvency, confirming a sale of real estate made by an assignee or trustee at private sale, under the insolvency laws, an appeal lies to the court of common pleas: *Browne v. Wallace*, 60 O. S. 177, IV Longsdorf's Notes, 781.

In an action for specific performance against a purchaser, an appeal lies from the judgment of the court of common pleas to the circuit court: *Pierce v. Stewart*, 61 O. S. 422, IV Longsdorf's Notes, 812.

A sale made before an appeal bond filed, will not be confirmed after the appeal is perfected: *Bassett v. Daniels*, 10 O. S. 617, II Longsdorf's Notes, 471.

A petition in error is the only mode of review: *Aultman v. Seiberling*, 31 O. S. 201, III Longsdorf's Notes, 574.

No appeal lies in partition: *Robison v. Boniff*, 6 Dec. Rep. 1107, 10 Am. L. Rec. 485.

The action of the court in setting aside on motion a sale made under its order will not be reviewed on the weight of the evidence: *Niles v. Parks*, 49 O. S. 370, IV Longsdorf's Notes, 459; *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

Confirmation of a sale is not reviewable unless there is a manifest abuse of discretion: *Brigel v. Maxwell*, 5 O. N. P. 412, 8 O. D. (N.P.) 512.

A decision of the court overruling a motion to set aside a sale is not a final order that may be reviewed on error, where no objection is made to confirmation. Such error may be reviewed in proceedings to reverse the order of confirmation: *McArthur v. Trust Co.*, 21 O. C. C. 654, 12 O. C. D. 149 [citing *Thatcher v. Watson*, 51 O. S. 561, IV Longsdorf's Notes, 556; *Young v. Schallenberger*, 53 O. S. 291, IV Longsdorf's Notes, 600; *Aultman v. Seiberling*, 31 O. S. 201, III Longsdorf's Notes, 574].

A foreclosure decree adjusting liens and ordering sale, can not be vacated except in the manner provided in G. C., §§ 11631, et seq.: *Thatcher v. Dickinson*, 3 O. C. C. 144, 2 O. C. D. 82.

Where an order confirming a sale to a party is reversed after the execution of the deed and before a conveyance by the purchaser, the title, if any, acquired by the sher-

iff's deed is divested by the order of reversal: *McBain v. McBain*, 15 O. S. 337, II Longsdorf's Notes, 733.

XV. SETTING SALE ASIDE.

A sale will be set aside on behalf of the purchaser if it is ineffective to pass the title of the execution debtor: *Brickell v. Miles*, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463.

Where a sale has been made on void process, the court may, before distribution and on application of the buyer, set it aside and order the money refunded: *Dowell v. Goode*, 25 O. S. 390, III Longsdorf's Notes, 246 [affirming *Dowell v. Steamboat*, 13 Dec. Rep. 416, 1 C. S. C. R. 60].

Sale under cunningly devised scheme, by which one of stockholders was to get rid of a co-stockholder, may be set aside: *Rutledge v. Corbin*, 10 O. S. 478, II Longsdorf's Notes, 456.

A delay to return the sale as made after the sixty days, is not such an irregularity or neglect as to render the confirmation erroneous: *Lemert v. Clark*, 1 O. C. C. 569, 1 O. C. D. 318.

Sale on election day may be set aside: *Banning v. Pendery*, 7 Dec. Rep. 677, 4 Bull. 913.

Where there is a mistake as to identity of subject-matter of sale, the sale may be set aside: *Fallis v. Loughhead*, 9 Dec. Rep. 128, 11 Bull. 56.

An arrangement between the sheriff and parties to suit as to sale of property levied on, is not invalid where no bad faith is shown: *Hicks v. Grussel*, 8 O. N. P. 73, 10 O. D. (N.P.) 532.

Where there is cash paid on time sale, the sale is valid: *Brobst v. Skillen*, 16 O. S. 382, II Longsdorf's Notes, 783.

The delay of return does not prevent confirmation: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

It is presumed, upon hearing a motion to set aside a sale, that the confession of judgment in favor of the plaintiff by his attorney is authorized, or has been ratified by the execution debtor: *Brickell v. Miles*, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463.

Overruling motion for setting aside a sale is not reviewable on error where no objection is made to confirmation: *McArthur v. Trust Co.*, 21 O. C. C. 654, 12 O. C. D. 149.

XVI. SALE.

A. ORDER OF SALE.

1. From What Court to Issue.

An order of sale on a decree of the district court on appeal must issue from that court,

and if it reads as on an order of the common pleas the sale will be set aside: *Campbell v. Corry*, 8 Dec. Rep. 88, 5 Bull. 516.

The circuit court, decreeing a sale in foreclosure, may keep charge of the case and have the order for sale issued out of that court and money brought into it: *Maclaren v. Stone*, 18 O. C. C. 854, 9 O. C. D. 794.

A court can not declare alimony a lien on realty in another county and issue an order of sale: *Wilmot v. Cole*, 10 Dec. Rep. 777, 23 Bull. 339.

2. Mistake and Irregularity.

That the order did not describe the lands is a mere irregularity and not ground for collateral impeachment, as in ejectment, by the heirs against the buyer: *Herbst v. Bates*, 9 Dec. Rep. 444, 13 Bull. 565.

Omission of the judge's signature does not invalidate the record of the order: *Herbst v. Bates*, 9 Dec. Rep. 444, 13 Bull. 565.

Mere clerical errors in naming officers are amendable: *Bolin v. Anderson*, 8 Dec. Rep. 49, 5 Bull. 328.

Separate decrees for several lienholders, in suit to foreclose or marshal liens, is irregular. Hence, where a decree is obtained by one defendant lienholder, and an appraisal is had thereunder, a lower appraisal and sale under a latter decree obtained by plaintiff, will be set aside for irregularity: *Sauer v. Cox*, 5 O. N. P. 460, 7 O. D. (N.P.) 507.

A party is not prejudiced by two decrees to sell, if sale realizes enough to satisfy conditions of both: *Ferguson v. Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

If the sheriff went out of office after having levied execution, the order of sale could, before the act of 1824, be issued to and executed by him. An execution is an entire thing: *Fowble v. Rayberg*, 4 O. 45, I Longsdorf's Notes, 202. See also JUDICIAL SALES.

3. Construction of Order.

Authority to sell lots in a town includes out-lots as well as in-lots: *Ludlow v. Park*, 4 O. 5, I Longsdorf's Notes, 201.

An order to sell enough real estate to pay the debts "except the farm and improved lands near Cincinnati, together with the houses and lots in Cincinnati," means not that the latter property in Cincinnati is to be sold, but that it is part of the exception, for the court would not probably, after ordering a sale of all, proceed to enumerate a part: *Ludlow v. Park*, 4 O. 5, I Longsdorf's Notes, 201.

An order to sell a railroad and its "appurtenances," will not under the latter term

include its freight contracts with other railroads, and if the receiver included them in his sale its confirmation will be deemed inadvertent and sale void: *Railroad v. Railway*, 6 O. N. P. 427, 9 O. D. (N.P.) 493.

A life estate can not be enlarged by an order of sale into a fee simple: *Archer v. Brockschmidt*, 5 O. N. P. 349, 5 O. D. (N.P.) 348.

4. Real Property.

(a) Subdivision.

Subdivision under an order of sale of three lots authorizing the sheriff to subdivide and appraise such of said lots as he thinks best, as a whole and as subdivided, which does not observe the original lines, so that some of the sublots contain parts of more than one original lot, will not be held to depart from the order after several orders of sale and no objection for over a year and until motion to confirm: *Mathers v. Kinney*, 8 Dec. Rep. 516, 8 Bull. 267.

A tract of land subject to mortgages on specific parts of it, will not be ordered sold as an entirety, but each mortgaged parcel will be appraised and sold separately, that each may be paid from the proceeds of its own part: *Rhoades v. Raymer*, 6 O. C. C. 68, 3 O. C. D. 353.

A tract appraised entire may be subdivided and sold in parcels at sales by sheriff, administrator or guardian, he being responsible for any abuse of discretion: *Stall v. Macalester*, 9 O. 19, I Longsdorf's Notes, 458.

(b) Undivided Interest.

Where an assignee for creditors is seeking sale of a three-quarters interest in a tract and mortgagees are seeking sale of the rest, the whole should be sold by one officer, and the sheriff will be ordered to sell the whole, but the assignee's compensation will be protected: *Rhoades v. Raymer*, 6 O. C. C. 68, 3 O. C. D. 353.

If, after foreclosure decree ordering sale of an undivided interest, a partition is had in another case, the sale in the foreclosure case can be ordered of the share in severalty instead of the undivided share in all: *Mathers v. Kinney*, 8 Dec. Rep. 516, 8 Bull. 267.

5. Personal Property.

An order of sale of personal property must be based upon a prior valid levy. If there is but a mere paper levy, which is void, or where there has been a valid levy, which has become fraudulent and void, such an order of sale is inoperative against subsequent levies: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659,

6. Determination of Liens.

Sale may be decreed on finding the amount due plaintiff without finding the amount of other liens or their priority: *Railroad v. Lewton*, 20 O. S. 401, II Longsdorf's Notes, 1004.

In suits to marshal liens and sell, it is perhaps more regular to have settled the liens before or at the time of ordering sale, but deferring it until after sale will not alter the rights of the lienholders: *Dempsey v. Bush*, 18 O. S. 376, II Longsdorf's Notes, 899.

A sale ordered subject to an undetermined lien, in a suit to foreclose, marshal liens and sell, is erroneous: *Thatcher v. Dickinson*, 3 O. C. C. 144, 2 O. C. D. 82.

A sale of real estate to pay debts is not authorized to be ordered by the probate court subject to a mortgage or other liens. The court is to settle priorities and order sale free of liens: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

A homestead having been assigned by metes and bounds to the widow and minor children, in a proceeding to sell to pay debts, subject to the homestead, and while occupied as such, is not voidable, but void for want of jurisdiction: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036.

On bill to marshal liens and sell, one defendant being a mortgagee against whom the debtor can not claim homestead, the proper practice is to adjudicate all the liens so that the sale may, if possible be without assigning homestead and not to decree sale, on plaintiff's claim alone, reserving the rest for future adjudication: *Nixon v. Vandyke*, 2 O. C. C. 63 [reversing *Nixon v. Van Dyke*, 9 Dec. Rep. 622, 15 Bull. 358, 1 O. C. D. 364].

Lands not to be sold for less than two-thirds of appraised value; exception as to enforcement of junior lien. G. C., § 11675.

On foreclosure of a vendor's lien on a railroad, being the first lien, the decree need not find the amount due later lienholders until after sale, nor will the decree be withheld because judgment creditors have not been made parties, for they can be brought in later: *Ames v. Railway*, 17 O. C. C. 684, 9 O. C. D. 443.

An order of the probate court, on petition of the widow as executrix to sell land to pay debts, finding priorities, and with her knowledge putting power and year's support inferior to certain liens and decreeing sale, is a final and not interlocutory order, and can not be set aside and a different distribution ordered after the term on motion or except by proceedings under G. C., §§ 11631 to 11643: *Potter v. Jennman*, 4 O. N. P. 78, 4 O. D. (N.P.) 444.

A sale made *pendente lite*, before determining liens is erroneous, and any party can prosecute error: *Harland v. Newcombe*, 2 O. C. C. 330, 1 O. C. D. 514.

7. Perishable Goods.

Perishable and deteriorating property in possession of chancery may be ordered sold before finding an amount due any one: *Newcombe v. Harland*, 23 Bull. 110.

B. SALE FOR CASH.

It is the duty of the sheriff to sell for cash if there is no order to the contrary: *Sharp v. Ross*, 7 O. C. C. 55, 3 O. C. D. 660.

The fact that sheriff takes notes in his own name does not alter his liability: *Griffin v. Underwood*, 16 O. S. 389, II Longsdorf's Notes, 784.

The sheriff is bound to pay over money which he has returned as paid down at sale: *Brobst v. Skillen*, 16 O. S. 382, II Longsdorf's Notes, 783.

C. DEPOSIT OF MONEY.

Deposit of money or other security that terms of sale be complied with is in the discretion of court to guard against failure of sale: *Coe v. Railroad*, 10 O. S. 372, II Longsdorf's Notes, 442.

D. TIME OF SALE.

The time of the sale may be extended beyond the original sixty days called for in the writ: *Newcombe v. Harland*, 23 Bull. 110.

E. DEATH OF DEFENDANT.

A sale on execution is void after death of the defendant: *Massie v. Long*, 2 O. 287, I Longsdorf's Notes, 125; see *Arnold v. Fuller*, 1 O. 458, I Longsdorf's Notes, 94.

On death of fraudulent grantee, after decree setting aside conveyance and ordering sale, sale may be had without revivor against heirs: *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

Real estate levied on during the debtor's life may be sold under the levy without making his heirs or representatives parties: *Bigelow v. Renker*, 25 O. S. 542, III Longsdorf's Notes, 261.

F. SALE TO APPRAISER.

Where an appraiser of lands to be sold by an administrator, becomes a purchaser, the sale may be set aside on application of the

heir, as infected with fraud: *Armstrong v. Huston*, 8 O. 552, I Longsdorf's Notes, 456.

The purchase by a son of an appraiser of land, ordered to be sold to pay the debts of a decedent, is in fraud of the estate owning the land, where it appears that the purchase by the son amounted to a secret trust for his father: *Brickman v. Shale*, 11 O. C. C. (N.S.) 41, 20 O. C. D. 372.

After a lapse of thirty years a sale to an appraiser will not be set aside: *Brickman v. Shale*, 11 O. C. C. (N.S.) 41, 20 O. C. D. 372.

A purchase of real estate at a judicial sale, by an appraiser, is not under this section, strictly void, but is voidable only; and will "be considered fraudulent and void" only on an interposition or proceeding by a party in interest, directly for the purpose of avoiding such sale. As against collateral attack by a third person, such purchaser acquires a good title: *Terrill v. Auchauer*, 14 O. S. 80, II Longsdorf's Notes, 637.

In proceedings in partition, an appraiser, in the absence of fraud prior to the act of March 29, 1841, might become a purchaser at the sheriff's sale: *Bohart v. Atkinson*, 14 O. 228, I Longsdorf's Notes, 664.

The general rule in equity is, that a trustee can acquire no personal interest in the trust property; and where he is authorized to do so by statute, the validity of his title depends, in equity, upon its *bona fides*: *Rammelsberg v. Mitchell*, 29 O. S. 22, III Longsdorf's Notes, 436.

A party holding one of a series of notes secured by a chattel mortgage, holds it in trust for the owners of the notes; and if he purchase the mortgaged property at a sale made by himself, he will be held to account for the fair value of the same: *Beard v. Westerman*, 32 O. S. 29, III Longsdorf's Notes, 618.

If an administrator purchases land at his own public sale, he will be held to have purchased in trust for the heirs, and, upon being refunded the amount by him paid, will be decreed to convey to the heirs. If he has sold the land to a third person, he (the vendor) will be held to account to the heirs for its value at the time of its original purchase, or otherwise, as the case may be, with interest, first deducting the amount by him paid. Such is the rule whether he purchases directly or indirectly: *Glass v. Great-house*, 20 O. 503, I Longsdorf's Notes, 922.

An administrator can not be directly or indirectly interested as a purchaser, at his own sale of lands of the intestate; neither can he act as the agent of others, with a view of making profits out of such purchases, while his relation as trustee is still

subsisting: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

Although one executor can not purchase at a sale by his co-executors, yet such a sale may be executed with the subsequent assent and ratification of the heirs: *Mitchell v. Dunlap*, 10 O. 118, I Longsdorf's Notes, 493.

The rule in equity, as to purchase by an executor at his own sale, is the same as under the statute. Where the trustee purchases the subject of his trust, equity will vacate the sale: *Welsh v. Perkins*, 8 O. 52, I Longsdorf's Notes, 413.

The creditor, in an execution, may claim the benefit of a purchase made by his attorney, especially if the whole debt is not paid, but he must assert his right in a reasonable time: *Wade v. Pettibone*, 11 O. 57, I Longsdorf's Notes, 540.

XVII. DISTRIBUTION.

Claims may be brought in at any time before distribution, in foreclosure: *Allemania v. Mueller*, 8 Dec. Rep. 402, 7 Bull. 301.

A claim in lieu of a homestead made after decree, may be allowed: *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596.

For order of distribution of judgments and mortgages, see *Stoehr v. Brewing Co.*, 17 O. C. D. 330, 2 O. L. R. 449.

Mortgage notes are paid out of proceeds in order of their maturity: *Maas v. Miller*, 58 O. S. 483, IV Longsdorf's Notes, 746; *Wohlgemuth v. Drug Co.*, 14 O. C. C. 316, 8 O. C. D. 9.

A sheriff can not delay compliance with the order of distribution until the appeal is perfected or a motion for a new trial is disposed of: *Chilcote v. Hodgkins*, 40 Bull. 199.

General creditors are allowed to participate in distribution where chattel mortgage is held void: *Devine v. Taylor*, 12 O. C. C. 723, 4 O. C. D. 248.

Subcontractors' claims are protected though not a lien: *Electric Co. v. Electric Co.*, 4 O. N. P. 279, 6 O. D. (N.P.) 475.

For priority of vendor's lien, mortgage and mechanic's lien, see *Walbridge v. Barrett*, 21 O. C. C. 522, 11 O. C. D. 634.

In an action where the wife joins as surety, and property is sold, the wife's dower interest and the homestead exemption should first be deducted, the balance being applied to liens until fund is gone, then resort may be had by mortgagees, but not judgment lienholders, to dower and exemption: *Stoehr v. Brewing Co.*, 17 O. C. D. 330, 2 O. L. R. 449.

Costs not paid as ordered is not a ground for resisting confirmation when paid by someone else for the defendant: *Ashley v. Hull*, 18 O. C. C. 614, 9 O. C. D. 664.

When a junior lienholder forecloses and the first lien is not paid in full, the junior lienholder must pay the cost: *Hulbert v. Lentz*, 1 Dayton Term Rep. (Iddings) 7.

In an action to marshal liens, the costs are to be paid by the insolvent debtor up to the time he demands his homestead exemption; after that, by the judgment creditor, while the purchaser of the land can not be required to pay any of the costs: *Warns v. Reeck*, 8 O. C. C. (N.S.) 401, 18 O. C. D. 785.

The owner of land incumbered by a judgment lien, may recover from the judgment creditor an excess over the balance due on the judgment received by the latter on a sale under a *vendi*: *Sparrow v. Hosack*, 40 O. S. 253, IV Longsdorf's Notes, 22.

When a judgment is obtained and a levy had against the goods of the debtor, and then the debtor assigns, and after the assignment of the debtor another judgment is obtained, the latter judgment being of the same term as the first, there must be a pro rata distribution on sales or executions when proceeds are not sufficient to satisfy entire claims, notwithstanding no levy was made on account of latter judgment: *Ryan v. Root*, 56 O. S. 302, IV Longsdorf's Notes, 690.

Where a creditor obtains judgment and levies execution on property of the debtor during the interval between the sale of the property by the debtor and execution of a deed and its delivery, the purchaser will be entitled, on distribution of the fund arising from the sale, to the protection of the court to the extent of the amount he paid down at the time the contract of sale to him was made: *Warns v. Reeck*, 8 O. C. C. (N. S.) 401, 18 O. C. D. 785.

If several judgments are rendered at the same term and executions at the term or within ten days are levied on land in another county, the distribution of the proceeds must be *pro rata*: *Wilcox v. May*, 19 O. 408, I Longsdorf's Notes, 884.

Distribution by officer before the expiration of the time specified will render the officer liable to any creditor deprived of his share: *Doll v. Barr*, 58 O. S. 113, IV Longsdorf's Notes, 734.

Although the statute seems to require the sheriff to pay over on demand money made on execution, his only safe course is to wait until the time expires within which judgment liens of equal right may be obtained, for other judgments may be got dur-

ing the term: *Doll v. Barr*, 58 O. S. 113, IV Longsdorf's Notes, 734.

The lien of contractors or materialmen completing work, suspended without their consent (G. C., § 8337), is superior to an execution levied before the work was done: *Holbrook v. Ives*, 44 O. S. 516, IV Longsdorf's Notes, 230. See also MECHANIC'S LIEN.

A sheriff sued by a judgment creditor for a share in a fund obtained by executions on other judgments can interplead and have the other judgment creditors substituted in his place as defendants: *McAlpin Co. v. Finsterwald*, 57 O. S. 524, IV Longsdorf's Notes, 727. See also INTERPLEADER.

An heir's attorneys employed to resist actions which would wipe out the whole estate, having saved a large part of it, will be allowed their fees out of the sum realized by their efforts in preference to prior levies by judgment creditors of the heir: *Kirk v. Breed*, 3 O. N. P. 122, 4 O. D. (N.P.) 403. See also ATTORNEY AND CLIENT.

Marshaling liens, consisting of a judgment lien and execution, a mortgage lien with release of dower, and a second mortgage held by the same mortgagee, and the claim of the mortgagor for homestead exemption, distribution will be made (1) to the homestead exemption; (2) to the judgment lien; (3) the balance to the payment of the mortgages, and such mortgages not being satisfied, the homestead exemption being covered by the mortgages must be applied to their satisfaction: *Conant v. Unus*, 6 O. L. R. 62.

XVIII. TAXES AND ASSESSMENTS.

A. IN GENERAL.

Taxes are deemed due on October 1st for the purpose of being paid out of the purchase money on administrator's, guardian's, trustee's or judicial sales, though the lien of the state attaches at the prior April: *Hoglen v. Cohan*, 30 O. S. 436, III Longsdorf's Notes, 537.

"Taxes, interest and penalty," which by the statute are to be paid from the proceeds, means taxes standing on the duplicate, and does not include the claim of a buyer at tax sale not made a party, for it is not taxes: *Ketcham v. Fitch*, 13 O. S. 201, II Longsdorf's Notes, 602.

Taxes due on land are also a personal debt of the owner. When paid by debtor after sale they are not recoverable, but when wrongfully paid from proceeds, they may be recovered by the debtor from the purchaser: *Creps v. Baird*, 3 O. S. 277, II Longsdorf's Notes, 28.

A foreclosure suit is not *lis pendens* as to proceedings by the state to collect taxes: *Trust Co. v. Root*, 4 O. C. C. (N.S.) 129, 15 O. C. D. 614.

B. DELINQUENT TAXES.

If the property becomes delinquent and is sold at tax sale after decree for sale and before order of sale, the court still has the power to pay tax and penalty out of the proceeds of sale, as a tax, that is, without the penalty on the tax sale: *Walker v. McGechin*, 8 Dec. Rep. 222, 6 Bull. 340.

Holder of a certificate of purchase at a delinquent tax sale can not on distribution of the proceeds of the land at judicial sale have penalties beyond what he has paid with interest, unless he proves that the land was duly listed, advertised and sold for taxes. The rule is different under forfeiture sales: *Loan Association v. Bacon*, 2 O. N. P. 295, 1 O. D. (N.P.) 197.

If a certificate of purchase at delinquent tax sale fails so to describe the land that the county surveyor can lay off the quantity sold, only the amount paid with simple interest, will be awarded to the holder on foreclosure of mortgage: *Building Association v. Ziegler*, 1 Dayton Term Rep. (Iddings) 166.

A lienholder who allows the property to be sold for taxes and then buys the certificates can receive on distribution only the taxes and simple interest, including the penalty: *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419.

Doctrine of *lis pendens* is not applicable to a purchaser at delinquent tax sale held during the pendency of an action to foreclose a mortgage on the same property: *Trust Co. v. Root*, 4 O. C. C. (N.S.) 129, 15 O. C. D. 614.

If a holder of the tax title, brought into the case before the order of sale is issued, waiving his penalty on the tax purchase, the court has power to order him paid out of the proceeds: *Sibley v. Elliott*, 7 Dec. Rep. 668, 4 Bull. 885.

C. ON PARTITION.

In partition sale after October 1st, taxes for the year must be paid out of the proceeds: *Scheid v. Scheid*, 7 O. N. P. 554, 5 O. D. (N.P.) 559.

At partition sale a party electing to take, but failing to have the taxes paid out of the proceeds, can not recoup them against the notes and mortgages given for deferred payment in the hands of the heirs. *Caveat emptor* applies: *Callahan v. Rose*, 7 Dec. Rep. 384, 2 Bull. 281.

D. STREET ASSESSMENTS.

Street assessments, payable in installments, should not be placed on the duplicate except those payable after the end of September in any year. Only those properly on the duplicate can be paid out of the proceeds of judicial sales. Those falling due later can not be required to be so paid either by the buyer or by the municipality. They remain a lien on the land: *Makley v. Whitmore*, 61 O. S. 587, IV Longsdorf's Notes, 817.

A city's neglect to plead an assessment where made a party to a foreclosure suit bars it from collecting assessment against purchaser of property: *Cincinnati v. Lingo*, 13 O. C. C. 334, 7 O. C. D. 356 [affirmed, without report, *Cincinnati v. Sterritt*, 57 O. S. 654].

The rule that lienholders after they are made parties are bound to set up their liens, and if they fail to do so, and the court adjudicates as to their rights, they are bound by the judgment, does not apply to a municipal corporation where the statute contains a provision that the lien of an assessment shall not be divested by any judicial sale unless the payment of the same is provided for from the proceeds of the sale, and such city is not a necessary or proper party in an action to foreclose a mortgage upon property charged with an assessment lien in its favor, nor is it concluded by a judgment therein, although it is made a party and fails to appear and set up its lien: *Hagerty v. Columbus*, 14 O. D. (N.P.) 1 [distinguishing it from *Cincinnati v. Lingo*, 13 O. C. C. 384, 7 O. C. D. 356, and citing *Makley v. Whitmore*, 61 O. S. 587, IV Longsdorf's Notes, 817].

E. FAILURE OF SHERIFF TO PAY.

A sheriff is liable to a purchaser at tax sale who has to pay taxes if he disobeys order to pay taxes out of proceeds: *Springmeier v. Blackwell*, 7 Dec. Rep. 577, 3 Bull. 1160; *Springmeier v. Blackwell*, 6 Dec. Rep. 705, 7 Am. L. Rec. 476.

F. PAYMENT BY MORTGAGEE.

A mortgagee who pays taxes is subrogated thereto and entitled to be reimbursed out of the proceeds on foreclosure: *Lawton v. Adams*, 13 O. C. C. 233, 7 O. C. D. 129.

XIX. DEED.

A. GRANTOR.

When a special master commissioner is appointed for the sale of specific property, the judgment, order or decree ordering the

sale must show the special reason or reasons why the sale should not be made by the sheriff of the county: *Augustus v. Lynd*, 7 O. N. P. (N.S.) 473, 19 O. D. (N.P.) 143.

An order of sale to the "sheriff or master," without naming him, which is executed by a master, is good after confirmation: *Loan Association v. O'Conner*, 29 O. S. 651, III Longsdorf's Notes, 508.

Courts have inherent power, which is not taken away by the code, to appoint a special master for a special purpose, as to sell a tract on foreclosure. Such appointee is not an officer, hence need not give bond or take oath unless required by the court: *Mayer v. Wick*, 15 O. S. 548, II Longsdorf's Notes, 748.

The sheriff's term as master expires with his office as sheriff, and if he was appointed master to sell, his sale after he ceases to be sheriff must be set aside: *Norton v. Gray*, 2 Dec. Rep. 118, 1 W. L. M. 408.

A sale of land by a marshal on a *venditioni exponas* after he is removed from office and a new marshal appointed and qualified, is not void: *Miner v. Cassat*, 2 O. S. 198, I Longsdorf's Notes, 1039.

A deed upon a sale on execution in 1799 might be executed by a sheriff's deputy in the name of his principal: *Anderson v. Brown*, 9 O. 151, I Longsdorf's Notes, 472.

Where a sale of land has been made by a former sheriff the deed is to be made by the sheriff in office at the time of the application: *Fowble v. Rayberg*, 4 O. 45, I Longsdorf's Notes, 202.

B. DESCRIPTION.

A sheriff's deed, describing the land as 1,055 acres in a 1,731-acre tract, located in the name of R. T., is void for uncertainty: *Throckmorton v. Moon*, 10 O. 42, I Longsdorf's Notes, 486.

C. NATURE OF ESTATE.

Where the sheriff's deed enlarges the estate sold, the land can not be recovered without reformation: *Brockschmidt v. Archer*, 64 O. S. 502, IV Longsdorf's Notes, 876 [reversing *Brockschmidt v. Archer*, 5 O. N. P. 349, 5 O. D. (N.P.) 348].

An order that a deed be in fee simple can not enlarge a life estate, and is void as to excess: *Archer v. Brockschmidt*, 5 O. N. P. 349, 5 O. D. (N.P.) 348 [reversed in *Brockschmidt v. Archer*, 64 O. S. 502, IV Longsdorf's Notes, 876].

D. RECITAL OF AUTHORITY.

Where there has been a sale of real estate upon execution, and an order for a

deed, these proceedings lay the foundation to admit parol testimony that a deed was executed and delivered: *Armstrong v. McCoy*, 8 O. 128, I Longsdorf's Notes, 418.

If a sheriff's deed recite so much of the executions and other proceedings as shows a clear and undoubted authority for its execution, such recitals are sufficient: *Armstrong v. McCoy*, 8 O. 128, I Longsdorf's Notes, 418.

If a sheriff's deed recite enough to show his authority, it is good, though it does not recite all that the statute requires: *Perkins v. Dibble*, 10 O. 434, I Longsdorf's Notes, 526.

E. EXECUTION AND ACKNOWLEDGMENT.

An acknowledgment of a sheriff's deed is indispensable: *Roads v. Symmes*, 1 O. 281, I Longsdorf's Notes, 82.

The acknowledgment can not be presumed: *Roads v. Symmes*, 1 O. 281, I Longsdorf's Notes, 82.

A deputy sheriff may execute a valid deed for lands sold on execution by himself or by his principal: *Haines v. Lindsey*, 4 O. 88, I Longsdorf's Notes, 206.

The conveyance by the sheriff of lands sold on a judgment by *scire facias*, in 1811, and acknowledged before a justice of the peace, was sufficient to pass title: *Heighway v. Pendleton*, 15 O. 735, I Longsdorf's Notes, 742.

F. REVENUE STAMP.

A revenue stamp on a sheriff's deed is properly charged for as costs: *Loan Co. v. Hoskins*, 6 O. N. P. 274, 8 O. D. (N.P.) 437.

G. WHEN DEED TAKES EFFECT.

A sheriff's deed takes effect from the day of sale, so as to pass whatever interest the judgment debtor had in the lands sold at the time of the levy: *Boyd v. Longworth*, 11 O. 235, I Longsdorf's Notes, 552.

The sheriff's deed relates back to the day of sale: *Jashenosky v. Volrath*, 59 O. S. 540, IV Longsdorf's Notes, 771.

A levy and sale of land upon execution will confer a title paramount to a prior assignment of the property, made by the judgment debtor to a creditor to secure a debt, which has not been acknowledged or recorded: *Fosdick v. Barr*, 3 O. S. 471, II Longsdorf's Notes, 49.

H. REFORMATION.

A mistake in deed may be reformed by an independent suit: *Gill v. Pelkey*, 54 O.

S. 348, IV Longsdorf's Notes, 639; see *Cook v. Prosser*, 14 O. C. C. 137, 7 O. C. D. 619.

Parol evidence of a mistake in the return of the appraisement and in the deed whereby a tract of land not sold to or paid for by the party is included may be received in a suit to correct the mistake: *Gill v. Pelkey*, 54 O. S. 348, IV Longsdorf's Notes, 639.

The plaintiff having the equitable title can not recover possession without first obtaining a reformation of the deed: *Brockschmidt v. Archer*, 64 O. S. 502, IV Longsdorf's Notes, 876.

The title of a purchaser at a judicial sale, as a general rule, can not be impeached in equity for errors or irregularities in the proceedings; but where a tract of land, not in fact sold, and for which no consideration was paid or intended to be paid, is by mistake included in the report of sales, such mistake may be corrected in equity as against the purchaser or his heirs, even after confirmation and deed in pursuance thereof: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809.

Parol evidence may be admitted to prove a mistake in the report of the sale: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809.

After a decree of foreclosure of a life estate, followed by appraisement and sale of the life estate, an order that the deed be in fee simple can not enlarge the estate sold, and is as to the excess void: *Archer v. Brockschmidt*, 5 O. N. P. 349, 5 O. D. (N.P.) 348 [reversed in *Brockschmidt v. Archer*, 64 O. S. 502, IV Longsdorf's Notes, 876].

A sheriff's deed for lands sold under execution, correctly reciting the judgment, execution, levy and sale, is *prima facie* evidence of title; but parol evidence is admissible, that it does not, in fact, cover all the land claimed under it, and embraced in its description of boundaries: *Longworth v. Bank*, 6 O. 537, I Longsdorf's Notes, 358.

If the judgment is for a different amount than recited in the vendi and deed, being for less, its identity may be proved and the discrepancy explained *aliunde*, as by showing that increased costs had been added: *Bank v. White*, W. 51, I Longsdorf's Notes, 4; *Humbert v. Church*, W. 213, I Longsdorf's Notes, 19.

XX. RIGHTS AND TITLE OF PURCHASER.

A. IN GENERAL.

An examination of title by purchaser before his bid, is requisite for his protection:

Brickell v. Miles, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463.

An unrecorded deed does not affect a purchaser at judicial sale: *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267.

A change in the value after the sale falls to the purchaser: *Murphy v. Hardee*, 22 O. C. C. 511, 12 O. C. D. 837.

A *bona fide* purchaser without knowledge, holds free from dower: *Fast v. Umbaugh*, 22 O. C. C. 409, 12 O. C. D. 434.

B. INTERESTS OF PARTIES ACQUIRED BY PURCHASER.

A patent issued, after sheriff's sale, to the heirs of the original owner of the entry and survey, inures to the benefit of the purchaser under the execution: *Jackson v. Williams*, 10 O. 70, I Longsdorf's Notes, 489.

The purchaser at a sheriff's sale, without notice of a dormant equity prior to the return of the execution satisfied, takes title as a *bona fide* purchaser without notice, although the sheriff's deed bears date subsequent to actual notice, given after the sale: *Oviatt v. Brown*, 14 O. 285, I Longsdorf's Notes, 666.

When a creditor, whose debt is secured by mortgage, recovers judgment for the same debt, takes out execution, and causes the mortgaged premises to be sold, the purchaser takes an indefeasible title, although the money made is not sufficient to satisfy the entire debt: *Foadick v. Risk*, 15 O. 84, I Longsdorf's Notes, 699.

Where a mortgagee recovers a judgment at law, for any part of the money secured by the mortgage, and causes the mortgaged premises to be sold on execution, the purchaser at sheriff's sales takes the land relieved from the lien of the mortgage: *Freeby v. Tupper*, 15 O. 467, I Longsdorf's Notes, 723.

If land be sold by virtue of an execution upon a judgment against several defendants, only a part of whom have been served by summons, a title to a proportion, if not the whole, will pass to a purchaser at the sheriff's sale: *Douglass v. Massie*, 16 O. 271, I Longsdorf's Notes, 762.

One in possession, claiming title derived with warranty from an entry and survey not patented, has an estate that may be sold on execution: *Jackson v. Williams*, 10 O. 70, I Longsdorf's Notes, 489.

A purchaser at a foreclosure sale brought upon a mortgage which contains an incorrect description of the mortgaged realty is subrogated to the mortgagee's right to reformation: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

A levy of execution in favor of a judgment creditor of a purchaser at a master commissioners sale, but before the deed is delivered or possession is taken by the purchaser, is invalid; and is inferior to a levy made after the deed is delivered and possession is taken: *Gorrell v. Kelsey*, 40 O. S. 117, IV Longsdorf's Notes, 10.

Where a person owning land on one side of a stream buys land opposite to it, and also by the same deed obtains a right to dam the stream and overflow upper land of his grantor, and uses this right to run a mill on his former tract on one side, this right becomes appurtenant to the former tract, and a levy of execution on and sale thereunder of the former tract carries the right to such appurtenance, though not described in the levy and sale, and the judgment was a lien thereon. The attaching of such easement to the former tract prevents it becoming an appurtenance to the opposite tract, though acquired by the same deed, and subsequent buyers of the latter get no right in it: *Morgan v. Mason*, 20 O. 401, I Longsdorf's Notes, 915. See also EASEMENT.

C. INTERESTS OF PERSONS NOT PARTIES.

At sheriff's sale the rule of *caveat emptor* applies, and the purchaser takes subject to every lien that could be asserted against the debtor: *Corwin v. Benham*, 2 O. S. 36, I Longsdorf's Notes, 1019; *Dresbach v. Stein*, 41 O. S. 70, IV Longsdorf's Notes, 51.

The purchaser at a sheriff's sale takes the land subject to a tax lien, and if the land is sold he has no action against the judgment debtor: *Creps v. Baird*, 3 O. S. 277, II Longsdorf's Notes, 28; *Ketcham v. Fitch*, 13 O. S. 201, II Longsdorf's Notes, 602.

The purchaser of land at a sheriff's sale takes the title, as held by the debtor, subject to prior existing liens: *Riddle v. Bryan*, 5 O. 48, I Longsdorf's Notes, 246.

A purchaser at sheriff's sale acquires no greater interest than the judgment debtor had at the time of levy and sale, and takes the property subject to outstanding equities, especially if the purchaser has notice of these equities: *McLouth v. Rathbone*, 19 O. 21, I Longsdorf's Notes, 865.

Where a mortgage on real estate is duly executed and recorded, and the mortgaged premises are subsequently sold at sheriff's sale, under a judgment in favor of a third party, against the mortgagors, obtained subsequent to the recording of the mortgage, and the mortgagee is present at the sheriff's sale, and keeps silent in respect to his mortgage, the mortgage being duly recorded,

and there being no other evidence of actual fraud, the mortgagee is not estopped, by his mere silence, from afterward claiming the benefit of his mortgage lien: *Fisher v. Mossman*, 11 O. S. 42, II Longsdorf's Notes, 477.

A *bona fide* purchaser at a judicial sale without notice of an unrecorded deed made by the judgment debtor before the rendition of the judgment, is within the protection of the statutes and acquires the title as against the grantee in the deed: *Sternberger v. Ragland*, 57 O. S. 148, IV Longsdorf's Notes, 710.

D. EFFECT OF IRREGULARITIES.

Errors or irregularities in the proceedings will not deprive purchaser of his title: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809; *Piatt v. Piatt*, 9 O. 37, I Longsdorf's Notes, 460; *Cadwallader v. Evans*, 12 Dec. Rep. 811, 1 D. 585.

A purchaser's rights are not affected by want of appraisal: *Allen v. Parish*, 8 O. 187, I Longsdorf's Notes, 156.

The title of a purchaser is not affected by want of revivor: *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

A *bona fide* purchaser, without notice of an unrecorded deed made by the judgment debtor before the rendition of the judgment, acquires the title as against the grantee in the deed: *Sternberger v. Ragland*, 57 O. S. 148, IV Longsdorf's Notes, 710; see editorial on *Wright v. Rong*, 11 Bull. 13.

A false return of service does not defeat the purchaser's title: *Miller v. Erdhouse*, 7 Dec. Rep. 294, 2 Bull. 84.

E. CAVEAT EMPTOR.

The rule of *caveat emptor* applies in judicial cases: *Corwin v. Benham*, 2 O. S. 36, I Longsdorf's Notes, 1019; *Riddle v. Bryan*, 5 O. 48, I Longsdorf's Notes, 246; *Creps v. Baird*, 3 O. S. 277, II Longsdorf's Notes, 28; *McKinzie v. Perrill*, 15 O. S. 162, II Longsdorf's Notes, 715; *Dresbach v. Stein*, 41 O. S. 70, IV Longsdorf's Notes, 51; *McLouth v. Rathbone*, 19 O. 21, I Longsdorf's Notes, 865; *Brickell v. Miles*, 2 O. N. P. (N.S.) 153, 14 O. D. (N.P.) 463; *Jewett v. Feldheiser*, 68 O. S. 523, IV Longsdorf's Notes, 948; *Trust Co. v. Building Co.*, 1 Hosea, 518; *Anderson v. Realty Co.*, 9 O. C. (N.S.) 473, 19 O. C. D. 267.

To relieve against the doctrine of *caveat emptor*, evidence as to the understanding between the original owner and the purchaser is admissible in a subsequent action: *Niece v. Percy*, 9 O. C. (N.S.) 233, 19 O. C. D. 219.

F. RIGHT TO RENTS AND PROFITS.

Rents not becoming due until after title vests in purchaser, as a general rule, belong to him: *Albin v. Riegel*, 40 O. S. 339, IV Longsdorf's Notes, 29.

Rents coming due after sale and before confirmation belong to the purchaser, for the deed relates back to the day of sale: *Jashenosky v. Volrath*, 59 O. S. 540, IV Longsdorf's Notes, 771.

If a purchaser's title is set aside and his money refunded, rents and profits received by him should be set off against his claim for improvements and taxes during the interim: *Jashenosky v. Volrath*, 59 O. S. 540, IV Longsdorf's Notes, 771.

Oil produced after sale passes to the purchaser: *Murphy v. Hardee*, 22 O. C. C. 511, 12 O. C. D. 837.

G. RIGHT TO POSSESSION.

A writ of possession will not issue against one not a party to the suit of the *pendente lite* buyers. But interference by the sheriff with a buyer who was in possession before suit and not made a party, will be enjoined: *Poole v. Loan Co.*, 7 O. N. P. 292, 4 O. D. (N.P.) 504.

A buyer, though he has paid his money, is not entitled to possession until after confirmation, and a promise to pay rent for that time would be void. After confirmation he is entitled to possession, though the deed is not yet made: *Heidelberg v. Slader*, 12 Dec. Rep. 234, 1 H. 456.

A writ of assistance to compel the delivery of the property to the buyer at foreclosure by the mortgagor, if he refuses, will be issued, and so although the buyer has sold by warranty deed to enable him to deliver: *Tetterbach v. Meyer*, 10 Dec. Rep. 212, 19 Bull. 221.

H. SUBROGATION.

A purchaser is not entitled to be subrogated to rights of mortgagee: *Jewett v. Feldheiser*, 68 O. S. 523, IV Longsdorf's Notes, 948.

A purchaser of mortgaged lands at a judicial sale from an assignee for the benefit of creditors becomes subrogated to the rights of the mortgagee as against a released dower interest by assignee for benefit of creditors, subrogated to mortgagee's rights as against dower released: *Jeffrey v. Yoxtheimer*, 12 O. C. D. 568 [affirmed, without opinion, *Jeffrey v. Yoxtheimer*, 59 O. S. 628].

If the sheriff is amerced and compelled to pay a judgment for failure to make the money, or pays to avoid amercement, he is subrogated to the claim and can issue exe-

cution in the plaintiff's name, G. C., § 12109, but his interest disqualifies him to execute the process, and it must be directed to the coroner, under G. C., § 2835: *Murphy v. Swadener*, 33 O. S. 85, III Longsdorf's Notes, 659.

I. OTHER QUESTIONS.

A purchaser of a turnpike road at an execution sale is vested with all the property and franchises of the original corporators, and is liable for unlawfully usurping franchises and the commission or omission of acts which amount to a surrender of corporate rights, privileges and franchises or for their misuse: *Turnpike Co. v. Wacchter*, 2 O. C. (N.S.) 21, 15 O. C. D. 605.

The title obtained by purchaser at judicial sale is limited to terms of decree in case of sale of oil lease, notwithstanding lease in oil fields means the lease with its equipment and appurtenances: *Niece v. Percy*, 9 O. C. C. (N.S.) 233, 19 O. C. D. 219.

Where B conveyed to X by deed with but one witness and afterwards on attachment against X the land was bought by W, as equitable interests are not attachable, W got nothing by the purchase. Hence, when W afterwards got a decree against B for the legal title, he held it in trust for X, the owner of the equitable title. Hence, if B afterwards buys X's equity, he can compel W to reconvey the legal title to him; the former decree is no estoppel. (As explained in *Payne v. Mooreland*, 15 O. 435, I Longsdorf's Notes, 719): *Warner v. Webster*, 13 O. 505, I Longsdorf's Notes, 648. See also JUDGMENT.

A mortgagee of real estate whose mortgagor had become bankrupt and who bought the mortgaged property at bankrupt sale and took a deed from the trustee in bankruptcy, "subject to the mortgage," and entered into possession and received rents and profits, did not by these facts alone merge the legal and equitable estates: *Senter v. Senter*, 87 O. S. 377.

The owner of a senior chattel mortgage does not, by recovering a judgment on the note which it secures and causing execution to be levied on the chattels mortgaged, waive the priority of his lien: *Green v. Bass*, 83 O. S. 378 [approving and following *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26].

J. RIGHTS IN CASE OF INVALID SALE.

At a void judicial sale the buyer is subrogated to the administrator's rights: *Doyle v. Breneman*, 2 O. N. P. 415, 4 O. D. (N.P.) 22.

If an administrator's sale to pay debts is void for want of jurisdiction and the buyer

loses the property subsequently, he should be considered as subrogated to the claims paid and to the right to demand a sale to reimburse him: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036.

Where the attachment sale is void, the buyer is subrogated under G. C., § 11704, to the attaching creditor's rights to the extent that his money has paid the debt: *Endel v. Leibrock*, 33 O. S. 254, III Longsdorf's Notes, 672.

The purchaser at a foreclosure sale gets the entire title of the mortgagee, and is subrogated to all his rights: *Frische v. Kramer*, 16 O. 125, I Longsdorf's Notes, 755; *Childs v. Childs*, 10 O. S. 339, II Longsdorf's Notes, 440.

Under an invalid sale the buyer is subrogated to the rights of an attaching creditor: *Endel v. Leibrock*, 33 O. S. 254, III Longsdorf's Notes, 672.

A purchaser from the mortgagor, whose purchase was made subsequent to the date of the mortgage, can not maintain ejectment against the purchaser at a sheriff's sale, although such subsequent purchaser was not made a party to the proceedings in chancery. He may have a bill to redeem: *Frische v. Kramer*, 16 O. 126, I Longsdorf's Notes, 755.

Where in a foreclosure suit the summons on the mortgagor and his wife were returned as personally served and judgment by default was regularly taken, the purchaser at the sale will be protected in his title, though after the mortgagor's death his widow seeks to vacate the sale on the ground that the mortgage was as to her a forgery, and that she was not served in the foreclosure suit. The purchaser had a right to rely on the record and the widow must seek her rights in the purchase money paid by the purchaser to the judgment creditor: *Miller v. Erdhouse*, 7 Dec. Rep. 294, 2 Bull. 84.

Where mortgaged property has been sold under a decree of foreclosure and the sale confirmed and the money applied in extinguishment of the mortgage debt and subsequently the judgment order of sale and confirmation are set aside, the purchaser, although a stranger to the proceedings, does not hold the property under G. C., § 11702, but is entitled to be subrogated to the rights of the owner of the mortgage under G. C., §§ 11703 and 11704: *McMahan v. Davis*, 19 O. C. C. 242, 10 O. C. D. 467.

A mortgagee with express notice is not a *bona fide* purchaser without notice and is not entitled to the protection afforded to such *bona fide* purchasers by G. C., § 11704, but takes his mortgage subject (1) to the equitable lien of a prior mortgage duly ex-

ecuted and recorded and intended by the parties thereto to be a mortgage upon the same premises, although by mutual mistake the premises were incorrectly described, (2) to the right of a purchaser at a sale pursuant to a decree of foreclosure founded upon such erroneous mortgage to be subrogated to the rights of all the parties to the suit in which such decree was rendered: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

When such mortgagee with express notice assigns his mortgage, his assignee, although acquiring title in good faith and before maturity, takes the mortgage subject to such prior equities in the mortgaged premises as might have been successfully asserted against his assignor: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

A sale of mortgaged property invalid by reason of failure to serve the defendant is embraced by G. C., § 11704: *Endel v. Leibrock*, 33 O. S. 254, III Longsdorf's Notes, 672.

A mortgage was foreclosed and a sale was made to R without making C, a later execution creditor, a party. R quitclaimed to P, who sold by warranty deed to D. D now claims to be subrogated to R, as equitable assignee of the mortgage lien, and therefore to have a prior claim over C's execution. It was held that the quitclaim deed did not convey R's right of subrogation. Under G. C., § 11704, P's warranty deed only conveyed the right P had: *Cook v. Dinsmore*, 5 O. C. C. 385, 3 O. C. D. 189.

K. EFFECT OF REVERSAL OF JUDGMENT.

A subsequent reversal of a judgment does not affect the sale of the land: *Smith v. Dixon*, 27 O. S. 471, III Longsdorf's Notes, 369.

Where a tract of land, not in fact sold, and for which no consideration was paid, is by mistake included in the report of sales, such mistake may be corrected, in equity, after confirmation and deed: *Stites v. Wiedner*, 35 O. S. 555, III Longsdorf's Notes, 809.

In a sale of property to a stranger, a subsequent reversal of the judgment does not divest the purchaser's title. But this statutory rule, which applies only to purchases by strangers, when the judgment is reversed, does not apply to a mortgagee who is a party, nor where the order of sale or confirmation is reversed: *Insurance Co. v. Sampson*, 38 O. S. 672, III Longsdorf's Notes, 1001; *McBain v. McBain*, 15 O. S. 337, II Longsdorf's Notes, 733.

Where the purchaser is a defendant lien holder, such purchaser, though a party to the suit, is entitled to the protection af-

forded by the provisions of G. C., § 11702, upon the reversal of the judgment under which the sale was made: *McBride v. Longworth*, 14 O. S. 349, II Longsdorf's Notes, 685.

G. C., § 11702, does not apply to a purchaser at a foreclosure sale of mortgaged premises where the judgment, order of sale and confirmation are reversed and set aside: *McMahan v. Davis*, 19 O. C. C. 242, 10 O. C. D. 467.

If a purchaser's title is set aside and his money refunded, rents and profits received by him should be set off against his claim for improvements and taxes during the interim: *Allen v. Russell*, 59 O. S. 137, IV Longsdorf's Notes, 761.

Reversal of an order to an administrator to sell real estate to pay debts does not divest the purchaser's title. The policy of the statute as to execution sales applies. This is so, though the purchaser had notice of the error before buying: *Irwin v. Jeffers*, 3 O. S. 389, II Longsdorf's Notes, 40.

When in a suit to foreclose a mortgage, the mortgaged premises do not sell for enough to pay the amount found due, and an execution is issued and other lands sold, the sale on execution is void and the purchaser's title fails. He is entitled to subrogation and has a lien on the lands sold to the extent of the money he paid as applied to the debt as against the heirs and legatees of the mortgagor, but not as against the widow's claim of dower: *Doyle v. Breneman*, 2 O. N. P. 415, 4 O. D. (N.P.) 22.

Where the title to a part of the premises sold and conveyed fails the vendee may recover back a proportionate share of the purchase money: *Michael v. Mills*, 17 O. 601, I Longsdorf's Notes, 831.

A sale based on void judgment has no foundation in law: *Jenkins v. Hannan*, 26 Fed. 657, 5 O. F. D. 285.

One who buys realty from a vendee in whose favor a decree of specific performance has been rendered, acquires title as against the vendor who institutes proceedings in error by which such decree is reversed, if summons in error is not served when such sale is made: *Taylor v. Boyd*, 3 O. 337, I Longsdorf's Notes, 176.

On restitution after reversal the judgment creditor can not set off the amount of his claim against such claim for restitution: *Bickett v. Garner*, 31 O. S. 28, III Longsdorf's Notes, 560.

If an order of restitution is made, the judgment debtor may maintain an action to recover the amount of the judgment which he has paid in, even if such payment was made voluntarily. The order of restitution can not be attacked collaterally: *Hiler v.*

Hiler, 35 O. S. 645, III Longsdorf's Notes, 816.

Prior to the code, a writ of restitution might be awarded if the judgment of reversal contained evidence of the precise thing to be restored; but if the matter to be restored was not specified in the judgment, but depended on evidence *dehors* the record, as where recovery of payments upon the judgment was sought, execution should not be awarded without giving to the adversary party an opportunity to make a defense; and *scire facias* was the proper remedy: *Cowden v. Hurford*, 4 O. 375, I Longsdorf's Notes, 229.

If an action is brought before a justice of the peace and on appeal to the common pleas court judgment is rendered for the plaintiff in the same amount as that for which judgment was rendered by the justice on the erroneous theory that the case could not be appealed, the circuit court on reversing the judgment will remand the case to the common pleas court for restitution: *Stoffregen v. Biederman*, 6 O. C. C. 55, 3 O. C. D. 347.

XXI. LIABILITY OF SHERIFF FOR PURCHASE-MONEY.

A sheriff and the sureties on his official bond are liable for money which comes into his hands by reason of a sale by him as master commissioner, even though the money was not demanded until his term of office expired: *Hubbard v. Elden*, 43 O. S. 380, IV Longsdorf's Notes, 172.

A partial compliance by a sheriff, with an order of the court, that such money should be loaned, will not release him or his bondsmen: *Hubbard v. Elden*, 43 O. S. 380, IV Longsdorf's Notes, 172.

The sheriff has the right to take a check. This is not payment if dishonored: *In re Worstall*, 6 O. N. P. (N.S.) 525, 8 O. D. (N.P.) 264.

Neglect to execute a writ of execution will not justify amercement if no law authorizes the writ: *Levi v. Steamboat Baltimore*, 12 Dec. Rep. 387, 2 H. 172.

An error of the court in issuing a writ would be no excuse for the sheriff: *Duncan v. Drakeley*, 10 O. 45, I Longsdorf's Notes, 487.

If the statute requires an indorsement by the clerk of funds deposited for costs on a writ from another county before the sheriff is bound to execute it, a tender of fees to the sheriff will not make him amenable to amercement for refusal to execute a writ without such indorsement: *Duncan v. Drakeley*, 10 O. 45, I Longsdorf's Notes, 487.

A judgment creditor can not maintain an action against a sheriff for failure to execute a foreign writ of execution, or for fail-

ure to index his foreign execution docket, or to do other things enumerated in G. C., § 2837, unless such judgment creditor has made a deposit of the sheriff's fees with the clerk issuing the writ as required by G. C., § 12105: *Lumber Co. v. Kennard*, 11 O. C. C. (N.S.) 161, 20 O. C. D. 475 [affirmed, without opinion, *Lumber Co. v. Kennard*, 81 O. S. 537]. See also AMERCEMENT.

Since the statute does not give amercement for charging excessive costs, as poundage on money not paid through the sheriff, it does not lie: *Bushnell v. Eaton*, W. 720, I Longsdorf's Notes, 56.

A sheriff as executive officer of the court is bound to execute all process, regular upon its face and emanating from a court of competent jurisdiction and to give the process, as far as in him lies, its full legal effect irrespective of his personal judgment as to the propriety of issuing the same. He can not refuse to do so because the judgment upon which the process issues is void. The apparent regularity and presumed jurisdiction, as evidenced by the execution, not only protects him in serving the process, but makes it his duty to proceed to execute the writ: *State v. Holden*, 12 O. D. (N.P.) 91. See also SHERIFF.

The sheriff may be amerced for neglect to return the order of sale to the proper court, though the making of such return be not demanded by plaintiff: *Sharp v. Ross*, 7 O. C. C. 55, 3 O. C. D. 660.

If an execution recites a judgment for a substantially greater amount than the actual judgment the officer can not be amerced for not returning it until after the return day: *Moore v. McClellan*, 16 O. S. 50, II Longsdorf's Notes, 758.

If the return of the sheriff in an execution shows a due execution and faithful discharge of his duty, the plaintiff can not go behind it on motion to amerce, but is left to his remedy by action for false return: *Bank v. Domigan*, 12 O. 220, I Longsdorf's Notes, 605.

If a return was in time, but the indorsement showed it to be out of time, the case is not within the spirit of the statute: *Conkling v. Parker*, 10 O. S. 28, II Longsdorf's Notes, 405.

Where the return was money made and paid, but the fact was a sale on credit by order of parties and an injunction against paying over the cash payment, the case is not within the spirit of the statute: *Langdon v. Summers*, 10 O. S. 77, II Longsdorf's Notes, 412. See also AMERCEMENT.

If a sheriff have executions from different counties, and returns a copy of the appraisal to the county where the land lies, he is not amerceable for not returning a copy

to the other county: *Cook v. Drake*, 1 Dec. Rep. 12, 1 W. L. J. 104.

XXII. INDEX TO EXECUTION DOCKET.

A failure to index in the foreign execution docket (G. C., § 2837), all of the names of the judgment debtors, will defeat the lien of the levy on the property of one whose name is not indexed as against a subsequent mortgagee without actual notice: *Lamdon v. Denman*, 18 O. C. C. 857, 4 O. C. D. 65.

The entries on a sheriff's foreign execution docket are constructive notice to subsequent purchasers and creditors of a lien: *Coal Co. v. Bank*, 55 O. S. 233, IV Longsdorf's Notes, 660.

There is no statutory requirement that an entry be made upon the foreign execution docket of the issuing of a second or subsequent execution from the county wherein the judgment was rendered, and where the record shows that a judgment lien has been acquired, the duty devolves upon a prospective purchaser to search the record of the latter county, and ascertain whether the lien has been kept alive or is dormant: *Steel v. Katzenmeyer*, 5 O. C. C. (N.S.) 25, 16 O. C. D. 400.

XXIII. TRIAL DOCKET.

Under G. C., § 11720, the effect of a decree in foreclosure is not affected by its having been left off of the trial docket: *Moore v. Ogden*, 35 O. S. 430, III Longsdorf's Notes, 794.

XXIV. EXEMPTION FROM EXECUTION.

A. PURPOSE AND SCOPE OF STATUTORY PROVISIONS.

G. C., § 11725, is to be construed in connection with G. C., § 10654: *In re Post*, 8 O. L. R. 492, 55 Bull. 382.

G. C., § 11725, is not limited by G. C., § 10253, of the justice's code. Hence, an attachment for the excess of earnings over \$150, if necessary for the support of the family, must be dissolved: *Vandal v. Daiber*, 10 O. C. C. 355, 6 O. C. D. 585, 3 O. D. (N.P.) 385; see *Driscoll v. Kelly*, 5 O. N. P. 243, 4 O. D. (N.P.) 124.

The policy of the law is to construe exemption laws equitably and liberally, so as to effect the purposes of their enactment: *Bretz v. Moore*, 4 O. C. C. (N.S.) 556, 16 O. C. D. 66 [affirmed *Swart v. Dock Co.*, 69 O. S. 574, IV Longsdorf's Notes, 965].

The law relating to exemptions should be liberally construed, not only in favor of the debtor, but of his family: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657; *McConnville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 657.

dorf's Notes, 596; *Ditney v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

The exemption is not exclusively for the benefit of the owner of the property. It is intended mainly for the benefit of the family for which he provides: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929; *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98; *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657.

The object of the exemption laws is not to exonerate the debtor from the payment of his debts, but "to protect his family": *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

One having a right, as agent or otherwise to demand an exemption in property levied on execution can not stand by and permit an officer to take the property in his custody without assertion or suggestion that the property is exempt, and afterwards forcibly rescue the property from the officer upon a claim of exemption. It was queried but not decided whether a city can claim an exemption in property subject to execution except only as to the right of exemption, or waives the exemption therein through failure of its mayor to demand it: *State v. Holden*, 12 O. D. (N.P.) 91.

The law in force when the debt occurred, and not when the suit is brought, governs exemptions: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149; *Curtis v. Selby*, 1 O. C. C. 40, 1 O. C. D. 25.

Property absolutely exempt by law must be noticed as such and let alone by the officer at his peril, unless the debtor turns it out to him: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

If the officer seizes property absolutely exempt, his bond would no doubt be liable: *State v. Jennings*, 4 O. S. 418, II Longsdorf's Notes, 109.

Property exempt only when selected is subject to levy and sale until selection. There is no presumption of the law that the debtor has selected or will claim any particular item of personal property in lieu of homestead, even though he owns no other: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

The provision of G. C., § 10272, making a demand in writing a prerequisite to the bringing of a suit in attachment for the excess over and above ninety per cent. of the personal earnings of the debtor, is applicable only to cases where it is sought to reach personal earnings of married men: *Parkinson v. Crawford*, 13 O. N. P. (N.S.) 73, 23 O. D. (N.P.) 77.

B. BENEFICIARY INSURANCE FUNDS.

The exemption of proceeds from benefit certificates from attachment or other legal process is to prevent its appropriation for debts of holders or beneficiary: *Brewing Co. v. Cassman*, 21 O. C. C. 465, 12 O. C. D. 141.

Money due on a certificate of membership in the Endowment Rank Knights of Pythias is not exempt from execution and attachment: *Hildreth v. Knights of Pythias*, 8 O. N. P. 540, 11 O. D. (N.P.) 622.

Where the deceased named his wife and son as beneficiaries under a life insurance policy and died leaving his wife the sole survivor of the three it was held that the wife was entitled to whole fund and none passed to the heirs: *Richardson v. Michener*, 4 O. D. (N.P.) 520, 30 Bull. 120.

Policies in different societies can not be added together, but each must stand alone: *Hinsch v. D'Ulassy*, 1 O. D. (N.P.) 372.

The order of a justice of the peace in attachment proceedings requiring a garnishee to pay the proceeds of a policy of insurance into court for the benefit of the judgment creditors is not an application of the fund to the creditors' claims so as to preclude a claim for exemption therein, the selection being reasonable if made before the fund has actually come into custody of the court: *Rempe v. Ravens*, 8 O. N. P. 513, 1 O. D. (N.P.) 684.

G. C., § 9394, exempting from debts a certain amount of a person's insurance on his own life payable to widow and children, applies to policies in companies of other states as well as of this state: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

A policy on a man's life purporting to have been effected by the wife for her sole use, in consideration of premiums paid and to be paid by her, is *prima facie* her sole property, and not governed by G. C., § 9394, though the husband paid the premiums: *Weber v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

Where a person insured his life, payable to his wife, in one company, but the next year by agreement of all parties this was surrendered, and a new policy in another company was taken out in the wife's name on the husband's life, he paying the premiums, it was held that though the first policy would have been governed by G. C., § 9394, the second policy was governed by G. C., § 9398, and creditors can only recover the premium for four years past: *Insurance Co. v. Eckert*, 5 Dec. Rep. 528, 6 Am. L. Rec. 452.

Life insurance for the benefit of a wife and three children, the premiums exceeding one hundred and fifty dollars, exhausts the

right to insure under G. C., § 9394, and the proceeds go to the wife and three children, notwithstanding the will, and the surplus of that policy and all of a later policy for the wife and four children, there being another child born, goes to the creditors: *Wagner v. Karman*, 6 Dec. Rec. 753, 7 Am. L. Rec. 670.

Where a husband, at his wife's suggestion and with her money, procured insurance on his life for her benefit, although he signed the application, it is within G. C., § 9397, and she holds it free of his creditors. He was her agent in obtaining it: *Jacob v. Insurance Co.*, 13 Dec. Rep. 696, 1 C. S. C. R. 519.

G. C., § 9394, applies. Existing creditors must have been injured by the payments, and if their debts were incurred only a few weeks before the death, the fact that there had been creditors years before who were compromised with and are not complaining, is not proof of injury to any rights: *Weber v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

An assignment by a man of a policy on his life to his wife with intent to defraud creditors is voidable. G. C., § 9395, was not intended to dispense with *bona fides* of such assignment. If set aside the whole proceeds less the amount permitted to the wife by G. C., § 9394, and not merely the premiums paid, go to the creditors: *Child v. Graham*, 8 Dec. Rep. 294, 7 Bull. 43.

Insurance to executors for the benefit of brothers and sisters in a mutual assessment company of another state where it is not subject to the insured's creditors, and made and to be performed there, is exempt here from such creditors. G. C., § 9441, excluding application of preceding sections to foreign assessment companies, excludes G. C., § 9394, and thus distinguishes: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238; *Andress' Estate*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

G. C., § 9469, exempting beneficial insurance from the beneficiaries' debts is constitutional: *Williams v. Donogh*, 6 O. N. P. 418, 9 O. D. (N.P.) 414.

The law making power may provide adequate laws for the full collection of debts, or it may omit to do so; it has the power within the limits of constitution, to declare what property shall be exempt from force of the collection laws and when that power has been lawfully exercised the effect is to make the law a part of subsequently executed contracts: *Williams v. Donogh*, 65 O. S. 499, IV Longsdorf's Notes, 890. See also CONSTITUTIONAL LAW.

A paid-up ten-payment life insurance providing for payment of the face to the wife

at insured's death and an annuity to him after twenty years from date of living, can not be subjected by the trustee in bankruptcy as to the amount payable to the wife, but the husband's future annuity only can be reached: *In re Shaefer*, 16 O. F. D. 637, 9 O. L. R. 357. See also BANKRUPTCY.

C. EXEMPTION TO HEAD OF FAMILY AND WIDOW.

1. Person Who Has Family.

A man who does not live with and support his family is not entitled to have his wages exempt: *Beitz v. Schueller*, 7 O. N. P. 619, 8 O. D. (N.P.) 674.

A widower who is living with his own mother can not be said to be a man of family and entitled to the special exemption allowed to one with a family because he contributes something toward the support of a stepchild, who has never been formally declared to be his own child and who lives with her maternal grandmother: *Kraft v. Wolf*, 3 O. N. P. (N.S.) 105, 15 O. D. (N.P.) 554.

The word "family" as used in G. C., § 11725, does not necessarily require a wife: *Weber v. Beier*, 14 O. C. C. 277, 7 O. C. D. 381.

The father of a bastard child, who is living with and supported by the father, is not a person who has a family, under G. C., § 11725: *Moore v. Baughman*, 7 O. N. P. 149, 8 O. D. (N.P.) 396.

A debtor supporting his widowed mother and invalid brother, who live with him, is not the head of a family or a person having a family, within the meaning of G. C., § 11725. The statute suggests and implies support and maintenance by a parent: *Riley v. Hitzler*, 49 O. S. 651, IV Longsdorf's Notes, 477.

One who marries after filing his petition in bankruptcy, but before the trustee in bankruptcy is elected and qualified is not entitled to the exemptions allowed the head of a family. His status is determined at the time of the filing of his petition and no subsequent act on his part can alter that condition: *In re Fletcher*, 15 O. F. D. 210, 16 Am. Bank. Rep. 491.

2. Widow.

A divorced woman if not a "widow" is at least an unmarried female and where she has the care and maintenance of her own minor children she is entitled to the exemption in lieu of homestead: *In re Giles*, 6 O. L. R. 173.

A widow, not the owner of a homestead, and not having in good faith the care and

maintenance of any minor child or children of a deceased relation, is not entitled to hold property exempt from levy and sale: *Brown v. Parham*, 1 O. C. C. (N.S.) 602, 4 O. C. C. (N.S.) 344, 15 O. C. D. 640 [explaining *Wentzel v. Hays*, 16 O. C. C. 110, 8 O. C. D. 756; affirmed, without opinion, *Brown v. Parham*, 71 O. S. 516]. The correctness of this view was doubted in *Bentze v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244, but the affirmance by the supreme court was regarded as conclusive.

3. Who May Take Advantage of Exemption Laws.

The defendant in execution only can avail himself of the privilege given by G. C., § 11725: *Kelley v. Barnett*, 36 Bull. 314 [affirmed, without opinion, *Kelley v. Barnett*, 55 O. S. 662]; *Conley v. Chilcote*, 25 O. S. 320, III Longsdorf's Notes, 232.

Where a man engaged in agriculture absconds, his wife can not claim his horse, etc., as exempt under G. C., § 11726, giving this exemption to a person engaged in agriculture. The privilege is personal to him: *Kelley v. Barnett*, 36 Bull. 314 [affirmed, without opinion, *Kelley v. Barnett*, 55 O. S. 662].

The exemption laws extend to nonresidents: *Sproul v. McCoy*, 26 O. S. 577, III Longsdorf's Notes, 330; *Jacoby v. Dotson*, 7 O. N. P. 276, 7 O. D. (N.P.) 412.

The exemption laws extend to nonresidents in a bastardy proceeding: *State, ex rel., v. O'Brien*, 14 O. C. C. 300, 7 O. C. D. 386.

The exemption is a personal privilege and must be claimed by the party entitled thereto before the property is sold: *McComb v. Thompson*, 42 O. S. 130, IV Longsdorf's Notes, 98.

A debtor living with and supporting his widowed mother and invalid brother is not entitled to hold his personal earnings exempt from execution or in lieu of homestead: *Riley v. Hitzler*, 49 O. S. 651, IV Longsdorf's Notes, 477.

A married woman living apart from her husband and having no child with her is entitled to the exemptions of heads of families. G. C., § 11591, does not require her to be the head of a family: *Kimmel v. Paronto*, 52 O. S. 468, IV Longsdorf's Notes, 579.

A man not living with his family and not contributing to their support, can not hold his wages exempt from attachment as being necessary for the support of family: *Wright v. Ball*, 4 Dec. Rep. 231, 1 Clev. L. Rep. 140.

A man who does not live with and support his family is not entitled to have his wages exempt: *Beitz v. Schueller*, 7 O. N.

P. 619, 8 O. D. (N.P.) 674; *Beitz v. Schueller*, 35 Bull. 358.

A father of a bastard child who is living with and supported by him is not thereby a person who has a family under G. C., § 11725, entitled to hold earnings exempt. R. S., § 3140-2 (repealed 99 v. 230; for analogous section, see G. C., § 13008), does not apply to the reputed father: *Moore v. Baughman*, 7 O. N. P. 149, 8 O. D. (N.P.) 396.

4. What Property is Exempt.

(a) Wearing-apparel.

"Wearing apparel" includes that which is worn for comfort or convenience. It may be cheap or expensive according to the wearer's station in life. Therefore a watch and chain, which is constantly worn and used may constitute a part of one's "wearing apparel" within the meaning of the statute: *In re Henry*, 14 O. F. D. 353, 14 Am. Bank. Rep. 362.

A watch and chain of moderate value, worn habitually, are "wearing apparel": *Beckett v. Wishon*, 5 O. N. P. 155, 5 O. D. (N.P.) 257.

A diamond ring worn for mere personal adornment is not "wearing apparel" within the meaning of G. C., § 11725: *In re Henry*, 14 O. F. D. 353, 14 Am. Bank. Rep. 362.

A married woman living apart from her husband and not supporting a child demanded and was allowed wearing apparel and household goods in *Kimmel v. Paronto*, 52 O. S. 468, IV Longsdorf's Notes, 579.

A married woman living apart from her husband and not supporting a child demanded and was allowed money in lieu of homestead in *Shaw v. Foley*, 62 O. S. 30, IV Longsdorf's Notes, 823. Under G. C., § 11591.

(b) Provisions.

A field of standing corn was not exempt, either as food for animals or as provisions actually prepared and designed for the family. They must be appropriated to that use, else a grocery keeper could claim his stock was for the family: *Donahue v. Steele*, 1 Dec. Rep. 130, 2 W. L. J. 402.

Groceries bought to sell in part, and in part for family use, all kept without separation in a store, were not in any part exempt as prepared and designed as provisions for the family: *Robinett v. Doyle*, 2 Dec. Rep. 391, 2 W. L. M. 585.

(c) Household Furniture.

The term "household furniture," though not susceptible of strict definition, has acquired a definite meaning by which it is un-

derstood to include everything which may contribute to the use or convenience of the householder or the ornament of the house, such as plate, linen, china, pictures, etc. Family pictures are exempt. But this exemption would not extend to the private gallery of a connoisseur nor to costly pictures the subjects of which are not connected with the family in whose possession they are found: *McMicken v. Directors*, 3 Dec. Rep. 429, 2 Am. L. Reg. 489.

(d) *Personal Earnings.*

(aa) *In Ordinary Actions.*

Personal earnings are exempt from being applied to the payment of debts, where necessary for the support of the debtor's family: *Snook v. Snetzer*, 25 O. S. 516, III Longsdorf's Notes, 258.

A citizen of this state may be enjoined from prosecuting an attachment in another state against a citizen of this state to subject to the payment of his claim the earnings of the debtor which, by the laws of this state, are exempt from being applied to the payment of such claim: *Snook v. Snetzer*, 25 O. S. 516, III Longsdorf's Notes, 258.

The salary of a superintendent of a county infirmary is "personal earnings": *Beckett v. Wishon*, 5 O. N. P. 155, 5 O. D. (N.P.) 257.

The interest of a workingman, whose wages are exempt, in the property of his wife, to whom he regularly pays a part of his wages, to be used by the wife in paying off a mortgage on this property, can not be subjected to the creditors' claims: *Stump v. Frary*, 13 O. C. C. 619, 6 O. C. D. 357; *Stump v. Frary*, 2 O. D. (N.P.) 680.

A resident head of a family may hold his exemption in lieu of homestead in addition to the personal earnings exempt: *Ross v. Tailoring Co.*, 7 O. C. C. 51, 3 O. C. D. 658.

Where a debtor earning sixty dollars a month gives sixteen dollars to his wife to pay building association dues on a loan used in building the house in which the family reside, the money thus paid will be regarded as rent under the law exempting personal earnings and beyond the reach of creditors. But money previously paid by the husband out of his earnings for the lot on which the house stands is not exempt, and the property to the extent of such payment by him is liable for his debts: *Lynch v. Rodebaugh*, 4 O. N. P. (N.S.) 260, 17 O. D. (N.P.) 58.

Personal earnings are exempt from proceedings in aid of execution (see G. C., § 11781): *Riley v. Hitzler*, 49 O. S. 651, IV Longsdorf's Notes, 477.

In proceedings in aid of execution, before a justice of the peace, against an unmarried

judgment debtor, having in good faith the maintenance and support of his widowed mother, wholly dependent upon him for support, such judgment debtor, under the provisions of G. C., §§ 10253 and 10436, may demand and hold as exempt from the orders of the justice, his personal earnings in a sum less than one hundred and fifty dollars, if the same have been earned within three months next preceding the commencement of the proceeding: *Duffey v. Reardon*, 70 O. S. 328, IV Longsdorf's Notes, 974 [distinguishing *Riley v. Hitzler*, 49 O. S. 651, IV Longsdorf's Notes, 477]. See also PROCEEDINGS IN AID OF EXECUTION.

Payment by the garnishee after the action was begun but before he was served, is sufficient to cancel all excess of one hundred and fifty dollars or more, will not invalidate attachment of such excess: *Driscoll v. Kelly*, 5 O. N. P. 243, 4 O. D. (N.P.) 124. See also ATTACHMENT.

(bb) *In Actions for Necessaries.*

Ten per cent of a debtor's personal earnings are not exempt from execution and attachment where the claim, debt or demand for the payment of which it is sought to subject them is for necessities furnished to the debtor, his wife or family since April 26, 1898: *K. B. Co. v. Batie*, 2 O. C. C. (N.S.) 358, 15 O. C. D. 482.

An attachment issued in an action for necessities should not be discharged because the plaintiff has failed to make a demand in writing for the excess over and above ninety per cent. of the personal earnings of the debtor. G. C., § 10272: *K. B. Co. v. Batie*, 2 O. C. C. (N.S.) 358, 15 O. C. D. 482. See also ATTACHMENT.

G. C., § 10253, subdivision 9, providing that of earnings exempt from attachment before a justice, ten per cent. shall not be exempt if the claim is for necessities, does not apply to a person's debt for his mother's burial expenses. "Necessaries" means what is required for the support of a living person: *Watkins v. Schlechter*, 7 O. N. P. 42, 9 O. D. (N.P.) 590.

The word "necessaries" is not used in the Ohio statutes in the narrow sense of articles which are indispensable, but it includes all articles which are within the circumstances of the family and will enable them to live conveniently and decently according to the custom of those among whom they reside; and under this construction of the word the water heating apparatus used in a dwelling of sufficient convenience and accommodation to have a bath room and tub is a "necessity": *Water Heater Co. v. Meckel*, 9 O. N. P. (N.S.) 581.

Under proceedings in aid of execution, it may be shown by parol evidence that the claim upon which the judgment was rendered was for necessities, and ten per cent. of the earnings of the judgment debtor subjected to the payment of the claim of the judgment creditor: *Sweet v. Barnum & Co.*, 8 O. C. C. (N.S.) 108, 18 O. C. D. 380.

A judgment on a claim for necessities is a debt for necessities to satisfy which ten per cent. of the debtor's earnings may be subjected: *Esman v. Roller*, 17 O. C. D. 712, 3 O. L. R. 116; *Sweet v. Barnum*, 8 O. C. C. (N.S.) 108, 18 O. C. D. 380.

Where a claim against the head of a family for necessities has been reduced to a judgment, the judgment creditor can not enforce the payment from ten per cent. of the personal earnings of the debtor on the theory that his claim is still for necessities. The original claim is merged in the judgment: *Salisbury v. House*, 15 O. D. (N.P.) 584.

Only that portion above ninety per cent. of the personal earnings of the debtor is subject to garnishment under G. C., § 10271; and if there be more than one creditor whose claim is preferred on the ground of necessities, such creditors, individually or collectively, can not sequester more than ten per cent. of such earnings in payment thereof: *Bulla v. Kent*, 15 O. D. (N.P.) 409, 2 O. L. R. 340.

Voluntary payments to the extent of ten per cent. after the same are garnished will not protect the debtor from prior garnishment by another creditor: *Walt v. Kant*, 15 O. D. (N.P.) 643, 2 O. L. R. 493.

Voluntary payments to the extent of ten per cent. precludes further proceedings pending such payments: *Bulla v. Kent*, 15 O. D. (N.P.) 409, 2 O. L. R. 340; *Hackett v. Zuendel*, 15 O. D. (N.P.) 498, 3 O. L. R. 47.

An action in attachment or in aid of execution can not be maintained to recover ten per cent. of the wages of a married man, on a bill for necessities, unless a written demand is first made upon the debtor as provided in G. C., § 10272, as amended, 94 v. 376: *Freedman v. Hanaure*, 12 O. D. (N.P.) 438.

Only one actually furnishing necessities directly to a wage earner is entitled to the benefit of the ten per cent. statute; and where necessities are sold to a wage earner by a broker, an action in attachment does not lie for ten per cent. of the personal earnings of the debtor: *Schaap v. Flick*, 14 O. N. P. (N.S.) 260.

A claim for work and labor in shoeing a horse, used by its owner in the express business, is not a claim for necessities within the meaning of that term as used in the

code: *Mund v. Motz*, 14 O. N. P. (N.S.) 239.

Unless it appear that a judgment rendered by a justice of the peace was founded on a claim for necessities, the defendant is entitled to his earnings for personal services within three months next preceding the entering of the judgment: *Mund v. Motz*, 14 O. N. P. (N.S.) 239.

The demand in writing upon a debtor for the excess over and above ninety per cent. of his personal earnings, which is required by G. C., § 10272, may be made by registered letter, if such letter is delivered to the debtor personally and within the time limited: *Ostrander v. Norris*, 20 O. C. D. 643.

The requirement that a demand must be made in writing for the excess over and above ninety per cent. of the personal earnings of a debtor, has no application to a proceeding brought in aid of execution under G. C., § 10436: *Duffey v. Reardon*, 70 O. S. 328, IV Longsdorf's Notes, 974; *Hopper v. Gullier*, 14 O. C. C. (N.S.) 519, 23 O. C. D. 154; *Ammon v. Delaney*, 11 O. N. P. (N.S.) 574, 21 O. D. (N.P.) 251.

The provision of the statute that one bringing an action on a claim for necessities should first make a demand in writing upon the debtor for the excess over ninety per cent. of his original earnings, is jurisdictional, and when this requirement has not been complied with the attachment should be discharged: *Hughes v. Shields*, 7 O. C. C. (N.S.) 84, 18 O. C. D. 206 [affirming *Hughes v. Shields*, 15 O. D. (N.P.) 255].

A demand in writing upon a debtor for necessities, for the excess over ninety per cent. of his personal earnings, is a necessary condition to the issuing of an order for attachment: *Nemit v. Vargo*, 8 O. C. C. (N.S.) 97, 18 O. C. D. 515 [following *Hughes v. Shields*, 7 O. C. C. (N.S.) 84, 18 O. C. D. 206]. See also ATTACHMENT.

(e) Other Questions.

Pension money and arrears of pension paid by the United States to the guardian of an imbecile pensioner is subject to judgment: *Fullwiler v. Wilson*, 6 O. C. C. 36, 3 O. C. D. 338 [affirmed, in memorandum opinion on ground stated in opinion below: *Wilson v. Fullwiler*, 52 O. S. 623].

Under the act of 1850 farming utensils used for the support of the family were exempt, though the owner was not a farmer, as his threshing machine, clover huller, and wagon to haul them, used on the grain of others: *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149.

A defendant against whom an attachment was issued and judgment rendered in a jus-

tice's court, is entitled to set up his claim for exemption in an action of interpleader filed in the superior court by the garnishee, who has been ordered by the justice to pay the amount into his court, but has not complied with the order; and this is true notwithstanding no claim for exemption was made in the justice's court: *Rempe v. Ravens*, 8 O. N. P. 513, 11 O. D. (N.P.) 684.

Pension money is not exempt from liability for debts, after it has come into the pensioner's hands: *Fullwiler v. Infield*, 6 O. C. C. 36, 3 O. C. D. 338 [affirmed, on opinion below, *Infield v. Fullwiler*, 52 O. S. 623, 32 Bull. 374].

A debtor's family can be frugal in the expenditure of ordinary and reasonable allowances for household expenses without having their savings subject to the payment of his creditors: *O'Hara v. Bell*, 8 O. N. P. (N.S.) 352, 20 O. D. (N.P.) 55.

D. SELECTION.

Selection is necessary if the exemption depends on selection, otherwise the officer is not a trespasser. If the debtor is present he should select when the levy is made, otherwise on notice given to the officer in a reasonable time and before sale; hence, to hold the officer for trespass for levy on such property the plaintiff must prove that he had claimed it as exempt: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

The demand of articles as exempt may be made after levy and before sale: *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149.

The selection must be made at the time of levy. If taken into custody by the officer it is too late: *Donahue v. Steele*, 1 Dec. Rep. 130, 2 W. L. J. 402.

Demand of chattels to be exempt from an attachment before a justice is properly made to the justice: *Kirk v. Stevenson*, 59 O. S. 556, IV Longsdorf's Notes, 771.

If the attachment plaintiff sues the garnishee to recover what he owed to an original defendant, if the latter claims to have selected it as exempt from execution in lieu of homestead, he is entitled to be made a party, and to show such selection: *Chilicote v. Conley*, 36 O. S. 545, III Longsdorf's Notes, 874. See also ATTACHMENT.

An order made by a justice of the peace in proceedings in aid of execution, that a third party, who appears on notice for that purpose and admits an indebtedness to the judgment debtor, shall pay into court the amount of such indebtedness to apply on the judgment, is a final order reviewable on error at the suit of the judgment debtor, where it is made over his demand that the amount so due him is exempt under the laws

of Ohio: *Duffey v. Reardon*, 70 O. S. 328, IV Longsdorf's Notes, 974. See also PROCEEDINGS IN AID OF EXECUTION.

Exemptions dependent on selection are personal privileges, hence, on a creditor's action to compel the garnishee to pay him the amount he owed the original debtor, the garnishee can not show that the debtor could have held the amount exempt: *Conley v. Chilcote*, 25 O. S. 320, III Longsdorf's Notes, 232. See also ATTACHMENT.

E. WAIVER OF EXEMPTION.

Where after levy on a horse the debtor demanded the exemptions allowed by law, and he and the officer agree on a time and place to select and appraise the property exempt, the intentional absence of the debtor waives his right to select the horse as exempt: *Butt v. Green*, 29 O. S. 667, III Longsdorf's Notes, 509.

Exempt property can be pledged or mortgaged by the owner, and this waives the exemption as to such incumbrance: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

Action for sale of property claimed as exempt is waived by demanding and receiving the surplus after satisfying the execution: *Merry v. Walker*, 2 Dec. Rep. 308, 2 W. L. M. 384.

The right to make selection of property subject to exemption may be waived: *Rempe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940.

An assignment of wages or salary to be earned under an existing employment made in good faith and for a valuable consideration, is valid where the relation between the employe and his employer is such that the employe may be reasonably expected to earn the wages covered by the contract, and against such a contract a claim for exemption can not prevail: *Brooks Co. v. Tolman*, 6 O. C. C. (N.S.) 137, 17 O. C. D. 321 [affirmed, without opinion, *Brooks Co. v. Tolman* 74 O. S. 427]. See also SERVICES.

F. EXEMPTIONS TO CERTAIN OCCUPATIONS.

A person who lives in a village, and cultivates corn, potatoes, cabbage, beans, etc., on two town lots containing less than half an acre of land, is not one "engaged in the business of agriculture" within the meaning of G. C., § 11726: *Dulgar v. Hartmeyer*, 6 Dec. Rep. 763, 8 Am. L. Rec. 15; *Dulgar v. Hartmeyer*, 7 Dec. Rep. 642, 4 Bull. 540.

A "buggy" is not included in the term "wagon": *Dulgar v. Hartmeyer*, 6 Dec. Rep. 763, 8 Am. L. Rec. 15; *Dulgar v. Hartmeyer*, 7 Dec. Rep. 642, 4 Bull. 540.

A horse of any value is exempt for agriculture: *Munson v. Gashorn*, 1 Dec. Rep. 404, 8 W. L. J. 569.

Where a man engaged in agriculture absconds, his wife can not claim his horse, etc., as exempt under G. C., §11726. The privilege is personal to him: *Kelley v. Barnett*, 36 Bull. 314 [affirmed, without opinion, *Kelley v. Barnett*, 55 O. S. 662].

Being in the military service of the United States in the war, entitling a person under the act of 1861 to have his property exempt from sale is a privilege which must be asserted by him; it is not self-operating, and is waivable: *Sked v. Sedgley*, 86 O. S. 483.

On an order of sale on foreclosure, before a person is mustered into the service, a sale and confirmation while he is in the service is not void but voidable, hence not collaterally impeachable. If he does not object until after sale, confirmation, and possession taken, his remedy, if any, is by a direct proceeding to have the sale and confirmation set aside. A suit for an account and to redeem does not lie: *Sked v. Sedgley*, 86 O. S. 483.

The exemption of tools or a team in the act of 1850 in favor of one not the owner of a homestead are to be restricted to tools and team used for the support of family: *Burgess v. Everett*, 9 O. S. 425, II Longsdorf's Notes, 387.

Farming utensils used for support of family are exempt though the owner is not a farmer, as his threshing machine, clover huller and wagon to haul them, used on the grain of others: *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149.

G. CLAIMS AGAINST WHICH EXEMPTIONS DO NOT APPLY.

G. C., § 11729, is to be strictly construed: *Kelly v. Hines*, 6 Dec. Rep. 988, 9 Am. L. Rec. 404.

G. C., §11729, does not give to a judgment creditor any greater rights against mortgaged land than against other land: *Bernse v. Hamilton*, 6 O. C. C. 487, 3 O. C. D. 550.

Where a vendor reduces his claim for balance of purchase money to judgment, and takes the goods upon execution, there is a waiver by him of ownership, by virtue of a chattel mortgage, and the vendee is entitled to a homestead exemption out of such property: *State, ex rel., v. Laoy*, 18 O. C. C. 379, 10 O. C. D. 111.

Where a husband and wife have executed a mortgage and a judgment is afterwards recovered against the husband, the judgment creditor can not have the property sold against the wishes of the mortgagee for the payment of the mortgage as well as the judgment, and thus prevent the allowance

of a homestead: *Bernse v. Hamilton*, 6 O. C. C. 487, 3 O. C. D. 550.

The exception is, not of an amount less than one hundred dollars of a claim, but of a claim less than one hundred dollars for work and labor: *Kelly v. Hines*, 6 Dec. Rep. 988, 9 Am. L. Rec. 404.

In an action under the act of April 18, 1870 (67 v. 101), for injury to means of support in consequence of intoxication, which caused death, no exemption is allowed. (See G. C., § 6208): *Davis v. Justice*, 31 O. S. 359, III Longsdorf's Notes, 590.

In proceedings against a boat by name the owner is not entitled to exemption in lieu of homestead because the boat is seized for its debt, not his, and, besides, exemptions do not obtain against liens created by the debtor himself: *Johnson v. Ward*, 27 O. S. 517, III Longsdorf's Notes, 372.

If the mortgagee of exempt chattels gets judgment and levy on them, instead of foreclosing, the debtor can not claim the exemption: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26 [followed in *Colwell v. Carper*, 15 O. S. 279, II Longsdorf's Notes, 729].

If the mortgagee of exempt chattels gets judgment and levy on them, instead of foreclosing, the debtor's wife can not claim the exemption: *Hiser v. Dawson*, 9 Dec. Rep. 827, 17 Bull. 318.

That personal judgment and execution, instead of foreclosure of a real estate mortgage, does not bar dower released in the mortgage, see *Taylor v. Fowler*, 18 O. 567, I Longsdorf's Notes, 862.

H. SET-OFF

The right of set off is not affected by the provisions relating to exemptions: *Serhant v. Haker*, 72 O. S. 250, IV Longsdorf's Notes, 1002.

The provisions of G. C., §11321, that when cross demands have existed between persons under such circumstances that if one had brought an action against the other, a set-off could have set up, and that the two demands must be deemed compensated so far as they equal each other, forbids the allowance to one of the demand against him on a claim of exemption, even though such claimant may be entitled under the exemption statutes to hold exempt a sum equal to the demand against him: *Serhant v. Haker*, 73 O. S. 250, IV Longsdorf's Notes, 1002 [following *Pierce v. Kepner*, 52 O. S. 615, IV Longsdorf's Notes, 584]. See also SET-OFF.

The defendant's right of set off can be defeated by a claim by plaintiff to hold that amount exempt from execution: *Kepner v. Pierce*, 5 O. C. C. 488, 3 O. C. D. 239 [af-

firmed, without opinion, *Pierce v. Kepner*, 52 O. S. 615].

This would probably not apply in a suit for seizing and selling exempt property, for, otherwise a creditor would defeat the debtor's exemption: *Kepner v. Pierce*, 5 O. C. C. 488, 3 O. C. D. 239.

I. ALIMONY.

Whether exemptions to heads of families are applicable to judgments for alimony, was queried but not decided: *Pancost v. State, ex rel.*, 15 O. C. C. 246, 8 O. C. D. 546.

An award of alimony in gross is in legal effect a judgment collectible by execution, and operating *per se* as a lien on all the real estate of the defendant in the county: *Coffman v. Finney*, 65 O. S. 61, IV Longsdorf's Notes, 880. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

J. APPEAL.

A claim for exemption in an appellate court by a defendant against whom attachment was issued and judgment rendered in justice's court should be allowed: *Rempe v. Ravens*, 8 O. N. P. 513, 11 O. D. (N.P.) 684.

K. LAW CONTROLLING.

The law in force when the debt was contracted and not that when the suit is brought, governs exemptions: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *Curtis v. Selby*, 1 O. C. C. 40, 1 O. C. D. 25; *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149.

In a bankruptcy proceeding the state statutes determine the amount and character of the exemptions and to whom they are to be allowed, but the bankruptcy act, together with the rules of practice laid down by the supreme court controls as to the manner of the selection of the exempted property: *In re McOlintock*, 15 O. F. D. 58, 13 Am. Bank. Rep. 606.

A foreign state's exemption laws will not be applied here: *Jacoby v. Dotson*, 5 O. N. P. 282, 7 O. D. (N.P.) 412.

Property exempt only when selected is subject to levy and sale until selection. There is no presumption at law that the debtor has selected or will claim any particular item of personal property, in lieu of homestead, even though he owns no other: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980. See G. C., § 11738.

A claim for exemption can not prevail against an assignment of unearned wages: *Brooks v. Tolman*, 6 O. C. C. (N.S.) 137, 17 O. C. D. 321 [affirmed, without opinion,

Brooks v. Tolman, 74 O. S. 427, IV Longsdorf's Notes, 1012].

XXV. HOMESTEAD.

A. DEFINITION.

Homestead means the place where the head of the family resides. It is the home of the family which the law exempts and protects. It is not that which they intend to make their home, but it is that which actually is their home: *Stafford v. Smith*, 11 Dec. Rep. 884, 30 Bull. 288.

B. SCOPE AND PURPOSE.

The object of G. C., § 11730, is not to protect the debtor but to protect his family: *In re Talbott*, 14 O. F. D. 465.

The purpose of G. C., § 11734, exempting from execution a homestead not exceeding in value \$1,000, is to save unfortunate debtors who have families a place where they may live. It is as well subserved to one holding a life estate in the whole property by setting off an amount, the fee simple title to which is worth \$1,000, as it would be if the debtor owned a fee simple in the property. In neither case could any benefit be derived by the debtor beyond his own life: *Kerns v. Linden*, 3 O. C. C. (N.S.) 37, 13 O. C. D. 162.

G. C., § 11738, applies only to homesteads in Ohio occupied by residents: *Campbell v. Bennington*, 4 O. C. C. (N.S.) 447, 16 O. C. D. 239.

The homestead laws being designed for the benefit of the debtor, should be so construed as to effectuate and not to thwart its object and policy: *In re Assignment of Bell*, 12 O. C. D. 731.

These statutes should be liberally construed in favor of the claimant: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657; *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596; *Dithey v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

An increase in the amount of the exemption by change of statute does not affect debts contracted before its passage: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149.

The exemption in force when the debt was contracted governs. An increase enacted after decree of foreclosure of a mortgage in which the wife did not join can not avail her: *Curtis v. Selby*, 1 O. C. C. 40, 1 O. C. D. 25.

If a homestead right existing when a judgment was rendered can be repealed a repealing statute will not be construed retrospectively in case of doubt: *Allen v. Russell*, 39 O. S. 336, III Longsdorf's Notes, 1032.

C. WHO IS ENTITLED TO HOMESTEAD.

1. *Husband and Wife Living Together.*

A husband and wife are to be regarded as living together unless separated judicially or by agreement: *Dittey v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

The clause, "husband and wife living together," can not be construed to mean husband and wife living permanently separate and apart: *Banking Co. v. Huffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

Where a husband absconds to parts unknown, to avoid creditors or a criminal prosecution, leaving his family at the residence, they are still living together in the eye of the law, and he is still presumably a resident of the state until it is shown that he has selected another home, and has abandoned the homestead; therefore the wife may claim homestead in the property as against his creditors: *Dittey v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

A wife living separate, under a decree awarding her alimony and custody of a child, is not entitled to exemption in lieu of a homestead on sale of his property under liens. G. C., § 11737, is to be construed with G. C., § 11730: *Lugauer v. Weisgerber*, 9 Dec. Rep. 458, 13 Bull. 637, see *Banking Co. v. Huffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

A wife living separate from her husband and not on the property can not claim exemption in lieu, out of the proceeds, against judgments against him, he not claiming the exemption: *Brewing Co. v. Westmeier*, 4 O. C. C. 296, 2 O. C. D. 555.

A wife separated from her husband by going with her children to another part of the state three months before, and now claiming, as against his mortgage, a homestead on the premises he occupies with his children by a former marriage, has the burden of showing that her removal was with the intention of returning: *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159.

The mere fact that a debtor is married and has children does not entitle him to the exemption: *Beitz v. Schueller*, 7 O. N. P. 619, 8 O. D. (N.P.) 674; *Beitz v. Schueller*, 35 Bull. 358.

The marriage of a debtor previous to the day of sale, but after the time of levy, does not entitle him to a homestead: *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364 [citing, *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30, and *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57].

If a party marries after executing a mortgage he is not entitled to a homestead: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

A husband and wife are not both entitled to a homestead exemption: *Dwinell v. Edwards*, 23 O. S. 603, III Longsdorf's Notes, 149; *Lippelman v. Boning*, 7 Dec. Rep. 450, 3 Bull. 296.

A husband and wife who are co-partners are not entitled, either jointly or severally, to exemption out of the firm assets: *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

The wife may make the claim for homestead exemption: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596.

The exemption in lieu of homestead reserved to the head of a family may be claimed by the debtor's wife: *Regan v. Zeeb*, 28 O. S. 483, III Longsdorf's Notes, 416; *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596.

The wife can not select property exempt, in lieu of homestead, where the debtor himself could not: *Hanes v. Tiffany*, 25 O. S. 549, III Longsdorf's Notes, 261; *Gibson v. Mundell*, 29 O. S. 523, III Longsdorf's Notes, 494.

A court is not precluded from holding that a husband and wife are "living together" within the meaning of the homestead exemption statute, by the fact that following his assignment for the benefit of creditors the husband became unable to support his wife and even his whereabouts are now unknown to her, where she expresses confidence that he will return to her as soon as he is able to provide for her support: *Assignment of Davies*, 13 O. N. P. (N.S.) 105.

2. *Widow.*

A widow without a family may claim a homestead exemption under G. C., § 11730. The punctuation as it was at the time of this decision must be disregarded: *Allen v. Russell*, 39 O. S. 336, III Longsdorf's Notes, 1032.

A widow is entitled to a homestead in addition to dower: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036. See G. C., § 11740.

G. C., § 11730, does not authorize the assignment of a homestead to a widow in the lands belonging to her deceased husband at the time of his death; the only right in a homestead in such lands is created by G. C., § 11732: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

A widow, not the owner of a homestead, and not having in good faith the care and maintenance of any minor child or children of a deceased relation, is not entitled to hold property exempt from levy and sale: *Brown v. Parham*, 1 O. C. C. (N.S.) 602, 4 O. C. C. (N.S.) 344, 15 O. C. D. 640 [explaining *Wentzel v. Hays*, 16 O. C. C. 110, 8 O. C. D.

756, affirmed, without opinion, *Brown v. Parham*, 71 O. S. 516].

The correctness of this view was doubted in *Bentzel v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244, but the affirmance by the supreme court was regarded as conclusive.

A divorced woman is not a "widow" within contemplation of the statute allowing homestead exemption to insolvent debtors with families or other dependents: *In re Assignment Ashbaugh*, 4 O. N. P. (N.S.) 631, 52 Bull. 73 [affirmed, without opinion].

Under G. C., § 11737, a widow is entitled to an allowance in lieu of homestead as well as the wife if the husband is living. Said section should be construed in connection with the provisions of cognate sections: *Bank v. Stoughton*, 18 O. D. (N.P.) 633, 5 O. L. R. 613.

When one dies intestate leaving a widow, who having separated from him, is permanently residing elsewhere, and the property on which he resided is brought to sale for the payment of a mortgage lien thereon and for the payment of his debts, she is not entitled to an allowance out of the proceeds in lieu of homestead, the widow's right in that regard being fixed by G. C., § 11732, which confines the right to "a widow composing a part of the decedent's family at the time of his death": *Nichols v. French*, 83 O. S. 162 [approving and following *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159].

3. Widower.

A widower with no other family than an unmarried daughter over the age of minority, living with him, is entitled to the exemption: *Boettger v. Fischer*, 8 Dec. Rep. 776, 9 Bull. 337.

A divorced man living with an unmarried minor son, is a widower within the meaning of G. C., §§ 11730, 11738, and is entitled to the homestead exemptions therein provided: *Kunkle v. Reeser*, 5 O. N. P. 401, 5 O. D. (N.P.) 422.

A husband living with minor children, although not living with his wife, is entitled to homestead provisions: *Weber v. Beier*, 14 O. C. C. 277, 7 O. C. D. 381.

A stepchild who has not been declared by the probate court, under G. C., §§ 8026, 8029, to be to all legal intents and purposes the child of its stepfather is not the child of such stepfather within the meaning of the act provided for exemption in lieu of homestead: *Kraft v. Wolf*, 3 O. N. P. (N.S.) 105, 15 O. D. (N.P.) 554.

4. Family of Decedent.

The finding in an order to sell real estate upon petition by an administrator making the heir, mortgagees of deceased, and persons claiming liens as judgment creditors of the heir, parties, that such creditors of the heir had a lien on his interest by virtue of the levy of executions after the death of the ancestor, is not a bar to an allowance in lieu of a homestead under G. C., § 11738, if at the time the sale is made and proceeds distributed, he, by reason of changed circumstances, is entitled to the exemption although at the time the order of sale was made he was unmarried and not entitled to the exemption: *Simons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11; citing, *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147; *Mortley v. Flanagan*, 38 O. S. 401, III Longsdorf's Notes, 978.

5. Non-residents.

G. C., § 11734, providing for the exemption of a homestead not exceeding \$1,000 in value to the execution debtor, applies only to a homestead situated within Ohio, and which is occupied by persons living in the state: *Campbell v. Bennington*, 4 O. C. C. (N.S.) 447, 16 O. C. D. 239.

A nonresident of Ohio is not entitled to select and have set off to him \$500 in lieu of a homestead under G. C., § 11738. The exemption is created only in favor of residents of the state: *Campbell v. Bennington*, 4 O. C. C. (N.S.) 447, 16 O. C. D. 239.

One who is the head of a family continues to be a resident of the state within the meaning of the attachment laws, and is entitled to exemptions in lieu of homestead so long as he and his family are here, without regard to the fact that he is preparing to remove with his family from the state and is on the eve of so doing: *Rancourt v. Hahn*, 10 O. C. C. (N.S.) 313, 20 O. C. D. 245.

D. NATURE OF HOMESTEAD.

1. What Estate Constitutes Homestead.

A tenancy for one year is not treated as a homestead so as to defeat the exemption of personalty in lieu of homestead: *Colwell v. Carper*, 15 O. S. 279, II Longsdorf's Notes, 729.

Where land is contracted for, yet purchase price is not fully paid nor a deed given, the purchaser is not the owner of a homestead in that land: *Robinett v. Doyle*, 2 Dec. Rep. 391, 2 W. L. M. 585.

A life estate may constitute a homestead: *Staley v. Wooley*, 8 O. C. C. 35, 4 O. C. D. 550.

A tenancy of a house, stable and parcel of land, for a single year, where the tenant does not claim the same as a homestead, is not an ownership of a homestead within the meaning of G. C., § 11731, so as to deprive the holder of the benefit of the exemption from execution, under the provisions of the act of May 23, 1850, of personal property not exceeding three hundred dollars in value, in addition to articles of property specially exempt: *Colwell v. Carper*, 15 O. S. 279, II Longsdorf's Notes, 729. The owner of life estate in property is the owner of a homestead: *Staley v. Woolley*, 8 O. C. C. 35, 4 O. C. D. 550.

The purpose of G. C., § 11734, providing for homestead exemption not exceeding in value \$1,000, is as well subverted to one holding a life estate in the whole property by setting off an amount the fee simple title to which is worth \$1,000, as it would be if the debtor owned a fee simple in the property. In neither case could any benefit be derived by the debtor beyond his own life: *Kerns v. Linden*, 3 O. C. C. (N.S.) 37, 13 O. C. D. 162.

The owner of a life estate in lands occupied by him as a residence, who conveys to a creditor, with an agreement for reconveyance on payment, is the owner of homestead, for this is merely a mortgage: *Biddinger v. Pratt*, 50 O. S. 719, IV Longsdorf's Notes, 525.

The possessor of a life estate is the owner of a homestead, though the instrument (called here a lease) conveying it provides for forfeiture if it is sold on execution against him. He is none the less an owner: *Staley v. Woolley*, 8 O. C. C. 35, 4 O. C. D. 550.

A life tenant can not, by disclaiming to hold it as homestead, claim personalty in lieu of homestead, but his acts of possession and use as a homestead will override the disclaimer: *Staley v. Woolley*, 8 O. C. C. 35, 4 O. C. D. 550.

One who has sold the property, stipulating for a right of repurchase within three years, and still occupies it, is not the owner of a homestead: *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596.

One who lives on land contracted for, a deed to be given when the balance is paid, is not the owner of a homestead, so as to preclude other exemptions, because a homestead is only on lands about to be levied on, and such equity is not subject to levy. Doubtless a creditor, by levying, would be estopped to deny sufficient title to support a homestead if demanded: *Bobinett v. Doyle*, 2 Dec. Rep. 391, 2 W. L. M. 585.

Incumbrances on the homestead in excess of its value and overdue do not entitle the

owner to \$500 out of chattels in lieu of homestead. The claimant is still the owner of a homestead. The sheriff does not have the duty of ascertaining incumbrances on the realty: *Bartram v. McCracken*, 41 O. S. 377, IV Longsdorf's Notes, 67.

That a foreclosure of one of the mortgages is pending, no decree having yet been taken, makes no difference: *Olding v. Kemker*, 9 Dec. Rep. 601, 15 Bull. 310.

An execution debtor is not the owner of a homestead where a decree of foreclosure of the homestead was made before levy on the chattels, and it was sold before their sale, though the sale was not confirmed. The sheriff's deed relates back to the day of sale. Hence he can claim on the chattels in lieu of homestead: *Carter v. Ross*, 8 O. C. C. 139, 4 O. C. D. 333.

If the homestead is sold to pay incumbrances, the debtor may claim the \$500 in lieu out of the surplus proceeds of other lands; for the right thereto depends on the facts, as of the time the surplus arises, and there was no homestead at that time: *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147.

Where F owned two mortgaged tracts, and lived on one as a homestead, and both were ordered sold to satisfy a judgment, and she demanded \$500 in lieu, claiming that the mortgages precluded homestead by metes and bounds, and the homestead tract was sold first, but its surplus, after paying the prior liens, did not satisfy F's demand, but there was a surplus from the sale of the other tract, it was held the first sale having divested her of homestead, she became entitled in lieu out of the surplus of subsequent sales, for she had no homestead when such surplus arose: *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147.

2. When Homestead May Be Acquired.

A homestead may be acquired at any time before levy, although the land was not so occupied at the time of the judgment: *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57.

In October, 1877, the judgment of W against K, became a lien upon K's real estate. In June, 1878, K occupied said property as a family homestead. It was held that under an order for sale, issued in January, 1879, K was entitled to an assignment of a homestead in such property: *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes 57.

3. How Homestead May Be Lost.

A homestead may be lost by neglect or refusal to claim it or by abandonment: *Cooper*

v. Cooper, 24 O. S. 488, III Longsdorf's Notes, 188; *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642; *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98.

A homestead may be lost by a sale of the homestead property: *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98; *Blank v. Altenau*, 19 O. C. C. 635, 10 O. C. D. 536.

A homestead may be lost by a removal from the state without an intent to return: *Stewart v. Boyd*, 6 Dec. Rep. 973, 9 Am. L. Rec. 364.

A homestead may be lost by a removal into another house owned by the debtor: *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147.

Where a husband and wife join in a mortgage, their homestead is lost as against the mortgage, even if the mortgage is defective: *Van Thorniley v. Peters*, 26 O. S. 471, III Longsdorf's Notes, 320; *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

A homestead may be lost by liens created by the act of a debtor before the property is used as a homestead: *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57.

A homestead is not lost by leasing the property, when the debtor goes to another county for temporary purposes: *Wetz v. Beard*, 12 O. S. 431, II Longsdorf's Notes, 574.

A homestead is not lost by a temporary absence with intent to return: *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642.

A homestead is not lost by a temporary absence with intent to return as when a party moved to a place where he had work by the month for the present: *Holmes v. Book*, 1 O. N. P. 58, 1 O. D. (N.P.) 665.

A homestead is not lost by a removal consequent on the destruction of the house by fire without intending to rebuild: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596.

A homestead is not lost where the debtor has to give up possession by reason of a foreclosure sale: *Holmes v. Book*, 1 O. N. P. 58, 1 O. D. (N.P.) 665.

A homestead is still allowed, after a fraudulent conveyance has been set aside, in the property which the debtor attempted to convey: *Bills v. Bills*, 41 O. S. 206, IV Longsdorf's Notes, 57.

A judgment debtor contracting to sell his homestead does not lose his right to his exemption in lieu of homestead because of a judgment obtained and execution issued before the execution of the deed: *Warns v. Reeck*, 8 O. C. C. (N.S.) 401, 18 O. C. D. 785.

4. When Homestead May Be Claimed.

The proper time for the assertion of the debtor's claim of exemption is when the officer is about to execute the writ of execution or order of sale: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657.

An assignor for creditors, reserving exemptions where the property is subject to chattel mortgages, and hence there is no surplus existing until after sale, is in time if he demands his exemption a reasonable time after sale (G. C., § 11111): *In re Bremer*, 3 O. N. P. 12, 4 O. D. (N.P.) 80.

The fact that the wife of an assignor possessed a homestead at the time the assignment was made, which she was compelled by financial stress to abandon pending the proceedings in the assignment, does not bar the husband from asserting a claim for homestead exemption subsequent to such abandonment and before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

5. Effect of Homestead.

A judgment lien which has attached does not become lost or removed from that part of the real estate thereafter set off as a family homestead by the assignment and use of such homestead: *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98.

In an action to subject lands fraudulently transferred, to the payment of a judgment, an answer by the judgment debtor that he is a resident of Ohio, the head of a family and entitled to hold the premises as a homestead is no defense: *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

A homestead is subject to judgment or execution lien before and after the same is demanded and set off to the debtor: *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98; *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

Occupation of premises as a homestead after a judgment lien has attached, before it was about to be levied on or seized under an order of sale, is superior to the lien of the judgment: *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57; *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

6. Mortgaged Realty.

A wife is not entitled to a homestead in mortgaged non-homestead land, even if she did not join in the mortgage: *Gibson v. Muddell*, 29 O. S. 523, III Longsdorf's Notes, 494.

A wife is entitled to a homestead in her husband's mortgaged property, she not having joined in the mortgage, and the mortgage being executed after marriage: *Murdock v. Welch*, 6 Dec. Rep. 835, 8 Am. L. Rec. 411;

Curtis v. Selby, 1 O. C. C. 40, 1 O. C. D. 25; G. C., § 11739.

A wife is not entitled to a homestead in her husband's mortgaged property if the mortgage was executed before marriage: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

A wife can claim the exemption where the property has been mortgaged but which she has not signed: *Murdock v. Welch*, 6 Dec. Rep. 835, 8 Am. L. Rec. 411.

A defective mortgage by husband and wife, it having but one witness, precludes homestead: *Van Thorniley v. Peters*, 26 O. S. 471, III Longsdorf's Notes, 320.

A mortgage waives homestead exemption in the property intended to be conveyed, although by mistake it describes other property: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

7. Partition.

A homestead can not be allowed on partition: *McMasters v. Smith*, 2 Dec. Rep. 723, 5 W. L. M. 25; *Rinehart v. Rinehart*, 6 Dec. Rep. 907, 8 Am. L. Rec. 654.

An exemption in lieu of homestead may be allowed on partition: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588; *Comer v. Dodson*, 22 O. S. 615, III Longsdorf's Notes, 106.

When there has been a voluntary partition between tenants in common before levy, a judgment debtor will be entitled to a homestead in the interest set off to her in severalty: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

A homestead can only be claimed as against creditors: *Rinehart v. Rinehart*, 6 Dec. Rep. 907, 8 Am. L. Rec. 654.

8. Homestead Belonging to Spouse.

A wife's separate property is not the husband's homestead: *Davis v. Dodds*, 20 O. S. 473, II Longsdorf's Notes, 1012.

A wife's general property may be her husband's homestead: *Koontz v. Bateman*, 2 Dec. Rep. 299, 2 W. L. M. 327.

When homestead property is held by a husband and wife in common, the husband is not precluded from claiming an exemption therein: *Prosch v. Kuchta*, 9 Dec. Rep. 129, 11 Bull. 65.

The husband is entitled to claim a homestead exemption, notwithstanding his wife owns property, if he has removed his family from the house and lot of his wife and no longer occupies it as a homestead: *Ryan v. Miller*, 40 O. S. 232, IV Longsdorf's Notes, 20.

Under the act of 1871, husband and wife can not each claim a homestead at the same time, and if either have a homestead, the

other can not claim exemptions in lieu of homestead: *Dwinnell v. Edwards*, 23 O. S. 603, III Longsdorf's Notes, 149.

Though the wife's homestead is mortgaged for more than its value it excludes the debtor's claim in lieu of homestead: *Lippleman v. Boning*, 7 Dec. Rep. 450, 3 Bull. 296.

Ownership by the debtor's wife of personal property to over \$1,000 will not defeat her or his claim in lieu of homestead out of the proceeds of sale: *Hellebusch v. Richter*, 7 Dec. Rep. 341, 2 Bull. 127 [affirmed, on other grounds, *Hellebusch v. Richter*, 37 O. S. 222, III Longsdorf's Notes, 908].

A homestead may be had in the undivided interest of a tenant in common. Hence, if the wife owns an undivided share of the farm on which the family lives, the husband can not select personalty, levied on, in lieu of homestead: *Keys v. Young*, 2 O. N. P. 390, 4 O. D. (N.P.) 113.

The act of 1846, exempting a wife's real estate from her husband's debts leaves his life estate therein intact, and, hence, having this homestead he can not claim personalty in lieu of homestead: *Newton v. Clarke*, 3 Dec. Rep. 165, 4 Gaz. 109.

The wife's horses, wagons and crops not being choses in action became his on marriage and subject to debts without reduction to possession: *Newton v. Clarke*, 3 Dec. Rep. 165, 4 Gaz. 109.

E. DEMAND BY WIFE.

The wife has no right to make the demand unless the husband fails or refuses to make it: *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

A married woman who has wrongfully and without cause permanently abandoned her husband, and has no child or children living with or supported by her, is not entitled to an allowance in lieu of a homestead in her husband's estate under G. C., §§ 11730, *et seq.*, nor can she make a valid demand therefor upon his failure to demand the same: *Home Banking Co. v. Huffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

F. LAW CONTROLLING.

The law in force at the time the debt was contracted determines the value of a homestead: *Curtis v. Selby*, 1 O. C. C. 40, 1 O. C. D. 25.

G. ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205.

In case of assignment the facts existing at the time the assignment was made controls when the exemption is claimed under G. C., §§ 11730, 11734 and 11738; when claimed under G. C., § 11737 at time the order of distribution is made (see 94 v. 372, § 2): *Kunkle v. Reeser*, 5 O. N. P. 401, 5 O. D. (N.P.) 422.

The fact that the wife of the assignor possessed a homestead at the time the assignment was made which she was compelled by financial stress to abandon, pending the proceedings in the assignment, does not bar the husband from asserting a claim for homestead exemption subsequent to such abandonment and before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205.

The fact that at the time of the assignment the assignor and his wife were living in a house which belonged to her and was heavily encumbered with liens, and from which they removed and she has since collected rent therefor, is not a bar to an allowance of homestead exemption: *Assignment of Davies*, 13 O. N. P. (N.S.) 105.

H. OTHER QUESTIONS.

In proceedings against a boat, neither the boat nor its furniture can be held exempt from execution in lieu of homestead: *Johnson v. Ward*, 27 O. S. 517, III Longsdorf's Notes, 372.

The question as to whether a homestead, set off under the statute has subsequently become subject to "further proceedings" against it, should be first presented to and determined by the court under whose process such proceedings are sought, before the same are had: *Wets v. Beard*, 12 O. S. 431, II Longsdorf's Notes, 574.

The fact that the affidavit for attachment avers that the property is "not exempt from execution" can not operate as an adjudication of the claim for exemption in advance of or in the absence of an assertion of such right of exemption: *Rampe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940. See also ATTACHMENT.

A homestead having been assigned by metes and bounds to the widow and minor children in a proceeding to sell to pay debts, an order to sell to pay debts subject to the homestead, and while occupied as such, is not voidable, but void, for want of jurisdiction: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

I. METHOD OF ALLOWING HOMESTEAD.

A homestead is subject to a judgment or an execution lien, both before and after the

same is demanded and set off to the debtor: *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

As to the effect of a fraudulent sale, see *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

As to the marshaling of claims by the court with reference to homestead exemption, see *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

An assignor is not entitled to a homestead exemption, to be paid from rents collected by the assignee as against the claim of a mortgagee of the property rented where the proceeds from the sale of the property were not sufficient to satisfy the mortgage. Until the purchase money is paid, the purchaser has not such an estate in land as will support the homestead right against the party to whom the purchase money is due: *Starkey v. Wainright*, 6 O. N. P. 32, 9 O. D. (N.P.) 436.

Rent on indivisible homestead begins at the date of the order of sale: *Powell v. Hambleton*, 6 Dec. Rep. 735, 7 Am. L. Rec. 605.

J. EFFECT OF ALLOWING HOMESTEAD.

A judgment lien does not become detached by the setting off of the homestead, and when the rights of homestead are removed, as by a conveyance by the judgment debtor, the lien may be enforced by due process of law: *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98.

Assigning a homestead will not prevent the judgment from becoming dormant: *Wuest v. James*, 51 O. S. 230, IV Longsdorf's Notes, 540.

Where a homestead is awarded to the debtor in indivisible property, he to pay a certain rent, the rent should begin from the issuance of the order of sale, and not from the levy: *Powell v. Hambleton*, 6 Dec. Rep. 735, 7 Am. L. Rec. 605.

The property set off as a homestead is not thereby relieved from being subjected to the payment of a judgment to the extent that it never can be so used, but is relieved only while occupied by debtor's family as a homestead: *Kerns v. Linden*, 3 O. C. C. (N.S.) 37, 13 O. C. D. 162.

A motion setting up the selection and demand of property in lieu of homestead exemption, if supported, discharges the attached property, whether it is in the form of a discharge of the attachment or not, and the justice has jurisdiction to entertain and dispose of the contention: *Rancourt v. Hahn*, 10 O. C. C. (N.S.) 313, 20 O. C. D. 245.

If a homestead is set off no further proceedings against it can be had in the case while the exemption continues. Whether it

has become subject to further proceedings must be determined by the trial court: *Wets v. Beard*, 12 O. S. 431, II Longsdorf's Notes, 574.

XXVI. ALLOWANCE IN CASE OF LIEN PARAMOUNT TO HOMESTEAD.

A. WHO MAY CLAIM.

1. Head of Family.

The balance of the proceeds of the sale, not exceeding five hundred dollars, shall be awarded to the head of the family: *Van Thorniley v. Peters*, 26 O. S. 471, III Longsdorf's Notes, 320; *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642; *Niehaus v. Paul*, 43 O. S. 63, IV Longsdorf's Notes, 147; *In re Knepple*, 4 O. N. P. 213, 6 O. D. (N.P.) 417.

2. Wife.

A balance not exceeding five hundred dollars may be awarded to the wife on her application: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596.

When the wife is living apart from her husband under a judicial decree, allowing her alimony, she is not entitled to the allowance: *Luganer v. Weisgerber*, 9 Dec. Rep. 458, 13 Bull. 637.

A married woman giving a note, and thus charging her separate property, does not create a lien precluding homestead, though the suit on it is, in form, in chancery to subject the estate; hence, she may claim, at any time before levy or order of sale, the same as any debtor: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

A wife separated from her husband by going with her children to another part of the state three months before, and now claiming, as against his mortgage, a homestead in the premises he occupies with his children by a former marriage, has the burden of showing that her removal was with the intention of returning: *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159.

A wife living separate from her husband and not on the property, can not claim exemption in lieu of homestead out of the proceeds, against judgments against him, he not claiming the exemption: *Brewing Co. v. Westmeier*, 4 O. C. C. 296, 2 O. C. D. 555.

3. Husband.

A balance not exceeding five hundred dollars may be awarded to a husband occupying the homestead with his minor children, though his wife has left him: *Weber v. Beier*, 14 O. C. C. 277, 7 O. C. D. 381.

4. Widow.

In view of the provisions of cognate sections a construction should be given to this section which will permit the allowance of a homestead to a widow, if the husband is dead, as well as to the "wife" if he is living: *Bank v. Stoughton*, 18 O. D. (N.P.) 633, 5 O. L. R. 613.

A widow whose husband was not the owner of a homestead is not entitled to an allowance in lieu of a homestead out of his estate: *Wolverton v. Paddock*, 3 O. C. C. 488, 2 O. C. D. 279.

Where a widow was allowed \$500 in lieu of homestead, on sale by administrator, this was held not error to the prejudice of the administrator and creditors, no application having been made to set off the homestead, and the court still having control of the fund: *Evans v. Staggaman*, 8 Dec. Rep. 244, 6 Bull. 636.

A widow having a minor child belonging to decedent's family, held entitled to both dower and homestead: *Nauzer v. The Widow*, 2 Dec. Rep. 323, 2 W. L. M. 426.

G. C., §§ 11773 and 11774, apply to a widow on an administrator's sale to pay debts, but G. C., §§ 11737 and 11738 do not apply: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

G. C., § 11733, applies to a sale voluntarily made by the heirs and widow, and is not limited alone to cases where the homestead is brought to sale by the mortgagee or administrator or under legal process which compels a sale: *Brets v. Moore*, 4 O. C. C. (N.S.) 556, 16 O. C. D. 66 [affirmed, without opinion, *Brets v. Moore*, 69 O. S. 574].

In 1852, upon a proceeding in the probate court to sell lands to pay debts, a homestead was set off to the widow, and the balance of the property of the estate sold, the proceeds of which were insufficient to pay the debts of the estate. In 1876, the children of the intestate having all arrived at full age, the administrator filed a supplemental petition, and asked for an order to sell such homestead. It was held that he was entitled to such order: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

A homestead having been assigned by metes and bounds, under the act of 1850 (G. C., §§ 11730, *et seq.*), to the widow and unmarried minor children of a decedent, in a proceeding in the probate court, by an executor, to sell lands to pay debts, orders of such court in the proceeding directing and confirming a sale of the real estate so assigned, subject to the homestead, and while the same is occupied as such homestead, are not merely voidable, but void: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036.

It does not require an application by a widow for setting off a homestead to her, where lands are sold on petition to pay debts under this section, nor could the widow waive it where there are minor children. Where a homestead is set off to a widow, the judgment liens remain attached to it, and when the homestead rights terminate, such liens, if they are kept alive, can be enforced against it as liens: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

G. C., §§ 11733 and 11734, made no provision for election by a widow to have the homestead sold and have \$500 in lieu thereof out of the proceeds of sale: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

G. C., § 11733 has been amended since the *quære* in the editorial in 25 Bull. 182.

5. Assignor for Benefit of Creditors.

An assignor for the benefit of creditors and his wife are entitled to \$500 in lieu of homestead out of the balance of the estate assigned when the homestead so assigned was so encumbered with liens precluding the allowance of a homestead as to leave no balance when sold in the hands of the assignee after the payment of such liens when neither of them have any other homestead: *In re Bell*, 12 O. C. D. 731; *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642; *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147; *Bartram v. McCracken*, 41 O. S. 377, IV Longsdorf's Notes, 67; *In re Davies*, 10 O. N. P. (N.S.) 205.

Where after the assignment the assignor and his wife moved temporarily into a house belonging to the wife, which was built for sale and not for their residence, and which was encumbered for nearly its value, and which was sold and vacated by them after the hearing on the application for the allowance in lieu of homestead, such facts will not preclude the granting of such allowance: *In re Davies*, 10 O. N. P. (N.S.) 205; citing *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30; *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution. The fact that the wife of the assignor possessed a homestead at the time the assignment was made, which she was compelled by financial stress to abandon pending the proceedings in the assignment, does not bar the husband from asserting a claim for homestead exemption subsequent to such abandonment and before distribution: *In re Assignment of Davies*, 10 O. N. P. (N.S.) 205.

After an assignment for the benefit of creditors, a vendor of personal property who might theretofore have obtained judgment and execution for the unpaid purchase price may, through the agency of the assignee, successfully resist the allowance of a homestead exemption to the assignor out of the proceeds of the sale of such unpaid-for personalty: *In re Bowers*, 51 Bull. 53.

6. Personal Privilege.

The right to a homestead is a personal privilege and can not be conveyed to another: *McComb v. Thompson*, 42 O. S. 139, IV Longsdorf's Notes, 98; *Schuler v. Miller*, 45 O. S. 325, IV Longsdorf's Notes, 279; *Conley v. Chilcote*, 25 O. S. 320, III Longsdorf's Notes, 232.

B. TIME TO CLAIM.

The wife is entitled to the exemption, though no demand is made until after confirmation: *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596.

An exemption in lieu of a homestead must be demanded before the money is paid over to the judgment creditor: *Green v. Fischer*, 8 Dec. Rep. 345, 7 Bull. 131; *Green v. Fischer*, 6 Dec. Rep. 1138, 10 Am. L. Rec. 570.

After sale, under a claim precluding homestead, the exemption may be demanded out of any surplus as against debts not precluding it, in analogy to the provisions for the exemption of a debtor not the owner of a homestead: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642.

A party is entitled to allowance in lieu of homestead at the time distribution is made: *Holmes v. Book*, 1 O. N. P. 58, 1 O. D. (N.P.) 665.

C. DATE OF MARRIAGE.

1. After Levy.

The marriage of the debtor previous to the day of sale, but after the time of levy, does not entitle him to exemption: *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364; citing *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30; *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57. *Contra*, *Nixon v. Vandyke*, 9 Dec. Rep. 622, 15 Bull. 358; *Holmes v. Book*, 1 O. N. P. 58, 1 O. D. (N.P.) 665; *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11; *Ory v. Smith*, 61 O. S. 276, IV Longsdorf's Notes, 807; *Kunkle v. Reeser*, 5 O. N. P. 401, 5 O. D. (N.P.) 422; *Moore v. Moore*, 7 O. N. P. 320, 16 O. D. (N.P.) 154.

2. After Attachment.

Marriage of the debtor after attachment served does not entitle him to the exemption: *Bradley v. Wacker*, 13 O. C. C. 530, 7 O. C. D. 566.

The marriage of the debtor after levy of attachment does not entitle him to exemption: *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30.

3. Before Sale.

When the judgment debtor is unmarried, and not the head of a family at the time the order for sale was issued and the premises appraised and advertised for sale, but subsequently marries, and, before the sale, asks to have the premises set off to him as a family homestead, it was held that he was not entitled thereto: *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364.

D. WHEN RIGHTS FIXED.

The right to a homestead or an allowance in lieu of a homestead is fixed when the fund is disposed of: *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147; *Cooper v. Cooper*, 24 O. S. 488, III Longsdorf's Notes, 188; *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30; *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364.

E. PROPERTY EXEMPT.

1. Undivided Interest.

A married woman, with a family, may apply successfully for the assignment of a homestead, after judgment, but before levy, if her husband has no homestead, and the property is occupied by her as a family homestead before the levy, or before an order of sale was issued; and this is true even where the property is an undivided interest, which has, after the judgment, but before the levy or issue of order of sale been set off to her in severalty by consent of cotenants: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

2. Proceeds of Personality.

If the balance coming from the sale of the mortgaged homestead is not sufficient, then the deficiency must come out of the proceeds of the sale of personality: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596; *In re Kneppfe*, 4 O. N. P. 213, 6 O. D. (N.P.) 417.

3. Insurance Money.

Where all the homestead and exemption rights are reserved in a deed of assignment

by the assured for the benefit of his creditors, and there is a mortgage on the premises against which no exemption can be allowed, and the assured asks an allowance in lieu of a homestead out of the insurance money, such claim is not an interest in lands, but a claim for money: *Insurance Co. v. Waters*, 65 O. S. 157, IV Longsdorf's Notes, 883.

4. Rents of Mortgaged Realty.

The rents of mortgaged realty collected by the mortgagor's assignee for creditors can not be applied to the mortgagor's exemption in lieu of homestead until the mortgage has been paid in full, though taxes, street assessments, court costs, and compensation of the assignee are first deducted: *Starkey v. Wainwright*, 6 O. N. P. 32, 9 O. D. (N.P.) 436.

And the lands being subject to a prior mortgage lien, it is not error to decree the sale of the property, and the payment of costs and the mortgage lien. But a further order that, after the payment of the mortgage, the proceeds of the sale should be applied to the satisfaction of plaintiff's judgment, to the exclusion of the claim of the debtor in lieu of a homestead, is erroneous: *Roig v. Schultz*, 42 O. S. 165, IV Longsdorf's Notes, 101.

F. AGAINST WHAT CLAIMS.

1. Fraudulent Mortgage.

A mortgagor can not claim an allowance in lieu of homestead when the mortgage is decreed to be a deed of assignment for the benefit of creditors: *Pease v. Schuh*, 5 O. N. P. 245, 4 O. D. (N.P.) 121.

2. Fraudulent Transfer.

The fraudulent placing of title to the land in controversy in the wife, does not as against a judgment creditor, bar the right of the debtor to demand a homestead or an exemption in lieu of homestead: *Roig v. Schultz*, 42 O. S. 165, IV Longsdorf's Notes, 101; *Bills v. Bills*, 41 O. S. 206, IV Longsdorf's Notes, 57.

A fraudulent assignment of a house not occupied as a homestead having been set aside and a trustee appointed under G. C., § 11106, he becomes the legal owner, and no homestead rights in the house can be thereafter acquired. If the debtor secures a possession under the trustee, he can not dispute his landlord's title by claiming homestead, based on such possession: *Stafford v. Smith*, 13 Dec. Rep. 884, 30 Bull. 288.

A fraudulent conveyance being set aside, the right to a homestead exemption against the creditors obtains: *Sears v. Hanks*, 14

O. S. 298, II Longsdorf's Notes, 657; *Tracy v. Cover*, 28 O. S. 61, III Longsdorf's Notes, 389; *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57; *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

A conveyance of personal property to put it beyond creditors, does not give creditors levying on it a claim to resist exemption in lieu of homestead: *Tracy v. Cover*, 28 O. S. 61, III Longsdorf's Notes, 389.

Where a mortgage is declared to be in fraud of creditors, it stands as a deed of trust for creditors, the mortgagee becoming a trustee who must account for all proceeds; hence, the debtor can not have \$500 in lieu of homestead as against the general creditors: *Pease v. Schuh*, 5 O. N. P. 245, 4 O. D. (N.P.) 121 [affirms, *In re Assignment of Schuh*, 2 O. N. P. 381, 4 O. D. (N.P.) 30].

A conveyance of personality in fraud of creditors being converted into an assignment, the assignee's refusal to set apart in lieu of homestead is a breach of his bond: *Hall v. Brown*, 4 Dec. Rep. 80, 1 Clev. L. Rep. 9. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

3. Mortgage.

Neither the husband nor the wife is entitled to an allowance out of the proceeds as against a debt which both attempted to secure by mortgage upon such homestead duly executed, acknowledged and recorded, the legal validity of such mortgage being defeated by a mutual mistake in the description of the premises: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

The sale under G. C., § 11737, must be a sale upon a mortgage which precludes the allowance of a homestead and not simply a sale upon a judgment at the instance of the judgment creditor as against whom a homestead may be allowed: *Bernsee v. Hamilton*, 6 O. C. C. 487, 3 O. C. D. 550.

Where a mortgage covers two lots and a homestead, and a later judgment lien covers the same, and the mortgagee releases the homestead lot, the judgment creditor can not claim this to be a fraud on him, and require the homestead to be exhausted by the mortgagee. The rule that where one party has security on two funds, and a later lienholder has security on only one, the first creditor must exhaust his exclusive fund before resorting to the other, does not apply. The judgment creditor still has his lien: *Kilgore v. Miller*, 19 O. C. C. 93, 10 O. C. D. 464.

On foreclosure of a mortgage not executed by the wife, on assignment of homestead to the wife by metes and bounds, the fee simple of the whole tract may be sold subject to the

homestead: *Murdock v. Welch*, 6 Dec. Rep. 835, 8 Am. L. Rec. 411.

A mortgage not executed by the wife on property, not then impressed with the character of a homestead, is not affected by its subsequent occupancy as a homestead, and the wife can not claim the homestead where the debtor could not: *Gibson v. Mundell*, 29 O. S. 523, III Longsdorf's Notes, 494.

On distribution of proceeds from the sale of land, mortgages will be paid in full in the order of their priority before anything is applied on judgment liens or a claim for homestead exemption: *Archibald v. Marcus, et al*, 10 O. N. P. (N.S.) 251.

A judgment or decree in chancery charging specific property with the payment of a debt, which has been held in abeyance by the assertion of a homestead claim, when the right of homestead is removed, is prior to a subsequent mortgage on such homestead: *Smith v. Phillips*, 5 O. N. P. (N.S.) 502, 18 O. D. (N.P.) 429 [affirmed, *Smith v. Phillips*, 18 O. D. (N.P.) 429]. See also EQUITY.

4. Executor's Sale.

In a proceeding by an executor to sell land to pay debts a widow can not have under G. C., § 11737, allowed to her out of the proceeds of sale \$500 in money in lieu of homestead: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

G. C., § 11733, allowing the widow, or in case there be no widow, an unmarried minor child, to hold in lieu of a homestead the residue of the proceeds not exceeding \$500, arising from a sale of the homestead, made to pay any lien which precludes the allowance of a homestead, applies to a sale voluntarily made by the heirs and widow, and is not limited alone to cases where the homestead is brought to sale by the mortgagee or administrator, or under legal process which compels a sale: *Brets v. Moore*, 4 O. C. C. (N.S.) 556, 16 O. C. D. 66 [affirmed, without opinion, *Brets v. Moore*, 69 O. S. 574].

Where the widow and heirs, all of whom are *sui juris* and have full knowledge of the situation, voluntarily and mutually agree among themselves to sell at private sale, the homestead property, pay off a mortgage thereon, and deliver the balance to the administrator of the deceased husband and father for the purpose of paying any indebtedness against the estate, which mortgage precluded the allowance of such property as a homestead by reason of having been executed by the deceased and his wife (now the widow), which sale is duly made, the mortgage paid by the widow and heirs direct to the mortgagee, and the balance delivered to the administrator in accordance with the

terms of the agreement; in such case, the administrator holds the fund so delivered to him as trustee, and not as administrator; the widow, not having waived her right thereto under the agreement, is entitled to receive, in addition to the value of her dower interest, not exceeding \$500 from the fund in lieu of a homestead under G. C., § 11733, and her right thereto is not lost by reason of her abandonment of all claim to hold the premises as a homestead; and the heirs are estopped from denying the purpose of the sale, or the right of the widow in the fund so created: *Brets v. Moore*, 4 O. C. C. (N.S.) 556, 16 O. C. D. 66 [affirmed, without opinion, *Brets v. Moore*, 69 O. S. 574].

5. Garnishment.

A garnishee can not defend by demanding it for a debtor: *Conley v. Chilcote*, 25 O. S. 320, III Longsdorf's Notes, 232.

6. Proceedings in Equity.

A judgment creditor by a suit in equity, to subject the proceeds of his debtor's bills and accounts receivable, and the appointment of a receiver for the purpose of collecting them, does not acquire such lien as will preclude an allowance out of such proceeds to the debtor in lieu of a homestead, the debtor being the head of a family, from the commencement of a proceeding and not the owner of a homestead at the time of the distribution of such proceeds: *Fry v. Smith*, 61 O. S. 276, IV Longsdorf's Notes, 807.

7. Labor-claims.

A labor claim of less than \$100, against which no homestead exemption can be asserted (G. C., § 11729), does not include any part of a labor claim for over \$100: *Kelly v. Hines*, 6 Dec. Rep. 988, 9 Am. L. Rec. 404, 8 Dec. Rep. 126, 5 Bull. 815.

G. ADJUDICATION OF CLAIMS.

The court must adjudicate the question of the precedence of other liens, and the claim of the debtor in lieu of homestead: *Roig v. Schults*, 42 O. S. 165, IV Longsdorf's Notes, 101.

In an action to marshal liens where there are liens of both classes referred to in G. C., § 11737, the proper practice is to adjudicate as to both of the liens before the sale and not simply as to the one as against which the homestead claim could be asserted, so that if it is necessary the property may be sold without the assignment of a homestead therein: *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364.

H. ENFORCEMENT.

On distribution of the proceeds from the sale of land, mortgages will be paid in full in the order of their priority before anything is applied on judgment liens or a claim for homestead exemption: *Archibald v. Marcous*, 10 O. N. P. (N.S.) 251.

Upon distribution in an action to foreclose mortgages in which the wife released her dower and to adjust liens, as between the dower of the wife and the husband's exemption in lieu of homestead, the homestead exemption should be resorted to before the wife's dower: *Stoeck v. Brewing Co.*, 17 O. C. D. 330, 2 O. L. R. 449. See also MORTGAGES.

I. PRESUMPTIONS.

There is no presumption of law that a judgment debtor will claim to hold any particular item of personal property as exempt from execution: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

J. ABANDONMENT AND WAIVER.

Where the property was destroyed by fire before sale and the debtor removed from it, though with no intention to rebuild, it was held under the circumstances of the case, that there was no such abandonment as precluded the right to claim the exemption, and that out of the surplus, after payment of the preferred liens upon the application of the debtor's wife, an allowance to her might be made in lieu of homestead: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596.

If the debtor voluntarily abandons his homestead before claiming it as exempt his right is gone: *Jackson v. Reid*, 32 O. S. 443, III Longsdorf's Notes, 642.

In case of a pledge or chattel mortgage the owner waives the benefit of exemption so far as the incumbrance extends: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

It has been held that the wife can not select as exempt from execution chattels upon which her husband has given a mortgage to secure the judgment creditor for the debt on which the judgment is founded: *Hiser v. Dawson*, 9 Dec. Rep. 827, 17 Bull. 318.

The lien of a judgment or decree in chancery charging specific property with the payment of a debt having been held in abeyance by reason of the existence of a homestead claim, becomes enforceable after the death of the party entitled to such homestead: *Smith v. Phillips*, 5 O. N. P. (N.S.) 502, 18 O. D. (N.P.) 429 [affirmed, *Smith v. Phillips*, 18 O. D. (N.P.) 429]. See also EQUITTY.

K. RETROACTIVE EFFECT OF STATUTE.

G. C., § 11737, does not apply to debts contracted before its passage, but independently of it, the debtor's right to the exemption attaches to the surplus of the proceeds of such sale as against creditors whose claims do not preclude the allowance of a homestead: *Kelly v. Duffy*, 31 O. S. 437, III Longsdorf's Notes, 596.

XXVII. ALLOWANCE IN LIEU OF HOMESTEAD.

A. CONSTRUCTION OF STATUTORY PROVISIONS.

G. C., § 11738, must be construed to be so as to effectuate and not thwart the object and policy of the law: *In re Bell*, 12 O. C. D. 731; citing, *Colwell v. Carper*, 15 O. S. 279, II Longsdorf's Notes, 729; *Bretz v. Moore*, 4 O. C. C. (N.S.) 556, 16 O. C. D. 66 [affirmed, without opinion, *Bretz v. Moore*, 69 O. S. 574].

B. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

A resident of Ohio who is the head of a family and whose wife is not the owner of a homestead may in lieu thereof hold exempt from attachment personal property to an amount not exceeding \$500, including personal earnings in excess of \$150, exempt under G. C., § 10253: *Ross v. Tailoring Co.*, 7 O. C. C. 51, 3 O. C. D. 658; *Staley v. Wooley*, 8 O. C. C. 35, 4 O. C. D. 550; *Keys v. Young*, 2 O. N. P. 390, 4 O. D. (N.P.) 113.

C. PRIOR LEGISLATION.

By the act of 1869 the right to make the selection was extended to the debtor's agent or attorney, and by the act of 1873 (70 v. 51) the word "wife" was inserted, but under the previous amendment (66 v. 48, 50) it was held that if the husband owned but a single article of personal property, and it was of less value than \$500, and was levied upon to satisfy his debt, his wife was entitled to demand and have such article set off in lieu of homestead: *Regan v. Teeb*, 28 O. S. 483, III Longsdorf's Notes, 416.

The original § 8, act 1850, did not contain the clause "to be selected," etc. That clause was added by the amendment of 1858: *Slauker v. Beardsley*, 9 O. S. 590, II Longsdorf's Notes, 399.

G. C., § 11738, formerly provided that, "It shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead, to hold exempt from execution goods to the value of three hundred dollars": *Burgess v. Everett*, 9 O. S. 425, II Longsdorf's Notes, 387.

D. PROPERTY EXEMPT.

1. Personal Property.

"Personal property," includes credits and moneys selected by the debtor. Credits and moneys selected by the debtor can not be taken and held under an order of attachment or by garnishee process: *Chilcote v. Conley*, 36 O. S. 545, III Longsdorf's Notes, 874, see *Conley v. Chilcote*, 25 O. S. 320, III Longsdorf's Notes, 232; *Weels v. Bricker*, 37 Bull. 295.

G. C., § 11738, should be liberally construed and it will be held to include moneys or credits which are held to be personal property: *Warns v. Reeck*, 8 O. C. C. (N.S.) 401, 18 O. C. D. 785.

A resident head of a family may hold his exemption in lieu of homestead in addition to the personal earnings exempt: *Ross v. Tailoring Co.*, 7 O. C. C. 51, 3 O. C. D. 658.

The debtor has a right to select in lieu of homestead the personalty levied on and replevy it without regard to the fact that he may have other property which he refuses to disclose: *Clark v. Hicks*, 4 Dec. Rep. 413, 2 Clev. L. Rep. 129.

If personal property of less value than \$500, being levied on, is set apart to the debtor in lieu of homestead, and other executions are levied on after-acquired property, he may have enough of the latter set aside to make up the \$500: *Clark v. Ismael*, 13 Dec. Rep. 996, 2 C. S. C. R. 437.

The appraisal of personalty on demand, in lieu of homestead, is conclusive in the absence of collusion or fraud, the statute not providing for review: *Levi v. Groves*, 7 Dec. Rep. 508, 3 Bull. 569.

A debtor, who, at the time of demanding \$500 exemption out of attached funds, has other property of the same kind of the value of \$500, which he conceals or withholds from his creditors, will be deemed to have selected the latter, and his demand for the former will be refused: *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404 [affirms, *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98].

2. Pension Money.

But mere inaction as possession of and failure to turn over other money or property to the officer and afterwards squandering it, is not sufficient to constitute estoppel, waiver or selection, unless it is in his control at the time he demands the exemption: *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404.

Pension money is subject to judgment: *Fullwiler v. Wilson*, 32 Bull. 366.

E. WHO MAY CLAIM EXEMPTION.

1. Husband and Wife Living Together.

(a) Actual Cohabitation.

A husband and wife are living together unless separated judicially or by agreement: *Dithey v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

Where a husband absconds to parts unknown to avoid creditors or a criminal prosecution, leaving his family at the residence, they are still living together, in the eye of the law, and the wife may claim homestead in the property as against his creditors: *Dithey v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

If the wife's house and lot is not occupied as a homestead, the family having removed therefrom, the husband is not debarred from claiming chattels as exempt in lieu; her property is a homestead only while occupied as such: *Ryan v. Miller*, 40 O. S. 232, IV Longsdorf's Notes, 20.

Marriage of the debtor after service of a garnishment, and the justice's order on the garnishee to pay the admitted amount into court, will not entitle him to exemption in lieu of homestead, for the creditor's right has vested: *Bradley v. Wacker*, 13 O. C. C. 530, 7 O. C. D. 565.

An unassigned dower estate of a husband on proceedings by an administrator to sell, having been sought to be subjected by cross-petition by creditors of the husband, he married again, and then by motion demanded exemption in lieu of homestead. It was held that the motion was a sufficient selection, and as distribution was based on the facts as existing at the time of distribution, he was entitled to the exemption: *Moore v. Moore*, 7 O. N. P. 320, 6 O. D. (N.P.) 154.

(b) Separation.

A husband occupying the homestead and with his minor children is entitled though his wife has left him, to exemption in lieu of homestead under G. C., § 11737, out of the proceeds of sale to satisfy liens: *Weber v. Beier*, 14 O. C. C. 277, 7 O. C. D. 381.

A wife separated from her husband and having no child is entitled to \$500 in money in lieu of a homestead out of her own property as against her creditors, see G. C., § 11591: *Shaw v. Foley*, 62 O. S. 30, IV Longsdorf's Notes, 823.

A wife living separate under a decree awarding her alimony and the custody of a child is not entitled to an exemption in lieu of a homestead, on sale of his property under liens: *Luganer v. Weisgerber*, 9 Dec. Rep. 458, 13 Bull. 637.

A wife living separate from her husband and not on the property can not claim exemption in lieu of homestead out of the proceeds against judgments against him, he not claiming the exemption: *Brewing Co. v. Westmeier*, 4 O. C. C. 296, 2 O. C. D. 555.

A wife whose husband has absconded may claim a homestead in his property in proceedings to declare him a bankrupt: *In re Rich*, 15 O. F. D. 496.

A married woman who has wrongfully and without cause permanently abandoned her husband and has no child or children living with or supported by her, is not entitled to an allowance in lieu of a homestead in her husband's estate, nor can she make a valid demand therefor upon his failure to make the same: *Bank v. Huffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

2. Residents.

(a) Removal.

One who is a head of a family continues to be a resident of the state within the meaning of the attachment laws, and is entitled to exemptions in lieu of a homestead so long as he and his family are here without regard to the fact that he is preparing to remove with his family from the state and is on the eve of so doing: *Rancourt v. Hahn*, 10 O. C. C. (N.S.) 313, 20 O. C. D. 245.

(b) Non-residents.

Nonresidents of Ohio can not have the benefits of G. C., § 11738: *Campbell v. Bennington*, 4 O. C. C. (N.S.) 447, 16 O. C. D. 239.

3. Widower, etc.

A widower living with an unmarried daughter is also entitled to a homestead, likewise to exemption in lieu of homestead: *Boetiger v. Fischer*, 8 Dec. Rep. 776, 9 Bull. 337.

A divorced man is a widower under the liberal construction of the statute, and if a minor son lives with him is entitled to the exemption: *Kunkle v. Reeser*, 5 O. N. P. 401, 5 O. D. (N.P.) 422.

A man living with a stepchild who has never been declared a member of his family, is not entitled to exemption: *Kraft v. Wolf*, 3 O. N. P. (N.S.) 105, 15 O. D. (N.P.) 554.

A divorced husband who remains with his children in the homestead, or a divorced wife who with her children occupies it by way of alimony, would be entitled to exemption in lieu of homestead out of the proceeds

of a sale thereof on execution or under liens: *Weber v. Beier*, 14 O. C. C. 277, 7 O. C. D. 381.

4. Widow.

(a) Without Family.

A widow without a family is entitled under G. C., § 11738, to claim exemption in lieu of homestead: *Wentzel v. Hayes*, 16 O. C. C. 110, 8 O. C. D. 756.

Under G. C., § 11730, a widow may claim homestead exemption though she is not living with unmarried daughter or unmarried minor son: *Allen v. Russell*, 39 O. S. 336, III Longsdorf's Notes, 1032.

A widow is not entitled to exemption when she does not have the care of a minor child of deceased relative: *Brown v. Parham*, 4 O. C. C. (N.S.) 344, 15 O. C. D. 640, also reported *Brown v. Parham*, 1 O. C. C. (N.S.) 602 [affirmed, without opinion, *Brown v. Parham*, 71 O. S. 516].

The exemption in lieu of homestead to every widow (G. C., § 11738), applies only to her own property, and not her husband's after his decease; hence, where a debtor assigns for benefit of creditors and dies, the widow can not obtain the exemption: *Sterritt v. Lingo*, 4 O. N. P. 366, 6 O. D. (N.P.) 481.

(b) Widow of Assignor.

Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, can not be attacked collaterally by exception to her account as administratrix of the said estate: *In re Hess*, 14 O. C. C. (N.S.) 463, 23 O. C. D. 449.

The exemption in lieu of homestead to every widow applies only to her own property and not her husband's after his decease; hence, where a debtor assigned for benefit of creditors and dies, the widow can not obtain the exemption: *Sterritt v. Lingo*, 4 O. N. P. 366, 6 O. D. (N.P.) 401.

5. Divorced Woman.

A divorced woman is not a "widow": *In re Ashbaugh*, 4 O. N. P. (N.S.) 631, 52 Bull. 73.

A divorced woman having the care and maintenance of minor child is entitled to exemption: *In re Giles*, 6 O. L. R. 173.

6. Not the Owner of a Homestead.

(a) Ownership.

(aa) By Either.

When real estate occupied as a family homestead is owned either by husband or

wife neither can hold exempt from execution the personal property allowed by G. C., § 11738, in lieu of homestead: *Devinell v. Edwards*, 23 O. S. 603, III Longsdorf's Notes, 149.

(bb) Undivided Interest Owned by Wife.

If the wife owns an undivided share of the farm on which the family lives, the husband can not select personalty levied on in lieu of homestead: *Keys v. Young*, 2 O. N. P. 390, 4 O. D. (N.P.) 113.

(b) Removal.

A man after he has moved his family from the house and lot of his wife is "not the owner of a homestead": *Ryan v. Miller*, 40 O. S. 232, IV Longsdorf's Notes, 20; *Niehans v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147 (equity of redemption subjected by creditor).

A widow whose husband was not the owner of a homestead is not entitled to an allowance in lieu of homestead out of his estate: *Wolverton v. Paddock*, 3 O. C. C. 488, 2 O. C. D. 279.

The fact that the debtor's wife possessed a homestead at time of assignment, but was compelled to abandon it, does not bar debtor from claiming homestead exemption: *In re Davies*, 10 O. N. P. (N.S.) 206.

(c) Mortgage.

Though the property which is used as a homestead is mortgaged for more than its value, the benefit of the exemption can not be claimed, as the debtor is still the owner: *Bartram v. McCracken*, 41 O. S. 377, IV Longsdorf's Notes, 67; *Biddinger v. Pratt*, 50 O. S. 719, IV Longsdorf's Notes, 525; *Olding v. Kemker*, 9 Dec. Rep. 601, 15 Bull. 310.

7. Partnership.

(a) Before Dissolution.

An exemption in lieu of homestead can not be claimed by partners: *Gaylord v. Imhoff*, 26 O. S. 317, III Longsdorf's Notes, 306; *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

One who obtains goods on credit while doing business under a fictitious name, representing a partnership, is entitled to exemptions in lieu of homestead out of the goods so obtained: *Longsdorf v. McBee*, 39 Bull. 97.

That the partners are husband and wife does not entitle them to exemption in lieu of homestead out of firm assets. G. C., § 11738, does not impart a joint right to

husband and wife: *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

Partners are not entitled to an exemption out of the firm goods in case of an assignment for creditors, for that is the legal equivalent of its seizure in execution: *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

(b) *After Dissolution.*

After the dissolution and sale of the interest of one member to the other, the latter might hold such property exempt from the payment of a debt thereafter asserted against him on the ground that such debt was a partnership debt due at the time of the dissolution: *Mortley v. Flannagan*, 38 O. S. 401, III Longsdorf's Notes, 978; see *Gaylord v. Imhoff*, 13 Dec. Rep. 625, 1 C. S. C. R. 404; *Mortley v. Taylor*, 7 Dec. Rep. 531, 3 Bull. 788.

And where one partner sells out to the other and withdraws on the latter's promise to pay him \$150 and to pay the debts, the former is entitled to exemption in lieu of homestead, although he has paid no part of either: *Voight Sons v. Lafkin*, 12 O. C. C. 751, 6 O. C. D. 124; *Long v. Hoban*, 7 Dec. Rep. 688, 4 Bull. 986; *Mortley v. Taylor*, 7 Dec. Rep. 531, 3 Bull. 788.

8. *Assignor for Benefit of Creditors.*

The probate court can allow \$500 in lieu of homestead assignor: (G. C., § 11112) *Kuhn v. Nieberg*, 40 O. S. 631, IV Longsdorf's Notes, 45; *Mercer v. Cunningham*, 53 O. S. 353, IV Longsdorf's Notes, 605.

An assignor, who was not a resident of Ohio on the day of her assignment for the benefit of creditors was made, but became a resident thereafter, is not entitled to homestead exemption under the Ohio law: *Assignment of Pelnick*, 9 O. N. P. (N.S.) 635.

Where an assignor for the benefit of creditors is induced to and does forego the selection of specific articles of personal property under his claim for exemption in lieu of a homestead, because of representations made to him by the assignee that he would have to wait until the property was sold and an order of court obtained, and that he would then be paid his exemption, actual selection, under such circumstances, is waived or excused, and the want of it can not be held to be an abandonment or forfeiture of the assignor's right to claim and have his exemption out of the proceeds of sale of the assigned property upon formal demand made therefor before distribution: *In re Kraus*, 79 O. S. 314, IV Longsdorf's Notes, 1046.

The fact that the wife of an assignor possessed a homestead at the time the assign-

ment was made, which she was compelled by financial stress to abandon pending the proceedings in the assignment, does not bar the husband from asserting a claim for homestead exemption subsequent to such abandonment and before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

F. DATE OF DETERMINATION.

The marriage of the debtor subsequent to levy and before sale does not entitle the debtor to the benefit of the exemption: *Selders v. Lane*, 40 O. S. 345, IV Longsdorf's Notes, 30; *Nixon v. Vandyke*, 2 O. C. C. 63, 1 O. C. D. 364; *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57; *Carter v. Ross*, 8 O. C. C. 139, 4 O. C. D. 333; *Bradley v. Wacker*, 13 O. C. C. 530, 7 O. C. D. 566.

An allowance as of time of sale and distribution of proceeds, though at time of order of sale debtor was unmarried: *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11, citing *Niehaus v. Faul*, 43 O. S. 63, IV Longsdorf's Notes, 147; *Mortley v. Flanagan*, 38 O. S. 401, III Longsdorf's Notes, 978.

One who marries after filing a petition in bankruptcy is not entitled to a homestead under G. C., § 11738. His status being determined at the time of the filing of his petition, no subsequent act on his part can alter that condition: *In re Fletcher*, 15 O. F. D. 210, 16 Am. Bank. Rep. 491.

Where an heir at the time an order of sale was made was not entitled to an exemption in lieu of a homestead, but before sale, by reason of changed conditions, he becomes so entitled, he can claim the same. In such case the findings and order of sale need not be changed: *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11.

G. PROCEEDINGS IN WHICH EXEMPTION MAY BE CLAIMED.

1. *Partition.*

In a partition case where property is sold, exemption in lieu of homestead may be awarded to a parcener or his wife out of his distributive share: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588; see *Comer v. Dodson*, 22 O. S. 615, III Longsdorf's Notes, 106.

A tenant in common may claim his exemption out of the proceeds of partition sale: *Comer v. Dodson*, 22 O. S. 615, III Longsdorf's Notes, 106.

A wife living with her husband, who is largely in debt, neither husband nor wife

owning a homestead, is entitled to select \$500 in lieu of a homestead out of a fund arising from a sale in partition of an undivided interest in real estate inherited by the husband while insolvent: *Gillett v. Miller*, 12 O. C. C. 209, 5 O. C. D. 588.

A husband's share of land as tenant in common with his wife is subject to his claim of homestead exemption; hence, if not exceeding \$1,000 in value, his conveyance of it to her through a trustee is not in fraud of creditors: *Prosek v. Kuchta*, 9 Dec. Rep. 129, 11 Bull. 65.

Where, after judgment against a married woman, charging her separate property, which consisted of an undivided interest in land, she procures a temporary delay in the issuance of an order of sale and procures a voluntary partition, puts a house on her share and moves into it and claims homestead, it was held that a tenancy in common was not like a partnership. The homestead having been created before levy or order of sale was valid, subject, however, to the creditor's right, on proper issues, to inquire into the equality of the partition: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

2. Assignment for Benefit of Creditors.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution: *In re Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

Where the assignor waives the right to select specific property in lieu of homestead, under G. C., § 11738, and asks that the sum of \$500 be allowed to him out of the proceeds from the sale of the assigned property, and such sum is set off to him by the appraisers, and the action of the appraisers is approved by the court and said sum is ordered to be paid to the assignor out of the proceeds of the sale, such order by the court is not a final order upon which, in case the assignee fails to pay, an action could be brought against the assignee on his bond: *Bentsel v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244.

An insolvent debtor who owns and occupies a homestead at the time of making an assignment for the benefit of creditors, and consequently is not entitled to an allowance in lieu of a homestead by the subsequent loss or termination of his homestead, becomes entitled to such allowance out of any fund still in assignee's hands: *Moody v. Whittaker*, 22 Bull. 168.

After an assignment for the benefit of creditors, a vendor of personal property who might have obtained judgment and execution for the unpaid purchase price, may through

the agency of the assignee successfully resist the allowance of a homestead exemption to the assignor out of the proceeds of the sale of such unpaid for personalty: *In re Bowers*, 51 Bull. 53.

An assignee for creditors allows exemption in lieu of homestead at his peril if the right is disputed, and can not shelter himself under advice of counsel: *Aultman v. Wilson*, 55 O. S. 138, IV Longsdorf's Notes, 655.

Where K's homestead is subject to a mortgage to M, who had failed to record it, and K assigns for creditors, and after sale there is \$350 proceeds from the homestead and \$400 from the sale of chattels, and K claims \$500 in lieu of homestead, it was held that the mortgage having been void as to creditors, they could object to the homestead being paid out of the \$400, except as to the surplus after crediting the \$350 to the homestead; and, although the mortgage was valid as against K, yet the failure to record it having deprived K of the right to take all the \$400, he and not M was entitled to the \$350: *Knepfle's Assignment*, 4 O. N. P. 213, 6 O. D. (N.P.) 417.

Exemption rights, excepting after property had been attached, does not waive the right to select the attached property as exempt: *Close v. Sinclair*, 38 O. S. 530, III Longsdorf's Notes, 991.

An assignor for benefit of creditors, reserving all rights to homestead and exemption, and demanding an allowance in lieu of homestead, the probate court has jurisdiction to require the assignee to pay \$500, in lieu of homestead, out of the proceeds of lands: *Kuhn v. Nieberg*, 40 O. S. 631, IV Longsdorf's Notes, 45.

A judgment against one who had assigned for creditors, reserving homestead rights, and had had the homestead assigned to him by appraisers under G. C., § 11112, is not a lien on the land so set apart, the title being in the assignee. A buyer of such land from the debtor by warranty deed gets no legal title, but only the debtor's equity after settlement of the assignment. Homestead being a personal privilege and not conveyable, the buyer's occupancy under such deed will be subject to the rights of the assignee and the settlement of his final account: *Schuller v. Miller*, 45 O. S. 325, IV Longsdorf's Notes, 279.

Assignment of a homestead by an officer levying execution will not prevent the judgment becoming dormant under G. C., § 11663: *Wuest v. James*, 51 O. S. 230, IV Longsdorf's Notes, 540.

The probate court has power which is exclusive, under G. C., § 11112, to allow exemption in lieu of homestead out of personal property, and if the assignee refuses the

claim, failure to apply to the probate court waives the right, and the common pleas has no original jurisdiction in the matter; hence, a suit on the assignee's bond for the value of the property selected does not lie: *Mercer v. Cunningham*, 53 O. S. 353, IV Longsdorf's Notes, 605.

A married woman, assigning her property for benefit of creditors, can be allowed exemption in lieu of homestead therefrom in a proper case: *Mercer v. Cunningham*, 53 O. S. 353, IV Longsdorf's Notes, 605.

3. Administrator's Sale.

In case of an administrator's sale to pay debts, the widow can not take in lieu of homestead out of the proceeds of sale: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

The finding in an order to sell real estate upon petition by an administrator making the heir, mortgagees of deceased and persons claiming liens as judgment creditors of the heir parties, that such creditors of the heir had a lien on his interest by virtue of the levy of executions, after the death of the ancestor, is not a bar to an allowance in lieu of a homestead under G. C., § 11738, if at the time the sale is made and proceeds distributed, he, by reason of changed circumstances, is entitled to the exemption, although at the time the order of sale was made he was unmarried and not entitled to the exemption: *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11.

The only right of a widow to a homestead in her deceased husband's land was under G. C., § 11732, which expires when the unmarried children arrive at age. She had no such right under G. C., § 11730: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

On administrator's sale of real estate to pay debts of one who left no homestead, the widow is not entitled to the allowance in lieu of homestead: *Wolverton v. Paddock*, 3 O. C. C. 488, 2 O. C. D. 279.

If an executor is about to sell land to pay debts under a power in the will, the widow with a minor child is entitled to homestead in addition to dower: *Wanzer v. Widow*, 2 Dec. Rep. 323, 2 W. L. M. 426.

The right of a widow to have a homestead set off to her under G. C., § 11732, on an executor's proceeding to sell to pay debts, gives her no right to ask sale and allowance of \$500 in lieu of homestead out of the proceeds, nor to have other property set off in lieu of homestead. G. C., §§ 11737, 11738 do not apply: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

In allowing homestead to the widow under G. C., § 10795, on executor's proceeding to sell to pay debts, the dower interest need not cover the same part of the ground as the homestead so assigned: *Anonymous*, 11 Dec. Rep. 159, 25 Bull. 102 (editorial).

On petition of an administrator to sell to pay debts, it is not error in the probate court to decree exemption in lieu of homestead to the family out of the proceeds, though not demanded under G. C., § 11732, until distribution: *Evans v. Staggaman*, 8 Dec. Rep. 244, 6 Bull. 636.

Judgment liens are superior to an allowance in lieu of homestead where land is sold by an administrator to pay debts, and the widow asks dower and homestead out of the proceeds instead of in the land, and the sale is not under a lien precluding homestead: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

4. Attachment.

G. C., § 11738, applies as well to property levied on by attachment as by execution, and an order for the sale of the attached property made in the proceeding in attachment does not prevent the debtor from exercising his right of selection after the making of such order of sale: *Close v. Sinclair*, 38 O. S. 530, III Longsdorf's Notes, 991; *Rempe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940, 48 Bull. 510; reported, *Rempe v. Ravens*, 1 O. L. R. 155.

5. Bankruptcy.

When the bankrupt in filing his schedule attempts to claim a homestead under G. C., § 11738, but does so improperly, he may, if there are still funds undistributed in the hands of the trustee in bankruptcy, so amend his schedule as to make the claim effective: *In re Breman*, 140 Fed. 761, 15 O. F. D. 110, 15 Am. Bank Rep. 463.

A, a voluntary bankrupt, failed to set out an itemized list of property, claimed to be exempt together with the estimated value thereof, but filed a claim as follows: "Property exempt under G. C., § 11725, household goods \$100.00. Property exempt under this section, household goods, \$500.00, total \$600.00," and having retained his household goods and there being no money on hand at the time of filing the petition, and all other property turned over to the trustee and sold, it was held, A was not entitled to have \$500 of this fund exempt in lieu of homestead because of his noncompliance with the bankruptcy act as to exemptions: *In re McClintock*, 15 O. F. D. 58, 13 Am. Bank Rep. 606.

Where the proceeds from the sale of real estate are entirely consumed in the payment of mortgages executed by a widow and as to which her homestead has been waived, she is not precluded from subsequently claiming a homestead out of the proceeds of the sale of other real estate in the hands of a trustee in bankruptcy: *In re Buckingham*, 102 Fed. 972, 11 O. F. D. 418.

6. Proceedings Against a Boat.

In proceedings against a boat by name neither the owner nor wife is entitled to select and hold its apparel or furniture exempt in lieu of homestead: *Johnson v. Ward*, 27 O. S. 517, III Longsdorf's Notes, 372.

H. AGAINST WHAT CLAIMS ENFORCEIBLE.

1. Judgment Lien.

A debtor's rights to a homestead are superior to judgment lien and it is not necessary to change the findings and order of sale against the property of a debtor, if he be found entitled to an exemption in lieu of a homestead: *Simmons v. Moore*, 3 O. C. C. (N.S.) 178, 13 O. C. D. 11 [citing *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596].

A lien of decree in chancery charging specific property with payment of debt is prior to subsequent mortgage on homestead when right of homestead is removed: *Smith v. Phillips*, 5 O. N. P. (N.S.) 502, 18 O. D. (N.P.) 429.

A lien becomes enforceible after the death of the homesteader: *Smith v. Phillips*, 5 O. N. P. (N.S.) 502, 18 O. D. (N.P.) 429.

2. Mortgage.

A widow's right to claim exemption in lieu of homestead out of a judgment and mortgage held by her against two-twelfths of land is not barred by her having mortgaged her own interest in other eight-twelfths: *Wentzel v. Hayes*, 16 O. C. C. 110, 8 O. C. D. 756.

A mortgage of premises, no part of which constitutes the family homestead of the mortgage debtor, at the time of the execution and delivery of the mortgage, although not executed by the wife, is not affected by the subsequent selection and occupancy of the premises mortgaged as the homestead of the mortgagor. Wife can not claim homestead: *Gibson v. Mundell*, 29 O. S. 523, III Longsdorf's Notes, 494.

When a mortgage is declared to be in fraud of creditor, it stands as a deed of trust for creditors, the mortgagee becoming

a trustee, who must account for all proceeds; hence the debtor can not have \$500 in lieu of homestead against the general creditors: *Pease v. Schuh*, 5 O. N. P. 245, 4 O. D. (N.P.) 121 [affirming *In re Schuh*, 2 O. N. P. 381, 4 O. D. (N.P.) 30].

A chattel mortgage void as to creditors, because reserving a right of disposition, does not deprive the mortgagor's wife of exemption in lieu against his assignee for creditors. Delaying demand until the mortgages are ascertained to be void, though sale has been had, is not a waiver: *White's Assignment*, Goebel, 153.

On distribution of proceeds from the sale of land, mortgages will be paid in full in the order of their priority before anything is applied on judgment liens or a claim for homestead exemption: *Archibald v. Marcus*, 10 O. N. P. (N.S.) 251.

3. Executor's Sale.

In a proceeding by an executor to sell land to pay debts of decedent, G. C., § 11738, does not authorize the widow to demand and have set off to her in lieu of homestead real property not exceeding \$500 in value: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

4. Set-off.

A set-off is not defeated by the plaintiff's right to an exemption in lieu of homestead: *Kemper v. Pierce*, 5 O. C. C. 488, 3 O. C. D. 239 [affirmed, without opinion, *Pierce v. Kemper*, 32 Bull. 331]; *Serhant v. Haker*, 73 O. S. 250, IV Longsdorf's Notes, 1002.

It has been repeatedly held that where a debtor is entitled to hold a judgment as property exempt from execution, a set-off as to such judgment will not be ordered: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

5. Garnishment.

Where upon a suit a party is garnisheed, and the garnishee pays the money to the magistrate, and the magistrate in turn to the debtor pending an appeal, the debtor may still claim it as exempt, although the affidavit claiming the exemption does not show definitely the amount of property he is the owner of, and where the record does not show that he in terms selected this particular property for his exemption: *Mentel v. McCammon*, 13 O. C. C. 280, 7 O. C. D. 320.

A motion to discharge a garnishment of money on the ground that the money is exempt from execution is a sufficient selection of it as in lieu of homestead: *Tombow v. Haskins*, 15 O. C. C. 656, 8 O. C. D. 281.

A claim for exemption which by G. C., § 11738 may be made "at any time before sale" is in time in case of garnishment where of course there is no sale, if made before the fund has come into the custody of the court, but remains with the garnishee for future disposition: *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98 [affirmed *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404].

I. NECESSARIES.

The word "necessaries" is not used in the Ohio statutes in the narrow sense of articles which are indispensable, but it includes all articles which are within the circumstances of the family and will enable them to live conveniently and decently according to the custom of those among whom they reside; and under this construction of the word the water heating apparatus used in a dwelling of sufficient convenience and accommodation to have a bath room and tub is a "necessity": *Water Heater Co. v. Meckel*, 9 O. N. P. (N.S.) 581.

J. TIME TO CLAIM.

A demand is permitted at any time before actual appropriation: *Rempe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940.

If in attachment proceedings no motion or application is made by defendant, and the decision of the justice is in no way invoked by him upon the question of the right to demand and hold said property exempt, the judgment of the justice upon the final hearing of said cause "sustaining said attachment and ordering the garnishee to pay the money in his hands into court," will not conclude or estop the defendant from thereafter asserting his right to have and hold said money exempt; but he may, notwithstanding said judgment and order, demand such exemption, and upon demand made at any time before the actual appropriation of the same to the payment of plaintiff's claim, he is entitled to have said money set off and allowed to him as exempt: *Rempe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940, 48 Bull. 510 [distinguishing *Strauss v. Cooch*, 47 O. S. 115, IV Longsdorf's Notes, 360].

A demand is permitted if made before fund has actually come into custody of the court: *Rempe v. Ravens*, 8 O. N. P. 513, 11 O. D. (N.P.) 684 [citing *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98].

A claim for exemption is in time, in case of garnishment, if made before the fund has come into the custody of the court, but remains with the garnishee for future disposition: *Hoover v. Haslage*, 5 O. N. P.

90, 7 O. D. (N.P.) 98 [affirmed *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404].

Where the only asset of an estate assigned for creditors, not covered by incumbrances, was an undivided interest in a tract of land and an application for exemption was made in the probate court, which was refused because no assets were then in the assignee's hands, the tract being then the subject of a partition suit, and the proceeds of sale coming in the probate court, it was held that the homestead was sufficiently selected before sale under G. C., § 11738 by reason of such application and would be granted: *Telsey v. Telsey*, 1 Dayton Term Rep. (Iddings) 65.

Where the execution debtor's wife owns land which is their homestead, but before the levy upon goods they have removed from it, and it is not then their homestead, the debtor may claim exemption of personal property in lieu of homestead: *Ryan v. Miller*, 40 O. S. 232, IV Longsdorf's Notes, 20.

It is too late to claim exemption after verdict and payment to the judgment creditor: *Green v. Fischer*, 6 Dec. Rep. 1138, 10 Am. L. Rec. 570.

Where lands were sold in an action on a mortgage executed by husband and wife, neither of whom had a homestead, the wife, as against a judgment creditor who was a party, was held entitled to the exemption out of the surplus after satisfaction of the mortgage debt, though no demand was made until the sale was confirmed and the money in the hands of the officer for distribution: *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596.

So after sale by assignee for creditors: *Hellebusch v. Richter*, 7 Dec. Rep. 341, 2 Bull. 127 [affirmed, on other grounds, *Hellebusch v. Richter*, 37 O. S. 222, III Longsdorf's Notes, 908].

Formerly the demand was to be made at the time of the levy: *Muse v. Darrah*, 2 Dec. Rep. 604, 4 W. L. M. 149; *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

If the debtor were not present, demand should be made, and notice given to the officer within a reasonable time before sale: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

When the officer is about to execute an order of sale or execution is a proper time to assert a homestead claim: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657.

A decretal order of sale may be subject to a demand for homestead as well as an execution at law: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657.

A demand in lieu of homestead out of the proceeds of a judgment in favor of the debtor, not made until the judgment had

been paid to a judgment creditor on petition to subject the fund, is too late: *Green v. Fisher*, 6 Dec. Rep. 1138 (last report is best), 10 Am. L. Rec. 570, 8 Dec. Rep. 345, 7 Bull. 131.

Delay of eight months, and until after order of sale in attachment proceedings to select the attached property as exempt in lieu of homestead, does not waive the right to select; for G. C., § 11738 allows selection "at any time before sale," and applies to attachments as well as to executions: *Close v. Sinclair*, 38 O. S. 530, III Longsdorf's Notes, 991.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution: *Assignment of Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

K. FORM OF DEMAND.

No particular notice of a demand is required: *Long v. Hoban*, 7 Dec. Rep. 688, 4 Bull. 986; *Green v. Fisher*, 6 Dec. Rep. 1139, 10 Am. L. Rec. 570; *Dunn v. Springmeier*, 7 Dec. Rep. 339, 2 Bull. 127.

Where a defendant in an attachment suit states by motion that he has selected and demanded the property attached in lieu of homestead, and neither he nor his wife is the owner of a homestead, the fact that he has not specified under what clause or section of the statutes he made his selection will not defeat his claim, but he will be presumed to have made it under a section which entitled him to the exemption, and it will be available to him under G. C., § 11738: *Rancourt v. Hahn*, 10 O. C. C. (N. S.) 313, 20 O. C. D. 245.

A demand for \$500 worth in lieu of homestead is sufficient for part of a homogeneous quantity as a pile of brick, without picking out the part: *Hall v. Brown*, 4 Dec. Rep. 80, 1 Clev. L. Rep. 9.

A motion to discharge a garnishment of money on the ground that the money is exempt from execution is a sufficient selection of it as in lieu of homestead under G. C., § 11738: *Tombow v. Haskins*, 15 O. C. C. 656, 8 O. C. D. 281.

L. NATURE OF THE INTEREST.

A claim for allowance in lieu of homestead is not an insurable interest in case of assignment for benefit of creditors, when transfer of property avoids the policy: *Insurance Co. v. Waters*, 65 O. S. 157, IV Longsdorf's Notes, 883.

The property set off as a homestead is not thereby relieved from being subjected to the payment of a judgment to the extent that

it never can be so used, but is relieved only while occupied by debtor's family as a homestead: *Kerns v. Linden*, 3 O. C. C. (N.S.) 37, 13 O. C. D. 162.

Real property of a judgment debtor that is exempt from sale in lieu of a homestead under G. C., § 11738, when selected and held by such judgment debtor as so exempt becomes his absolute property with full power of disposition, and if thereafter he sells and conveys the same, such property in the hands of his grantee is not subject to the lien of a judgment obtained against the grantor prior to such sale and conveyance, nor to seizure and sale upon execution in satisfaction of such judgment: *Genell v. Hiron*, 70 O. S. 309, IV Longsdorf's Notes, 974.

M. NECESSITY OF SELECTION.

Personal property is exempt only when selected. Until selected it is subject to levy and sale: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

Where the only asset of an estate assigned for creditors, which is not swallowed up by incumbrances, is an undivided interest in a tract of land, and an application for exemption is made in the probate court, which was refused because no assets were then in the assignee's hands, said tract being then the subject of a partition suit, and the proceeds of sale coming into the probate court, the homestead has been sufficiently selected before sale under G. C., § 11738, by reason of such application, and will be granted: *Kelsey v. Kelsey*, 1 Dayton Term Rep. (Iddings) 65.

In an administrator's sale to pay debts no demand is necessary. G. C., § 11732, makes it the peremptory duty of the appraisers to set off the homestead, nor could the widow waive it if there were minor children: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

N. SUCCESSIVE EXEMPTIONS.

A former allowance is no bar to subsequent claims against same judgment out of other property; subject to the limitation that a judgment debtor may not at any time hold exempt in lieu of a homestead property in excess of \$500 in value in addition to the chattel property otherwise by law exempted: *Hart v. Cole*, 73 O. S. 267, IV Longsdorf's Notes, 1003.

Part payments are credited against an insolvent grantor when he has received three hundred dollars of the balance of purchase money from the grantee: *Johnson v. Burnside*, 7 O. N. P. 74, 8 O. D. (N.P.) 412.

O. PROCEDURE.

An officer is bound at his peril not to take on execution articles absolutely exempt, unless the debtor waives his exemption: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

Under proceedings in aid of execution it may be shown by parol evidence that the claim upon which the judgment was rendered was for necessities, and ten per cent. of the earnings of the judgment debtor subjected to the payment of the claim of the judgment creditor: *Sweet v. Barnum*, 8 O. C. C. (N.S.) 108, 18 O. C. D. 380.

Where a defendant in an attachment suit states by motion that he has selected and demanded the property attached in lieu of homestead, and neither he nor his wife is the owner of a homestead, the fact he has not specified under what clause or section of the statutes he made his selection will not defeat his claim, but he will be presumed to have made it under a section which entitled him to exemption, and it will be available to him under G. C., § 11738. In such a case the motion, if supported, discharges the attached property, whether it is in the form of a discharge of the attachment or not, and the justice has jurisdiction to entertain and dispose of the contention: *Rancourt v. Hahn*, 10 O. C. C. (N.S.) 313, 20 O. C. D. 245.

A motion setting up the selection and demand of property in lieu of homestead exemption, if supported, discharges the attached property whether it is in the form of a discharge of the attachment or not, and the justice has jurisdiction to entertain and dispose of the contention: *Rancourt v. Hahn*, 10 O. C. C. (N.S.) 313, 20 O. C. D. 245.

It is the right of the creditor to have a sale of the property subject to his right, notwithstanding nothing above such exemption can be realized: *Jones v. Kaiser*, 12 O. D. (N.P.) 437.

On distribution in action to foreclose mortgages in which wife released her dower and to adjust liens, as between the dower of the wife and the husband's exemption in lieu of homestead, the homestead exemption should be resorted to before the wife's dower: *Stoehr v. Brewing Co.*, 17 O. C. D. 330, 2 O. L. R. 449.

Where an unassigned dower estate of a husband on proceedings by an administrator to sell was sought to be subjected by cross-petition by creditors of the husband, who married again, his motion to pay out of the proceeds of a sale was held a sufficient selection: *Moore v. Moore*, 7 O. N. P. 320, 6 O. D. (N.P.) 154.

Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, can not be attacked collaterally by exception to her account as administratrix of the said estate: *In re Hess*, 14 O. C. C. (N.S.) 463, 23 O. C. D. 449.

Where the probate court refused five hundred dollars in lieu to an assignor for creditors, because he then owned a homestead, and ten months after he again applied on the ground that his homestead had been sold under prior liens which exhausted the proceeds, it was held that the former order was not *res judicata*, and the assets being still undistributed the allowance was proper: *Moody v. Whittaker*, 22 Bull. 168.

Where the property is not taken for a debt no homestead right arises. Thus, where a widower and his infant children being tenants in common, he marries again, and on divorce his second wife has his share awarded to her as alimony, and brings partition and a sale is ordered, the infant children can not claim homestead: *Rinehart v. Rinehart*, 6 Dec. Rep. 907, 8 Am. L. Rec. 654.

A married woman claiming in lieu of homestead must show that she and her husband are living together and that neither owns a homestead; these facts are not presumed: *Voight v. Larkin*, 12 O. C. C. 751, 6 O. C. D. 124.

The facts at the time of an assignment and not at the time of distribution control where the exemption is claimed under G. C., §§ 11730, 11734, or 11738, but probably otherwise under G. C., § 11737: *Kunkle v. Reeser*, 5 O. N. P. 401, 5 O. D. (N.P.) 422; *Moore v. Moore*, 7 O. N. P. 320, 6 O. D. (N.P.) 154.

The better and safer procedure, in case the assignee has failed to pay the exemption claim, is for the party claiming the exemption to file exceptions to the account of the assignee and then, if an order to pay be made and the assignee fails to comply therewith, bring an action on his bond: *Bentzel v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244.

If the order directing the payment of a certain sum in lieu of exemption be made in the court's consideration of the question of distribution of the proceeds of sale of the property out of which exemption could be paid, and all persons in interest were in court, a failure to comply with such order might sustain an action on the bond: *Bentzel v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244.

Where an assignor waives the right to select specific property in lieu of homestead

under G. C., § 11738, and asks that the sum of five hundred dollars be allowed to him out of the proceeds from the sale of the assigned property, and such sum is set off to him by the appraisers, and the action of the appraisers is approved by the court and said sum is ordered to be paid to the assignor out of the proceeds of sale, it was held that such order by the court is not a final order upon which, in case the assignee fails to pay, an action could be brought against the assignee on his bond: *Bentzel v. Goodwin*, 14 O. C. C. (N.S.) 65, 22 O. C. D. 244.

P. WAIVER.

The abandonment of a homestead consists in actually quitting the premises and leaving it entirely as a home; but as an allowance in lieu of a homestead necessarily implies that the parties have no homestead, no abandonment of such allowance can be implied by simply showing a former ownership and subsequent abandonment of a homestead: *Bank v. Huffman*, 1 O. N. P. (N.S.) 349; 14 O. D. (N.P.) 225.

In case of a chattel mortgage the owner waives the benefit of exemption so far as the incumbrance extends or is operative: *Frost v. Shaw*, 3 O. S. 270, II Longsdorf's Notes, 26.

A chattel mortgage is not a mere waiver by the husband alone of the exemption, but is a conveyance, and his wife can not claim the goods exempt any more than if he had sold them: *Hiser v. Dawson*, 9 Dec. Rep. 827, 17 Bull. 318.

A mortgagee of chattels sold by him on installments, who obtains judgment at law and execution, waives ownership under the mortgage and the mortgagor can have homestead exemption out of the property: *State, ex rel., v. Lacy*, 18 O. C. C. 379, 10 O. C. D. 111.

If a debtor, demanding as exempt under G. C., § 11738, property taken by law and in the custody of the court, has at the time of such demand and the hearing thereon to determine his right to such exemption, other property of the same kind and of the value of \$500 in his possession, or under his control, which he conceals or withholds from his creditors, he will be deemed to have selected the property so concealed, and his demand for the property in the custody of the court will be refused: *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404 [affirming *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98].

A mere failure to make selection and demand for any time short of that permitted by the statute is not a waiver. The selection may be made before or at the time of the levy by withholding and concealing property for the purpose and with the effect of pre-

venting a levy upon it. The family of the debtor are bound by his selection or waiver: *Hoover v. Haslage*, 5 O. N. P. 90, 7 O. D. (N.P.) 98 [affirming, *Haslage v. Hoover*, 16 O. C. C. 570, 9 O. C. D. 404].

The right may be waived, as where the debtor fixed a time and place for meeting the officer and making the selection, and purposely failed to attend: *Butt v. Green*, 29 O. S. 667, III Longsdorf's Notes, 509.

Where property had been levied on by attachment, and, pending the suit, the debtor assigned all his property for the benefit of creditors, except such as he might lawfully hold exempt from execution, it was held that the right of the debtor to select the attached property as exempt from sale was not thereby waived: *Close v. Sinclair*, 38 O. S. 530, III Longsdorf's Notes, 991.

A colorable or pretended sale of exempt property by a debtor does not forfeit his right to hold the same exempt: *Tracy v. Cover*, 28 O. S. 61, III Longsdorf's Notes, 389.

A judgment debtor contracting to sell his homestead does not lose his right to his exemption in lieu of a homestead because of a judgment obtained and execution issued before the execution of the deed: *Warus v. Reeck*, 8 O. C. C. (N.S.) 401, 18 O. C. D. 785.

In a proceeding in attachment and garnishment under G. C., §§ 10253 and 10265, where property of the defendant in the hands of a garnishee is at the time of the service of process upon such garnishee, subject to exemption by the defendant under G. C., § 11738, mere failure of the defendant to assert such right in the attachment suit by a motion or application to discharge the attachment, or for a release of the property on the ground that the same is so exempt, does not of itself amount to and constitute an abandonment or waiver by the defendant of his right to claim and have such exemption: *Rempe v. Ravens*, 68 O. S. 113, IV Longsdorf's Notes, 940, 48 Bull. 510.

Where a man executes a mortgage and afterwards marries and becomes the head of a family, a family homestead in the mortgaged property is subject to the mortgage, and in an action against the mortgagor to foreclose such mortgage his wife is not a necessary party: *Wilson v. Scott*, 29 O. S. 636, III Longsdorf's Notes, 506.

A mortgage of premises, no part of which constitutes the family homestead of the mortgage debtor at the time of the execution and delivery of the mortgage, although not executed by the wife, is not affected by the subsequent selection and occupancy of the premises mortgaged as the homestead of the mortgagor. The wife can not claim a homestead:

Gibson v. Mundell, 29 O. S. 523, III Longsdorf's Notes, 494.

In a sale on foreclosure of mortgaged premises, the wife having joined in the execution of one mortgage, but not of the other, the controversy as to the wife's homestead is an equitable one in which there is no right of trial by jury, and therefore a right of appeal lies: *Spence v. Basey*, 34 O. S. 42, III Longsdorf's Notes, 697.

An execution may be levied upon a family homestead notwithstanding the exemption and the right of dower, but can only be enforced subject to such rights: *Winkler v. State, ex rel.*, 20 O. C. C. 360, 11 O. C. D. 123.

A widow's right to claim exemption in lieu of homestead out of a judgment and mortgage held by her against two-twelfths of land is not barred by her having mortgaged her own interest in the other eight-twelfths: *Wentzel v. Hayes*, 16 O. C. C. 110, § O. C. D. 756.

Where an assignor for the benefit of creditors is induced to and does forego the selection of specific articles of personal property under his claim for exemption in lieu of a homestead, because of representations made to him by the assignee that he would have to wait until the property was sold and an order of court obtained, and that he would then be paid his exemption, actual selection, under such circumstances, is waived or excused, and the want of it can not be held to be an abandonment or forfeiture of the assignor's right to claim and have his exemption out of the proceeds of sale of the assigned property upon formal demand made therefor before distribution: *In re Assignment of Kraus*, 79 O. S. 314, IV Longsdorf's Notes, 1046.

Q. PRESUMPTIONS.

A married woman claiming in lieu of homestead must show that she and her husband are living together, and that neither owns a homestead; these facts are not presumed: *Voight v. Lafkin*, 12 O. C. C. 751, 6 O. C. D. 124; see *Elliot v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159; *Bank v. Huffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

XXVIII. EXECUTION AGAINST PERSON.

A. ISSUING EXECUTION.

The affidavit directed by the third section of the act of March 19, 1838, is not defective because it states the ground for a *capias* in the words of the act merely, to-wit, "That the debtor is about to dispose of his property with intent to defraud his creditors": *Hock-*

springer v. Ballenburg, 16 O. 304, I Longsdorf's Notes, 765.

Execution against the person can not be issued out of a different court than that rendering judgment: *Fertilizer Co. v. Ronk*, 54 O. S. 422, IV Longsdorf's Notes, 641.

The probate court can not issue an execution against the person on a judgment in the common pleas: *Fertilizer Co. v. Ronk*, 54 O. S. 422, IV Longsdorf's Notes, 641.

A judgment rendered against a defendant while in custody under an order of arrest issued by a justice of the peace, is in effect, so far as execution against the person is concerned, a finding of the fraud charged in the affidavit upon which the order issued. Upon a judgment thus rendered process for imprisonment may issue of course. No affidavit after judgment is required. And where the face of the process shows such a judgment to have been rendered, a legal cause of imprisonment sufficiently appears: *Ex parte, Ogden*, 2 Dec. Rep. 93, 1 W. L. M. 350.

The only court authorized to allow an execution against the person under G. C., § 11746, is the court rendering the judgment. Hence, such allowance by the probate judge on a judgment of the common pleas in the absence of the judge of the latter is a nullity, and the party obtaining it may be liable for false imprisonment: *Fertilizer Co. v. Ronk*, 54 O. S. 422, IV Longsdorf's Notes, 641. See also ARREST.

B. DISCHARGE.

Under a former statute, a defendant arrested upon execution for a fine might surrender land in discharge of his body, and the land may be sold without valuation: *Walsh v. Ringer*, 2 O. 327, I Longsdorf's Notes, 130.

Where the defendant turns out real estate to release his body, the lien of the judgment on other lands of the defendant is not thereby discharged: *Douglas v. Wallace*, 11 O. 42, I Longsdorf's Notes, 539.

C. PRISON BOUNDS.

It never was intended that the bounds around the jail should be wholly inclosed by visible actual monuments. If monuments be set up at certain points and the lines between described only mathematically, it is sufficient: *Lucky v. Brandon*, 1 O. 49, I Longsdorf's Notes, 66.

Where jail limits are by law coextensive with a county, and a new county is made in part out of an old one, the jail limits of the old county are still the privilege of a debtor who was charged in execution before the new county was organized: *Kent v. Burnett*, 10 O. 392, I Longsdorf's Notes, 523.

On failure to pay the prison fee, a debtor does not violate his bond by going outside of prison bounds: *Gill v. Miner*, 13 O. S. 182, II Longsdorf's Notes, 602.

A certificate given by a commissioner of insolvents to a debtor who has given bond for the prison limits, discharges the security on the bond, notwithstanding the proceedings are afterwards dismissed in the common pleas: *Young v. Whitton*, 9 O. 100, I Longsdorf's Notes, 465.

In an action on a bond given under G. C., § 11759, it is a good defense that no order was made by the court or judge authorizing its issue, or that such order was made without the necessary preliminary proof, or that the writ has been quashed: *Hyatt v. Robinson*, 15 O. 372, I Longsdorf's Notes, 716.

Joint bonds given in separate suits are void; and a bond is void unless defendant is actually in prison, and that fact is recited in the bond: *Lytle v. Davies*, 2 O. 277, I Longsdorf's Notes, 125.

When a defendant in custody, within the prison limits, makes oath that he is unable to support himself, the plaintiff is not bound to furnish lodgings: *Buttles v. Carlton*, 1 O. 32, I Longsdorf's Notes, 65.

A debtor imprisoned within the jail limits may go into private houses, or labor on private ground within such limits, without being guilty of an escape: *Lucky v. Brandon*, 1 O. 49, I Longsdorf's Notes, 66.

Where jail limits are by law coextensive with a county, and a new county is made in part out of an old one, the jail limits are not thereby changed: *Kent v. Burnett*, 10 O. 392, I Longsdorf's Notes, 523.

D. LIABILITY OF SHERIFF.

The imprisonment of a judgment debtor upon execution operates as a satisfaction so long as the imprisonment continues, and so if he is discharged from such imprisonment with the assent of the creditor; but if the debtor escapes or is discharged without the assent of the creditor, it is not a satisfaction: *Bowrell v. Zeigler*, 19 O. 362, I Longsdorf's Notes, 883.

A sheriff can not be amerced for not executing a writ under G. C., § 11744, from another county, unless the indorsement "funds deposited" is made upon the writ; nor can a tender of his fees be substituted in the place of such indorsement: *Duncan v. Drakeley*, 10 O. 45, I Longsdorf's Notes, 487.

No action lies against the sheriff for imprisoning a debtor in the same room with criminals, if the county jail contains but one apartment: *Campbell v. Hampson*, 1 O. 119, I Longsdorf's Notes, 68.

A sheriff can not defend in an action on the case for the escape of a prisoner, on the ground that the jail was insufficient: *Richardson v. Spencer*, 6 O. 13, I Longsdorf's Notes, 316.

E. PRIVILEGE FROM ARREST.

1. Purpose of Statutory Provisions.

The law making power did not intend to excuse from arrest at any time those guilty of or charged with misdemeanors: *In re Carroll*, 9 Dec. Rep. 261, 12 Bull. 9.

G. C., § 13505, provides that, "If, during a session of the general assembly, a member or officer thereof is arrested upon a charge of treason, felony or breach of the peace, notice thereof shall be given forthwith to the body with which he is connected, by the officer issuing the process upon which such arrest is made."

2. Who Are Exempt.

(a) Members of General Assembly.

A member of the general assembly is exempt from service of summons in a county other than that of his residence, during the sessions of the assembly and the time usually occupied in traveling to and from such sessions, where the cause of action accrued ten days before the opening of the session: *Walsh v. Mooney*, 13 O. C. C. (N.S.) 90, 23 O. C. D. 214.

(b) Suitors.

(aa) Non-residents of State.

The privilege of suitors from service of summons while going to, attending or returning from court extends to all suitors whether they be residents or nonresidents of this state: *Barber v. Knowles*, 77 O. S. 81, IV Longsdorf's Notes, 1030.

Freedom from service of summons should be allowed with a reasonable latitude. Reasonable delays or deviations should be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending or returning from court: *Barber v. Knowles*, 77 O. S. 81, IV Longsdorf's Notes, 1030.

Service of summons and an order of arrest issued in a civil action against a non-resident and made upon him directly after he had entered into a recognizance to appear before the court of common pleas at its next term, and before conviction and before he had an opportunity to return to his home, was rightfully set aside: *Compton v. Wilder*, 40 O. S. 130, IV Longsdorf's Notes, 11.

Non-resident suitors are, by the rule of the common law, while attending court, privileged from being served with summons in civil actions, and it is not the intention or effect of G. C., § 11756, to deprive them of such privilege: *Bassett v. Gunsolus*, 6 Dec. Rep. 1228, 12 Bull. 319, 13 Am. L. Rec. 487.

Where one, who is a nonresident of this state, is called into this jurisdiction by his attorneys for the purpose of consultation with reference to the subject-matter of a pending action, he is exempt from service of summons, notwithstanding he instituted an independent action for replevin of the property involved: *Solomon v. Yokum*, 10 O. N. P. (N.S.) 271.

Service on a person induced by trick or false statement to come into another state is void. One who entices another into the jurisdiction to consult over pretended business matters can not have him served until a reasonable time to depart after termination of the business: *Pilcher v. Graham*, 18 O. C. 5, 9 O. C. D. 825.

A judgment rendered against one who has been fraudulently decoyed into the jurisdiction of the court is not absolutely void; and it can not be attached collaterally in an action upon such judgment: *Albright v. Boyd*, 85 O. S. 34.

(bb) Non-residents of County.

The privilege of suitors from service of summons while going to, attending or returning from court extends to all suitors whether they be residents or nonresidents of this state: *Barber v. Knowles*, 77 O. S. 81, IV Longsdorf's Notes, 1030.

Freedom from service of summons should be allowed with a reasonable latitude. Reasonable delays or deviations should be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending or returning from court: *Barber v. Knowles*, 77 O. S. 81, IV Longsdorf's Notes, 1030.

Service on a person in another county than that of his residence, into which he has gone to attend a trial in which he is concerned, and at which his presence is necessary, is not a good service: *Andrews v. Lembeck*, 46 O. S. 38, IV Longsdorf's Notes, 310.

The agent of a corporation, though without personal interest in the suit, is within the reason of the rule, and where he is in a county other than that of his residence for the purpose of hearing a motion in a case against his company and as a witness, service upon him after the hearing, but before he had time to leave, is not good: *Householder v. Insurance Co.*, 6 O. N. P. 520, 8 O. D. (N.P.) 321.

An attorney is exempt from service of summons while attending professional duties in another county, but such service is valid until impeached and set aside: *Whitman v. Sheets*, 20 O. C. C. 1, 11 O. C. D. 179.

One going out of the jurisdiction of his residence upon the advice of counsel to attend upon the cross-examination of adverse witnesses, whose depositions are being taken to be used in an action in which he is a party, is privileged from the service of summons: *Langdon v. Baker*, 5 O. N. P. 118, 7 O. D. (N.P.) 423.

Service of process may be had in a civil action upon the accused person who is voluntarily seeking a hearing before a grand jury in a county other than of his residence: *Fields v. Ragelmeir*, 7 O. N. P. (N.S.) 585, 19 O. D. (N.P.) 164.

A nonresident litigant is not privileged by being present to attend court if the case is one in which summons could be sent to the county of his residence: *Householder v. Insurance Co.*, 6 O. N. P. 520, 8 O. D. (N.P.) 321.

Where a nonresident witness comes into the jurisdiction of a court, as well as upon matters foreign to his case as those pertaining to it, his coming is voluntary and he is amenable to process, for the reason that the voluntary action destroys the privilege accorded to involuntary action therein: *Piano Co. v. Krell*, 12 O. D. (N.P.) 634.

3. Effect of Violation of Privilege.

Service of summons and an order of arrest issued in a civil action against a nonresident and made upon him directly after he had entered into a recognizance to appear before the court of common pleas at its next term, and before conviction and before he had an opportunity to return to his home, was rightfully set aside: *Compton v. Wilder*, 40 O. S. 130, IV Longsdorf's Notes, 11.

A judgment rendered against one who has been served with process after being fraudulently decoyed within the jurisdiction of such court is not void; and it can not be attacked collaterally in an action upon such judgment: *Albright v. Boyd*, 85 O. S. 34.

Service of civil process upon a person privileged from arrest, as provided by G. C., § 11754, is voidable only, and may be waived as any other privilege. A person indicted and brought into the jurisdiction of the court by extradition, enters an appearance and waives his privilege from arrest in a civil action against him as a suitor under G. C., § 11754, by filing motions for bail therein, which raise an issue of fact not only as to his rights for bail, but as to a complete defense to the action. After that it is

too late to make the claim of exemption from arrest: *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376 [reversing *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N.P.) 779].

The fact that a nonresident charged with a crime and brought into the jurisdiction of a court of this state upon proceedings in extradition, is privileged from arrest under G. C., § 11754, can not be noticed by the court *ex officio*, nor service set aside after appearance unless there has been an abuse of process, as where the defendant has been decoyed into the state in order that service might be had upon him or brought within the jurisdiction of the court under false pretenses; and then, not because of any right of the parties to have the same set aside, but because of the fraud upon the court and for the purpose of protecting and shielding its writ from imposition: *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376 [reversing *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N.P.) 779].

EXECUTIVE.

For executive of the state, see GOVERNOR; ATTORNEY GENERAL, ETC.

For executive of municipal corporations, see MUNICIPAL CORPORATIONS, ETC.

EXECUTIVE POWERS.

For executive powers, see CONSTITUTIONAL LAW.

For the discussion of the distinction between executive and legislative functions, see *Fairview v. Giffe*, 73 O. S. 183, IV Longsdorf's Notes, 1001.

EXECUTOR DE BONIS NON.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

EXECUTOR DE SON TORT.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

Scope Note.—Includes general administration of decedent's estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors and administrators in respect to the collection, management, and disposition of their testators' or intestates' estate; and legal proceedings relating thereto. Excludes probate, establishing, interpretation, and effect of wills, testamentary powers and trusts; rights upon distribution of intestates' estates.

Cross References.

For validity, construction, effect, operation, probate and contest of wills, see WILLS, LEGACIES AND DEVISES.

For questions of descent and distribution, see also DESCENT AND DISTRIBUTION.

For questions of dower, see DOWER.

For questions of curtesy, see CURTESY.

For the devolution of the right to sue for a breach of covenant in a deed, see DEEDS.

For validity and effect of antenuptial agreements, see HUSBAND AND WIFE.

For the devolution of the right to sue for property taken by eminent domain, see EMINENT DOMAIN.

For the right of the executor to growing crops, etc., see also EMBLEMENTS.

For the liability of an executor upon a lease of the decedent, see also LANDLORD AND TENANT.

For the specific performance of a contract to sell realty made by the decedent, see SPECIFIC PERFORMANCE.

For the right to take a mechanic's lien under a contract with the decedent, see MECHANIC'S LIEN.

For the foreclosure of a mortgage given by the decedent, see also MORTGAGES.

For the right to reach the distributive share of legatees, distributees, etc., by creditor's bill, see also CREDITOR'S BILL.

For the liability of an executor or administrator to attachment, see also ATTACHMENT.

For actions for care, support, etc., see SERVICES.

For the right of an administrator to sue for death by wrongful act, see DEATH BY WRONGFUL ACT.

For the effect of fraudulent conveyances, see FRAUDULENT CONVEYANCES.

- For questions of taxation, see **TAXATION**.
 For questions of costs, see also **COSTS**.
 For questions of jurisdiction, see **CONFLICT OF JURISDICTION**; **JURISDICTION**.
 For the right to enforce a stockholder's liability against the estate of a decedent, see also **CORPORATIONS**.
 For interference with an executor as contempt of court, see also **CONTEMPT**.
 For the effect of purchase by an executor at his own sale, see also **FRAUD AND DECEIT**.
 For homestead exemptions, see also **EXECUTION, WRIT OF**.
 For questions of assignment, see **ASSIGNMENTS**.
 For the effect of a judgment upon the rights and liabilities of an executor and his sureties, see also **JUDGMENT**.
 For the validity of judgment as against collateral attack, see also **JUDGMENT**.
 For collateral attack upon the appointment of an executor, see also **JUDGMENT**.
 For the jurisdiction of the court to settle questions of liens, etc., see also **COURTS**.
 For the abatement and revivor of actions, see **ABATEMENT AND REVIVOR OF ACTIONS**.
 For questions of interpleader, see **INTERPLEADER**.
 For questions of appeal, see also **APPEALS**.
 For the right to an accounting, see also **ACCOUNTING**.
 For questions arising out of trusts, see also **TRUSTS**.
 For the effect of the statute of limitations, see **LIMITATIONS, STATUTE OF**.
 For the competency of witnesses, see **WITNESSES**.
 For analogous topics, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**; **GUARDIAN AND WARD**; **RECEIVERS**.

ANALYTICAL OUTLINE.

- I. **Definition, 7409.**
- II. **Nature of Executor and Administrator, 7409.**
 - A. *In general, 7409.*
 - B. *Distinction between executor and trustee, 7410.*
- III. **Civil Death, 7413.**
- IV. **Necessity of Administration, 7413.**
- V. **Scope and Effect of Statutory Provisions, 7415.**
- VI. **Jurisdiction to Appoint, 7416.**
- VII. **Qualifications and Eligibility, 7418.**
 - A. *Executor, 7418.*
 - B. *Administrator, 7419.*
 1. *Who may act, 7419.*
 2. *Order of preference, 7421.*
- VIII. **Appointment, 7423.**
 - A. *Time, 7423.*
 - B. *Application, 7423.*
 - C. *Notice, 7423.*
 - D. *Refusal to act, 7424.*
 - E. *Hearing, 7424.*
 - F. *Review, 7424.*
 - G. *Collateral attack, 7425.*
- IX. **Termination of Authority, 7425.**
 - A. *Marriage, 7425.*
 - B. *Death, 7426.*
 - C. *Discovery of later will, 7426.*
 - D. *Resignation, 7427.*
 - E. *Removal for cause, 7428.*
 - F. *Filing final account, 7429.*
 - G. *Nature and effect of order of removal, 7431.*

- H. *Review*, 7432.
 - 1. *Appeal*, 7432.
 - a. *Before 95 v. 406*, 7432.
 - b. *After 95 v. 406*, 7433.
 - 2. *Error*, 7433.
 - a. *Before 95 v. 392*, 7433.
 - b. *After 95 v. 392*, 7433.
- X. **Administrator De Son Tort**, 7434.
- XI. **Ancillary Administrator**, 7435.
- XII. **Foreign Administrator**, 7437.
 - A. *Priority of administrators*, 7437.
 - B. *Non-resident*, 7437.
 - C. *Effect of treaty*, 7437.
 - D. *Effect of foreign judgment*, 7438.
 - E. *Wrongful death*, 7439.
 - F. *Powers*, 7439.
 - 1. *To sue and be sued*, 7439.
 - 2. *To settle estate*, 7440.
 - 3. *To sell*, 7440.
 - 4. *Action*, 7440.
- XIII. **Administrator De Bonis Non**, 7441.
 - A. *Qualification and nature*, 7441.
 - B. *When appointed*, 7442.
 - C. *Relation between executor and executor de bonis non*, 7443.
 - D. *Action*, 7443.
 - 1. *Against executor or administrator on bond*, 7443.
 - 2. *Against third persons*, 7445.
 - 3. *Against personal representatives of executor*, 7445.
- XIV. **Administrator with the Will Annexed**, 7446.
- XV. **Title to Property of Decedent**, 7446.
 - A. *Personalty*, 7446.
 - 1. *In general*, 7446.
 - 2. *Choses in possession*, 7448.
 - 3. *Choses in action*, 7449.
 - a. *Debts due from executor*, 7449.
 - b. *Debts due from others*, 7450.
 - B. *Realty*, 7451.
 - 1. *In general*, 7451.
 - 2. *Emblements*, 7453.
 - 3. *Estate for years*, 7454.
 - 4. *Rents*, 7454.
- XVI. **Inventory and Appraisement**, 7454.
- XVII. **Powers and Duties**, 7456.
 - A. *General scope*, 7456.
 - B. *To collect assets*, 7457.
 - C. *To manage estate*, 7459.
 - D. *To carry on business*, 7460.
 - E. *To invest funds*, 7461.
 - 1. *Diligence required*, 7461.
 - 2. *Liability*, 7462.
 - F. *To attack unfiled mortgage*, 7463.
 - G. *To set aside fraudulent conveyance*, 7463.
 - 1. *What constitutes fraudulent conveyance*, 7463.
 - 2. *When action may be brought*, 7464.
 - 3. *Method of procedure*, 7465.

4. Jurisdiction, 7465.
5. Effect of order setting aside conveyance, 7465.
6. Limitation, 7466.
7. Pleading, 7466.
- H. *Contracts of decedent*, 7467.
 - I. *To bind estate by admissions*, 7468.
 - J. *To bind estate by contract*, 7468.
 - K. *To borrow money*, 7469.
 - L. *To sell property of estate*, 7470.
 1. Personalty, 7470.
 2. Realty, 7471.
 - a. Nature of power, 7471.
 - b. Power given by will, 7471.
 - aa. How power given, 7471.
 - aaa. Express power, 7471.
 - bbb. Implied power, 7473.
 - bb. Who may execute power, 7474.
 - cc. When power may be executed, 7474.
 - dd. How power may be executed, 7475.
 - c. Statutory proceedings, 7476.
 - aa. History of legislation, 7476.
 - bb. Necessity of statutory provisions, 7477.
 - cc. Repeal of statute, 7477.
 - dd. Jurisdiction, 7477.
 - ee. Venue, 7479.
 - ff. Purpose of sale, 7480.
 - aaa. Power only to pay debts, 7480.
 - aaaa. Personalty insufficient, 7480.
 - bbbb. Amount, 7481.
 - cccc. Set-off, 7481.
 - dddd. Termination of right, 7481.
 - eeee. Pleading, 7482.
 - bbb. Validity of debt in issue, 7482.
 - ccc. Year's allowance, 7482.
 - ddd. Taxes, 7483.
 - eee. Legacies, 7483.
 - fff. Costs of administration, 7483.
 - gg. Bond to prevent sale, 7484.
 - hh. What interest may be sold, 7485.
 - aaa. Equitable interest, 7485.
 - bbb. Property conveyed in fraud of creditors, 7485.
 - ccc. Property incumbered by liens, 7486.
 - ddd. Dower and homestead rights, 7486.
 - eee. Estates in common, 7488.
 - ii. What property may be sold, 7488.
 - jj. Parties, 7488.
 - aaa. Plaintiff, 7488.
 - bbb. Defendant, 7488.
 - ccc. Appearance by guardian, 7489.
 - ddd. Effect of not being made a party, 7491.
 - kk. Pleading, 7491.

- ll. Process, 7492.
 - mm. Decree, 7493.
 - aaa. Necessity, 7493.
 - bbb. Effect, 7493.
 - ccc. Record, 7494.
 - ddd. Decree of foreign court, 7494.
 - nn. Determination of equities and priorities, 7494.
 - oo. Appraisement, 7498.
 - pp. Notice of sale, 7498.
 - qq. Place of sale, 7499.
 - rr. Purchaser, 7499.
 - aaa. Who may be, 7499.
 - aaaa. Administrator or executor, 7499.
 - bbbbb. Appraiser, 7502.
 - bbb. Interest acquired, 7502.
 - ss. Terms of payment, 7503.
 - tt. Confirmation, 7503.
 - uu. Deed, 7504.
 - aaa. Contents and construction, 7504.
 - bbb. Covenants, 7505.
 - ccc. Execution, 7505.
 - ddd. Fraudulent representations, 7506.
 - vv. Distribution, 7506.
 - ww. Limitation, 7508.
 - xx. Review, 7509.
 - yy. Sale in proceedings in partition, 7510.
- M. *Payment of debts*, 7512.**
- 1. What is payment, 7512.
 - 2. Funds from which payable, 7512.
 - 3. Notice of appointment, 7514.
 - 4. Presentation of claim, 7514.
 - a. Necessity, 7514.
 - b. Waiver, 7517.
 - 5. Allowance or rejection, 7517.
 - a. What constitutes, 7517.
 - b. When claim should be rejected, 7519.
 - c. Time, 7520.
 - d. Effect, 7520.
 - e. Rejection on demand of heir or creditor, 7522.
 - 6. Character in which payment is made, 7523.
 - 7. What are debts, 7523.
 - a. In general, 7523.
 - b. Amount, 7523.
 - c. Attorney's fees, 7524.
 - d. Taxes, 7524.
 - e. Support and services, 7525.
 - f. Funeral expenses and monument, 7527.
 - g. Gifts, 7528.
 - h. Mortgage, 7528.
 - i. Homestead, 7528.
 - j. Street and insurance assessments, 7528.
 - k. Expense incurred in defense of will, 7529.
 - 8. Payment out of funds not primarily applicable, 7529.
 - a. Money advanced by third person, 7529.
 - b. By executor, 7532.

9. Priority of payment, 7532.
 - a. In general, 7532.
 - b. Funeral expenses, 7534.
 - c. Attorney's fees, 7534.
 - d. Taxes, 7534.
 - e. Year's allowance, 7535.
10. Over-payment, 7535.
11. Action on claim, 7535.
 - a. Nature of action, 7535.
 - b. Time of bringing action, 7537.
 - aa. Earliest time, 7537.
 - aaa. When time begins to run, 7537.
 - bbb. Claim allowed, 7538.
 - ccc. Claim rejected, 7540.
 - bb. Latest time, 7542.
 - aaa. When time begins to run, 7542.
 - bbb. Claim allowed, 7544.
 - ccc. Claim rejected, 7545.
 - ddd. Disallowance of claim once allowed, 7546.
 - eee. Extension of time, 7547.
 - fff. Form and construction of statute, 7547.
 - ggg. Claim not filed, 7548.
 - cc. Waiver, 7550.
 - dd. Disability, 7550.
 - e. Parties, 7550.
 - d. Pleading, 7551.
 - e. Evidence, 7553.
 - f. Costs, 7553.
 - g. Review, 7554.
12. Arbitration, 7554.
- N. *Power to settle*, 7555.

XVIII. Year's Allowance, 7556.

- A. *Nature*, 7556.
- B. *Right to year's allowance*, 7558.
 1. Postnuptial contract, 7558.
 2. Antenuptial contract, 7558.
 3. Gift by will, 7558.
 4. Jointure, 7559.
 5. Payment of distributive share, 7559.
 6. Separation and divorce, 7559.
 7. Death of widow, 7560.
 8. Set-off, 7560.
 9. Lapse of time, 7560.
 10. Waiver, 7561.
- C. *Right of children to allowance*, 7561.
- D. *Procedure*, 7562.
- E. *Amount*, 7563.
- F. *Fund from which payable*, 7563.
- G. *Review*, 7564.

XIX. Mansion House, 7565.

XX. Distribution, 7565.

- A. *Interest of distributee*, 7565.
- B. *Interest of executor*, 7566.
- C. *Time*, 7566.

D. Order of court, 7567.

1. Form and effect of order, 7567.
2. Power to order distribution, 7568.
3. Power to determine distribution, 7569.
4. Necessity, 7571.
5. Method of enforcement, 7572.
 - a. In general, 7572.
 - b. Limitation, 7573.
 - c. Review, 7574.

E. Payment, 7574.

1. Method of payment, 7574.
2. Set-off, 7575.
3. To whom made, 7578.
4. Payment by mistake, 7579.
5. Presumption, 7579.

F. Subsequent discovery of will, 7580.**G. Receipt by distributee, 7580.****XXI. Accounts, 7581.****A. Power of court to compel, 7581.****B. Contents, 7583.**

1. In general, 7583.
2. Debits, 7584.
 - a. In general, 7584.
 - b. Rents, 7584.
 - c. Proceeds of sale, 7585.
 - d. Partnership funds, 7585.
 - e. Official money, 7585.
 - f. Proceeds of business carried on by executor, 7585.
 - g. Desperate claims, 7586.
 - h. After-acquired assets, 7586.
 - i. Life insurance, 7586.
 - j. Bonds, 7586.
 - k. Funds recovered for wrongful death, 7587.
 - l. Funds on which subcontractor had lien, 7587.
 - m. Securities of debtor held by his administrator, 7587.
 - n. Property subject to void chattel mortgage, 7587.
 - o. Note, 7587.
 - p. Remainders, 7588.
 - q. Gift with promise to surrender, 7588.
 - r. Interest, 7588.
 - s. Debts of administrator or executor to estate, 7589.
 - aa. In general, 7589.
 - bb. Executor insolvent, 7590.
 - cc. Principal and surety, 7591.
 - dd. Surviving partner, 7592.
 - ee. Joint administrators, 7592.
 - ff. Joint debtors, 7592.
 - gg. Executor without bond, 7592.
 - hh. Resigned administrator, 7592.
 - ii. Mortgagee, 7593.
 - jj. Contingent debt, 7593.
 - kk. Debt created after death, 7593.
 - ll. Effect of fraud, 7593.
 - mm. Method of determining amount, 7593.
3. Credits, 7594.
4. Partial and final accounts, 7595.

- C. *Exceptions and hearing*, 7598.
 - 1. Nature, 7598.
 - 2. Jurisdiction, 7598.
 - 3. Parties, 7600.
 - 4. Evidence, 7600.
 - 5. Reference to commissioner, 7600.
 - 6. Revivor, 7601.
 - 7. Review, 7601.
- D. *Effect of order settling accounts*, 7602.
 - 1. Collateral attack and res adjudicata, 7602.
 - 2. Correction for mistake and fraud, 7606.
 - 3. Review, 7609.
- E. *Adjustment by mutual agreement*, 7611.

XXII. Compensation, 7611.

- A. *Basis of compensation*, 7611.
 - 1. In general, 7611.
 - 2. Attorney's fees, 7612.
 - 3. Provisions against compensation, 7614.
- B. *Commissions*, 7615.
 - 1. Where purchasers are not lienholders, 7615.
 - 2. Where purchasers are lienholders, 7616.
- C. *Extra compensation*, 7616.
- D. *Forfeiture*, 7618.
- E. *Attachment of compensation*, 7618.

XXIII. Bond, 7619.

- A. *Necessity*, 7619.
- B. *Form*, 7620.
- C. *Contents*, 7620.
- D. *Joint bonds*, 7621.
- E. *Additional bonds*, 7621.
- F. *For what liabilities bond is given*, 7621.
- G. *Breach*, 7622.
- H. *Order settling account*, 7623.
- I. *Sureties*, 7623.
 - 1. Liability, 7623.
 - a. In general, 7623.
 - b. Breach of duty by executor, 7623.
 - c. Proceeds of land sold to pay debts, 7623.
 - d. Debts owed by executor, 7624.
 - e. Effect of giving new bond, 7624.
 - f. Sureties of removed executor, 7624.
 - g. Wrongful distribution of estate, 7624.
 - h. Joint liability, 7625.
 - i. Secondary liability, 7625.
 - j. Giving receipt, 7625.
 - k. Amount, 7625.
 - 2. Discharge, 7626.
 - 3. Indemnity, 7627.
- J. *Action on bond*, 7627.
 - 1. Right to action, 7627.
 - 2. Liquidation, 7629.
 - 3. Time action brought, 7630.
 - 4. Jurisdiction, 7631.
 - 5. Limitation, 7632.
 - 6. Set-off, 7632.

7. Parties, 7632.

a. Plaintiff, 7632.

aa. Creditors, 7632.

bb. Legatees, 7632.

cc. Distributees, 7633.

dd. Administrator de bonis non, 7633.

ee. Heirs, 7634.

b. Defendants, 7634.

8. Defense, 7635.

K. Pleading, 7636.

L. Evidence, 7638.

XXIV. Suit for Instruction by Court, 7639.**XXV. Personal Liability, 7642.**

A. Contracts, 7642.

1. Of executor, 7642.

2. Of decedent, 7646.

B. Torts of executor, 7646.

C. Leases of decedent, 7646.

D. Payment out of order of priority, 7647.

1. Debts, 7647.

2. Legacies, 7648.

E. In other cases, 7648.

XXVI. Actions By or Against Executor, 7648.

A. Nature of action, 7648.

1. Attachment, 7648.

2. Wrongful death and personal injuries, 7649.

3. Garnishment, 7650.

4. To recover assets, 7650.

5. In nature of creditor's bill, 7651.

6. Concealment or embezzlement of estate, 7652.

7. Accounting, 7652.

8. To cancel receipts, 7653.

9. For allowance of claim, 7653.

10. Action of debt, 7653.

11. In aid of execution, 7653.

12. To enforce gift, 7653.

13. For benefit of creditors, 7653.

B. Jurisdiction, 7654.

C. Parties, 7657.

1. In general, 7657.

2. Plaintiff, 7658.

3. Defendant, 7659.

D. Abatement and revivor, 7661.

E. Pleading, 7662.

F. Evidence, 7664.

G. Judgment, 7665.

H. Set-off, 7666.

I. Limitation, 7667.

J. Process, 7671.

K. Settlement, 7671.

L. Estoppel, 7671.

M. Costs, 7671.

N. Review, 7672.

XXVII. Proceedings by Creditor Against the Heirs, Devisees, etc., 7674.**A. Liability of heirs and devisees, 7674.**

1. Debts for which liability exists, 7674.
2. Nature of liability, 7674.

B. Proceedings, 7675.

1. In general, 7675.
2. Jurisdiction, 7675.
3. Defense, 7676.
4. Evidence, 7676.

I. DEFINITION.

An executor or administrator is merely an officer of the probate court selected to administer the estate, and in that capacity has no pecuniary interest in the estate, although he may be an heir or legatee of the deceased, and may have a pecuniary interest in the estate as such. Nor is the right of next of kin to administer the estate as provided by G. C., § 10617, a right of property: *Martin v. Dershem*, 46 Bull. 172 [memorandum opinion, 65 O. S. 556, IV Longsdorf's Notes, 891, affirming lower court on the authority of *Monger v. Jeffries*, 62 O. S. 149, IV Longsdorf's Notes, 827].

The authority of an executor or administrator to represent the estate, unless terminated in one of the modes provided by statute, continues until the estate is fully settled: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

"To settle an estate" is to collect and marshal the assets, pay the debts, and distribute according to law and the order of the court the balance found for distribution: *In re Ferguson*, 81 O. S. 58 [affirming *In re Ferguson*, 6 O. N. P. (N.S.) 417, 18 O. D. (N.P.) 374].

II. NATURE OF EXECUTOR AND ADMINISTRATOR.**A. IN GENERAL.**

The powers of an executor are co-extensive with all the trusts devolved upon him by the will, and all acts done by him in executing such trusts will be regarded as done in his capacity as executor, unless it plainly appears, from the whole will, that the testator intended to create a special trust to be managed by the person named as executor in the capacity of special trustee: *Matthews v. Meek*, 23 O. S. 272, III Longsdorf's Notes, 124.

An executor or administrator is merely an officer of the probate court selected to administer the estate, and in that capacity has no pecuniary interest in the estate, although he may be an heir or legatee of the deceased, and may have a pecuniary interest in the estate as such: *Martin v. Dershem*, 46 Bull.

172 [memorandum opinion, 65 O. S. 556, IV Longsdorf's Notes, 891, affirming lower court on the authority of *Monger v. Jeffries*, 62 O. S. 149, IV Longsdorf's Notes, 827].

Administrator's or executor's control over decedent's property is merely fiduciary and does not affect the successor's "right to succeed to or inherit property": *In re Bushnell*, 2 O. N. P. (N.S.) 673, 50 Bull. 87.

Equity doctrines rather than principles of law govern settlement of estates: *In re Ellis*, 5 O. N. P. 207, 5 O. D. (N.P.) 330.

The position of executors and administrators in chancery was fiduciary, and the execution of the trust could be enforced: *Cram v. Green*, 6 O. 429, I Longsdorf's Notes, 348.

The act of congress of June 19, 1840, making provision for the payment of pensions, etc., constitutes the administrator in such case a trustee to pay over the money to those entitled to it: *Chapman v. Loveland*, 11 O. S. 214, II Longsdorf's Notes, 494.

G. C., § 10716, is cited as to the provision that no lien, legal or equitable, shall be impaired by an administrator, who is to a certain extent a trustee for the benefit of a mortgagee as well as other creditors of the decedent: *Lingler v. Wesco*, 79 O. S. 225, IV Longsdorf's Notes, 1045.

B. DISTINCTION BETWEEN EXECUTOR AND TRUSTEE.

The general rule that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once and the same never becomes assets, is subject to the qualifications, that if needed as assets, the title of the executor is superior to that of the trustee, so that the former may take, use and account for the same as assets; and also that if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such, and that this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

Under a will devising certain sums of money to executors in trust for certain purposes, and devising to such executors all real and personal property, in trust for the execution of the will, with full power to sell or mortgage and convey any property, without being required to obtain orders of court therefor, the executors will take as executors, and their relations to the estate as trustees can not arise until the estate has been reduced to money, and nothing remains but to distribute or invest the funds as provided by the will: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

Where, under a will, there is doubt whether the executor is to act as such, or as a trustee, the rule is that the duty or trust devolves upon the executor, or upon the trustee as executor, by virtue of his office of executor: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

The same person being both executor and trustee, he will not take in the latter capacity, until he has fully discharged his duties in the former capacity, and not until the fund or property has been distinctly set apart as trust property: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

An executor is not a trustee in the technical sense. It is his duty to pay the creditors and legatees out of the assets, and he is not personally liable if he neglects to do so. But there is no trust which affects the assets themselves: *Bowen v. Bowen*, 38 O. S. 426, III Longsdorf's Notes, 980.

Where an executor in carrying out the provisions of a will sets aside and invests certain sums, the income of which is to be paid to a certain person during her lifetime, he ceases to act as an executor and as to that property becomes a trustee: *Krigbaum v. Irvine*, 8 O. N. P. 174, 10 O. D. (N.P.) 226.

To constitute the person named in a will as executor a special trustee, separate and apart from his office of executor, it is not enough that the powers granted to him, or the duties imposed upon him in relation to a particular fund, be such as are unusual in the course of ordinary administration; it must also appear that the intention was to withdraw the particular trust from the management and control of the executor as such, and to create a separate office for its management; and this must appear in the face of the presumption that every provision made in the will for the management of the

estate, and every part thereof, before it passes into the hands of the beneficiary, was intended as a direction to the executor in his official character: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938; approving *Mathews v. Meek*, 23 O. S. 272, III Longsdorf's Notes, 124].

Where an executor is to be held as acting in both capacities, as executor and as trustee, it must plainly appear that such was the intention of the testator. The executorship itself is a trust, and every provision in the will regarding the management of the assets, before they pass out of the executor's hands into those of the beneficiaries will *prima facie* be held as coming within that trust; and the contrary intention must be made plainly to appear. As a general rule, the duties of the executor as such, are coextensive with the provisions of the will; and it is only in case of unmistakable intention, or of inherent necessity, that a separate character will be assigned to him: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938; approving *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728].

An executor's acts in executing the trusts of the will are done in his capacity of executor, and he does not hold the fund as trustee unless the will plainly shows an intent to make him special trustee: *Mathews v. Meek*, 23 O. S. 272, III Longsdorf's Notes, 124; *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728.

A bequest of ten thousand dollars to the executors to be put at interest for six years and then to be used by the "executors" to build a hall, having after six years been paid over by the remaining executor to a contractor who gave bond to erect the hall, and the executor having resigned, his successor, with the will annexed, can sue on the bond: *Mathews v. Meek*, 23 O. S. 272, III Longsdorf's Notes, 124.

An action to recover the amount of a general pecuniary legacy, with respect to which the executor is not charged with any duty except to pay it out of the assets when due, is not founded on a continuing and subsisting trust, nor exempt from the operation of the statute of limitations, although the will creates some special trusts in the management and disposition of particular property by the executor: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

G. C., § 10591, requires that the executor give a separate bond as trustee to continue the testator's business, and a petition on a debt of the business should aver that such

bond was given: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

When an executor who is also made trustee has separated the funds, and appropriated it to the trust, they cease to be assets, and he has divested himself of the character of executor as to them, and has become trustee: *Krigbaum v. Irvine*, 8 O. N. P. 174, 10 O. D. (N.P.) 226.

A trustee who has acted as agent for devisees can only be required to account as their agent in a court of general jurisdiction, and not in the probate court as executor or trustee under the will: *Culver v. Culver*, 58 O. S. 172, IV Longsdorf's Notes, 735.

A devise to a trustee who is also an executor clearly clothing him with a complete estate in fee simple with power of disposition is not lessened or qualified by a subsequent paragraph reciting the intent to be to vest full and complete power of disposition during his "continuance as trustee and executor." The word "and" coupling "trustee" with "executor" will be read "or," or "respectively" will be inserted after "executor" or it will be held that the trusteeship is the office essential to the power: *Veazie v. McGugin*, 40 O. S. 365, IV Longsdorf's Notes, 32.

III. CIVIL DEATH.

A man sentenced to the penitentiary for life is not even civilly dead and letters of administration can not issue upon his estate: *Frazer v. Fulcher*, 17 O. 260, I Longsdorf's Notes, 809.

The appointment of an administrator for one presumed dead is necessary to the conveyance of property: *Mayhugh v. Rosenthal*, 13 Dec. Rep. 680, 1 C. S. C. R. 492.

In the absence of a showing to the contrary, the presumption from the absence for seven years, is that the money was paid to the wife, who was entitled to a year's support, on the supposition that her husband was dead: *Brent v. First*, 41 O. S. 436, IV Longsdorf's Notes, 70.

IV. NECESSITY OF ADMINISTRATION.

Though it may not be strictly necessary and though its propriety and expediency may be doubtful or open to criticism, yet if authorized, the action of the court in granting letters of administration can not be regarded as void or erroneous: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

While under a will giving full power to sell, mortgage, etc., without orders of court, the executors might proceed to sell the property without any special order or license of any

court other than that contained in the ordinary letters of administration, they must take out such letters of administration, before being empowered to sell: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed on other points *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

As a general rule, administration is a prerequisite to the devolution of the personal estate of a decedent. Such personal property does not vest in the heirs but is in abeyance until administration is granted and is then vested in the administrator. A party acquires a right of action on a promissory note belonging to the deceased by showing proof of possession and that he is the sole heir of decedent: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 1002.

Heirs can not sue in their own names to recover assets from third persons, even after the administrator has settled and all debts are paid, nor to compel an accounting for assets by the executor of one who has a life interest in them: *Davis v. Corwine*, 25 O. S. 668, III Longsdorf's Notes, 278.

Where executors are required to invest a fund and pay the income to the widow for life and then divide the principal among her children, and they die without debts, and she is their heir, it was held that as she has the sole beneficial interest in the fund the executors must pay it to her, and successive administrations on the estates of the children before reaching her are not necessary: *Taylor v. Huber*, 13 O. S. 288, II Longsdorf's Notes, 609.

And the same holding was made where the children assigned their interests to her: *Gloyd v. Roff*, 2 O. C. C. 253, 1 O. C. D. 472.

If a widow is sole legatee, and is settling the estate without an administration, she is not liable to an action as heir by the creditors, for the heir can not be sued for assets received until the administrator has settled: *Arbaugh v. Miller*, 5 O. C. C. 295, 3 O. C. D. 146.

Division of assets among the heirs without an administration, they paying the debts, vests no title in them, nor does it bind a subsequent administrator; accordingly a note allotted to one heir can not be collected by him: *Rousch v. Hundley*, 2 Dec. Rep. 445, 3 W. L. M. 126.

The debtor's promise to pay him in the absence of new consideration will not give a cause of action or create an estoppel, though time has been extended on higher interest, for the heir has not been injured by acknowledging a pretended claim: *Rousch v. Hundley*, 2 Dec. Rep. 445, 3 W. L. M. 126.

Where the devisees have substantially paid all debts, and there is no necessity for an executor or administrator, the courts will

not permit an executor appointed by the probate court to act, or to expend money for the mere form of administering: *Catlin v. Huestis*, 11 O. C. C. 120, 5 O. C. D. 23.

When there are no creditors, nor personal assets exceeding one hundred dollars, administration is not necessary: *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888.

A watch belonging to a decedent is neither "wearing apparel" nor an ornament within the meaning of G. C., § 10654, which provides that certain assets need not be administered on in settlement of estates in certain cases: *In re Post*, 8 O. L. R. 492, 55 Bull. 382.

Where the mortgagor is dead, the mortgagee can bring his action to foreclose in the common pleas court, and is not compelled to work out his rights through the administrator in the probate court: *Savings Bank v. Ide*, 20 O. C. C. 665, 10 O. C. D. 800, 38 Bull. 231.

V. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

Our statute for the settlement of estates was taken principally from the statute of Massachusetts, and is founded upon a similar policy: *Favorite v. Booher*, 17 O. S. 548, II Longsdorf's Notes, 849.

The means provided to determine the rights of legatees under G. C., §§ 10853, 10854 and 10855, are not exclusive. A like action may also be brought under G. C., §§ 10857 and 10858: *Davis v. Hutchings*, 15 O. C. C. 174, 8 O. C. D. 371.

The act of March 23, 1840, to provide for the settlement of estates of deceased persons, did not extend to estates in the course of settlement when it took effect: *McGorney v. State*, 20 O. 93, I Longsdorf's Notes, 897.

G. C., § 10740, has no application to a suit to enforce the statutory liability of a deceased holder of stock in an insolvent corporation: *Wanz v. Hotel Co.*, 1 O. C. C. 105, 1 O. C. D. 63.

G. C., § 10853, is not an independent section, but depends upon G. C., §§ 10848 and 10849, and before G. C., § 10853, can apply these two sections must be complied with: *In re Cloud*, 7 O. C. C. 67, 3 O. C. D. 666; *Sater v. Pease*, 10 O. D. (N.P.) 722.

G. C., § 10740, does not apply to proceedings to revive an action before judgment against the personal representative of a deceased party: *Musser v. Chase*, 29 O. S. 577, III Longsdorf's Notes, 500.

In ascertaining the powers of administrators as to the sale of land, remedial statutes may be resorted to. Such statutes are to receive a liberal construction so as to accomplish the apparent object of the legisla-

ture: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

Statutes regulating the sale of real estate of a decedent by his executor or administrator for the payment of his debts should be strictly construed: *Kummer v. Lake*, 1 O. N. P. (N.S.) 209, 13 O. D. (N.P.) 491.

G. C., §§ 10869 and 10871, were not repealed by G. C., §§ 10848-9 and 10856: *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

G. C., §§ 10848 to 10858, were designed to confer on the probate and common pleas courts the power of enforcing an order of distribution made by the probate court. They are merely cumulative to G. C., §§ 10762 and 10870: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

G. C., §§ 8085, 8086 and 8087, relative to the settlement of an estate of a deceased partner, do not authorize the probate court to make an appointment of administrator in any other manner than that pointed out in G. C., § 10617: *In re Warnock*, 15 O. C. D. 695, 2 O. L. R. 528 [affirming *Warnock v. Page*, 14 O. D. (N.P.) 278].

G. C., § 10736, was cited as regulating the distribution of estates, and making provision for the assertion of claims to share therein: *Stevens v. Smith*, 126 Fed. 706, 61 C. C. A. 624, 14 O. F. D. 357.

G. C., §§ 10746 and 10754, are subject to exceptions as must necessarily be implied, in order to give effect to other sections of the administration statutes. Among these is G. C., § 10853: *Eicher v. Darby*, 5 O. L. R. 102, 17 O. D. (N.P.) 780 [affirmed *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821; affirmed, without opinion, *Glenn v. Eicher*, 81 O. S. 553].

VI. JURISDICTION TO APPOINT.

The probate court has exclusive jurisdiction in proceedings to appoint administrators of the estates of deceased persons, and where the jurisdiction of the probate court once attaches, that court has full power to hear and determine all questions arising in the case, and such determination can not be collaterally attacked: *Railway v. Beard*, 20 O. C. C. 681, 11 O. C. D. 406.

Application to a probate court of one county for the appointment of an administrator excludes jurisdiction of all other probate courts, though the applicant is rejected as ineligible, for the application is pending, and the jurisdiction continuing, and an appointment thereafter by another probate court is void. That the latter's appointee first took possession of the property is not material; jurisdiction attaches on filing the

application: *In re Worthington*, 4 O. D. (N.P.) 381.

Appointment of administrator gives the probate court jurisdiction not only of the estate, but also of the administrator's person, until his accounts are settled. And that jurisdiction is not ousted by the fact that the court makes an order requiring him to make settlement, and at the same time orders his removal and appoints a successor: *In re Morrison*, 68 O. S. 252, IV Longsdorf's Notes, 943.

A court of probate has inherent power, without specific statutory authority, to grant administration limited to the defense of a particular suit: *McArthur v. Scott*, 113 U. S. 341, 5 O. F. D. 357.

A claim for wrongful death is part of decedent's estate, and an administrator can be appointed to recover it, even though deceased left no other assets: *In re Arduino*, 9 O. N. P. (N.S.) 369, 20 O. D. (N.P.) 461.

Only the probate court of the county of the deceased's residence can issue letters testamentary. This power is not incidental to the power to admit the will to probate in any county where there is property: *Limes v. Irwin*, 16 O. S. 488, II Longsdorf's Notes, 795.

Under G. C., § 10492, the probate court has exclusive and final jurisdiction to grant and revoke letters testamentary and of administration, and no other court has jurisdiction therein, either original, by appeal or in error, unless otherwise provided by statute: *Stafford v. Missionary Association*, 22 O. C. C. 399, 12 O. C. D. 442.

Whatever is done by the probate court in matters of probate of wills, appointment of executors and administrators and directing and controlling the accounting of such executors and administrators is presumptively within the jurisdiction of the court: *Hoffman v. Fleming*, 66 O. S. 143, IV Longsdorf's Notes, 901.

An order of the probate court appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court; but if made in the exercise of proper jurisdiction over the subject-matter and estate, although based upon erroneous conclusions of law or fact, it can not be collaterally attacked: *Bank & Trust Co. v. Telegraph Co.*, 79 O. S. 89, IV Longsdorf's Notes, 1044 [reversing *Telegraph Co. v. Trust Co.*, 20 O. C. D. 380; on re-hearing of former decision, without opinion, see *Bank v. Telegraph Co.*, 78 O. S. 398, which had reversed, *Telegraph Co. v. Trust Co.*, 20 O. C. D. 380; which reversed *Smith v. Telegraph Co.*, 7 O. N. P. (N.S.) 609, 19 O. D. (N.P.) 537].

Where the probate court, in the exercise of its exclusive jurisdiction over the administration of estates under G. C., § 10492, orders the payment of an unmatured note, but without canceling a mortgage securing the same on the ground of an alleged want of jurisdiction, the court of common pleas may then be appealed to for such relief: *Denmead v. Sharp*, 14 O. D. (N.P.) 300.

The common pleas court has no jurisdiction to compel an administrator of an estate to receive payment of an unmatured note from an executor of another estate under G. C., § 10735. Jurisdiction of the subject-matter is vested exclusively in the probate court under G. C., § 10492, and such court, as an incident to the exercise of such power, may order the cancellation of a mortgage securing the same: *Denmead v. Sharp*, 14 O. D. (N.P.) 300.

VII. QUALIFICATIONS AND ELIGIBILITY.

A. EXECUTOR.

At common law all persons are "capable" of becoming executors who are capable of making wills: *In re Sells*, 5 O. N. P. (N.S.) 629, 52 Bull. 610.

The word "capable" as used in G. C., § 10612, relative to executors, is not limited to its meaning at common law, nor is it synonymous with "suitable." The word is defined as ability, power or qualification: *In re Sells*, 5 O. N. P. (N.S.) 629, 52 Bull. 610.

A person eligible to appointment as executor of a will may be appointed as such by proper order of the probate court entered upon its journal without the issuance of letters testamentary. Such letters are merely evidence of appointment: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

Where the sister of the testator is named as a devisee and also one of the executors, the probate court can not consider objections to her appointment, made by other beneficiaries on the ground of her hostility toward them, or her lack of business experience, or her unsuitableness for any other reason which does not amount to mental or physical incapacity to discharge the trust: *In re Sells*, 5 O. N. P. (N.S.) 629, 52 Bull. 610.

The court has no discretion (G. C., § 10605), to refuse to appoint as executor the person named as such in the will, if he is legally competent, and he is competent if not a minor, idiot or insane. Lack of capacity or experience or that a contest of the will is pending, and that he is objectionable to a large number of the devisees, will not

prevent the appointment: *In re Sultzbach*, 5 O. N. P. 218, 5 O. D. (N.P.) 516.

A minor shall not be appointed, but some one shall be appointed to act for him until he is of legal age: *In re Sultzbach*, 5 O. N. P. 218, 5 O. D. (N.P.) 516.

That a suit to contest the will is pending or that the party named is opposed by a number of the devisees will not prevent the appointment: *In re Sultzbach*, 5 O. N. P. 218, 5 O. D. (N.P.) 516.

"Unsuitable" as used in the third clause of G. C., § 10617, is defined in G. C., § 10629, which should be read with G. C., § 10617, for that purpose: *Long v. Bowersox*, 8 O. N. P. (N.S.) 249, 19 O. D. (N.P.) 494.

Unfitness of the executor named in the will will not be considered on the probate, but letters must issue to him, and the remedy taken by motion to remove: *In re Os-kamp*, 7 O. N. P. 665, 5 O. D. (N.P.) 584.

The statute as to executors does not, in terms, exclude nonresidents, as in the case of administrators: *Trust Co. v. Railroad*, 6 O. N. P. (N.S.) 454.

The probate court has jurisdiction to hear and determine the question whether or not a trust company is legally competent to perform the duties of an executor, and where this jurisdiction has been exercised the determination by that court of the competency of the appointee can not be collaterally attacked: *Bank v. Telegraph Co.*, 79 O. S. 89, IV Longsdorf's Notes, 1044 [reversing *Telegraph Co. v. Trust Co.*, 20 O. C. D. 380, which reversed *Smith v. Telegraph Co.*, 7 O. N. P. (N.S.) 609, 19 O. D. (N.P.) 537].

B. ADMINISTRATOR.

1. Who May Act.

G. C., § 10629, defines what is meant by "unsuitable" in the third clause of G. C., § 10617, providing as to who shall be appointed administrator: *Long v. Bowersox*, 8 O. N. P. (N.S.) 249, 19 O. D. (N.P.) 494.

If the person entitled to be appointed has a claim against the estate, antagonistic to the heirs or legatees, and an animosity exists, whereby there may be improvident management and impossibility for the heirs to confer with him without embarrassment, the court may appoint some one else. So it was held that where B before her death gave a large part of her personality to her mother to be used for her minor children, and her husband denies the validity of this gift, desiring to have his distributive share out of it, and much ill feeling has been caused between him and the family, he is not a suitable person for appointment: *In re Brennan*, 5 O. N. P. 490, 5 O. D. (N.P.) 499.

The probate court may refuse the application of the widow to be appointed administratrix of her husband's estate when it appears that such appointment would cause friction and unpleasant relations between her and the next of kin, and would interfere seriously with the best interests of the estate: *In re Appointment*, 10 O. D. (N.P.) 731.

The appointment may be refused on the ground of unsuitableness or bad character, notwithstanding ample bond could be given: *In re Diller*, 5 O. N. P. 255, 6 O. D. (N.P.) 182.

Refusal to appoint the person entitled under the statute to be administrator is in the discretion of the court in case of unfitness, which would constitute ground for removal. The statutory power to remove overshadows the mandatory features of the priority in right to be appointed: *In re Diller*, 5 O. N. P. 225, 6 O. D. (N.P.) 182.

A foreign trust company, appointed executor in another state under the will of a foreign testator is not precluded by G. C., § 10629, from suing in Ohio: *Trust Co. v. Railroad*, 6 O. N. P. (N.S.) 454.

A creditor will be appointed administrator, if assets and debts are in the jurisdiction, regardless of an appointment in another state: *In re Fallon*, 3 O. N. P. 62, 4 O. D. (N.P.) 395.

The due qualification of an administrator relates back to the time of his appointment as regards acts done by him in the interim which are for the benefit of the estate: *Archdeacon v. Gas Co.*, 76 O. S. 97, IV Longsdorf's Notes, 1022.

It was questioned whether the probate court can appoint a stranger as administrator when there are no creditors, in the absence of a showing that there are personal assets, to the amount of \$100, in *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888.

Nonresidence from the county does not render one of the next of kin ineligible: *Todhunter v. Stewart*, 39 O. S. 181, III Longsdorf's Notes, 1017.

A nonresident of the state is properly refused appointment as administrator: *In re Ulhorn*, 12 O. C. C. 765, 4 O. C. D. 526.

A wife living apart from her husband may be appointed in opposition to the heir at law, though separated by a postnuptial agreement, and allowance in lieu of all claim on the estate, unless her absence of interest is further shown by proof that the agreement was carried out and was reasonable and adequate. Moreover, the right to a year's support is an interest preventing her exclusion: *Garretson v. Garretson*, 4 O. C. C. 336, 2 O. C. D. 581 [affirming, *In re Garretson*, Goebel

187, affirmed, without opinion, *Garretson v. Garretson*, 29 Bull. 220].

The legislature has never attempted to clothe corporations with capacity to act as administrators: *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963.

The qualifications of administrators being as universal as the administration of estates should be deemed to be a subject of general nature: *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963.

The right of the next of kin to administer the estate is not a property right: *Martin v. Dershem*, 46 Bull. 172 [memorandum opinion, 65 O. S. 556, IV Longsdorf's Notes, 891, affirming lower court on the authority of, *Monger v. Jeffries*, 62 O. S. 140, IV Longsdorf's Notes, 827].

Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons because the legislation evincing an intention to clothe them with such capacity (R. S. §§ 3821c and 3821f) is void, being of a general nature and not of uniform operation throughout the state as is required by § 26, Art. II, of the constitution: *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963 [affirming *McCallip v. Sharp*, 13 O. D. (N.P.) 650].

Where a corporation is a creditor of the estate of an intestate, the cashier thereof, although not individually a creditor of such estate, is a creditor within the meaning of G. C., § 10617, which provides who may be appointed administrator, and he may properly be appointed administrator of the estate: *McCallip v. Sharp*, 13 O. D. (N.P.) 650 [affirmed, on other grounds, *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963].

The words "next of kin," as used in G. C., § 10617, mean those relatives who, at the time of appointment, would inherit in case of intestacy. Hence, children and other relatives of such persons, *in esse*, are not included: *McCallip v. Sharp*, 13 O. D. (N.P.) 650 [affirmed, on other grounds, *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963].

2. Order of Preference.

A creditor may be appointed administrator in preference to the next of kin, who is a nonresident of the state. A nonresident of the state may be rejected: *In re Ulhorn*, 12 O. C. C. 765, 4 O. C. D. 526.

As between parties of equal suitability and statutory rights, the court may well choose the one possessing the confidence of and desired by a majority of the beneficiaries. And the fact that another court, on the same

showing, might have made a different selection, is not proof of abuse of discretion, nor ground for review: *Sargent v. Corbely*, 7 O. C. C. (N.S.) 226, 18 O. C. D. 125.

The husband has the first right to administer upon the estate of his deceased wife, and the probate court has no right to deprive him of that right except for cause: *In re Brennan*, 5 O. N. P. 490, 5 O. D. (N.P.) 499.

A widow has priority in the administration of her husband's estate, unless she comes within the provisions of the third clause of G. C., § 10617: *Long v. Bowersow*, 8 O. N. P. (N.S.) 249, 19 O. D. (N.P.) 494.

The statute, defining who shall have a right to administer, vests in each person named a legal right to administer in the order named, which right can not be ignored by the court nor waived by any other person than the one having that right: *Fow v. Kiester*, 6 O. N. P. 216, 8 O. D. (N.P.) 636.

No presumption arises that the administrator of an estate is not beneficially interested. The presumption is rather the other way, especially where he is of the same name as deceased for G. C., § 10617 prefers the husband or widow, next of kin, etc., over strangers: *In re Arkenberg*, 1 O. N. P. (N.S.) 9, 13 O. D. (N.P.) 656.

The right of creditors of one who dies seized of lands in Ohio, but whose heirs are nonresidents, to take out letters of administration on the estate, continues, even if there is a foreign will, for unless the will is produced and duly recorded, the probate court of the county in which the land is situated, has the right to, and upon application must, grant letters of administration, and if the will be produced, letters may be granted with the will annexed: *Bustard v. Dabney*, 4 O. 68, I Longsdorf's Notes, 203.

The next of kin are entitled to a reasonable time within which to apply for letters of administration, and an application made within eighteen days after intestate's death, by next of kin, residing in another county, is made within a reasonable time. When, without allowing such reasonable time, the probate court appointed a stranger as administrator, the appointment is illegal, and should be revoked on application of the next of kin: *Todhunter v. Stewart*, 39 O. S. 181, III Longsdorf's Notes, 1017.

G. C., § 8087, gives the surviving partner the right only to hasten the settlement of the estate of his deceased partner by making application for that purpose; and does not authorize the probate court to make an appointment pursuant thereto in any other manner than that pointed out by G. C., § 10617: *Page v. Warnock*, 15 O. C. D. 695 [affirming *Warnock v. Page*, 14 O. D. (N.P.) 278].

VIII. APPOINTMENT.

A. TIME.

The ordering of the letters, and not their actual issuance, is the date of power to bring a suit: *Morris v. Biles*, W. 343, I Longsdorf's Notes, 27.

B. APPLICATION.

A misstatement of fact or law, made in good faith and without any intent to deceive, in an application for special or ancillary letters of administration, even though material, will not necessarily invalidate such letters: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605.

Reasonable time must be given next of kin to apply for letters of administration. Eighteen days after death is a reasonable time for next of kin living in another county. Appointment of a stranger without allowing such reasonable time is illegal and should be revoked on application of the next of kin: *Todhunter v. Stewart*, 39 O. S. 181, III Longsdorf's Notes, 1017.

Appointment of an executor or administrator can not legally be advertised in a paper other than in the English language (G. C., § 10712), even though it is more desirable to use a German paper: *In re Ringwald*, 5 O. N. P. 496, 5 O. D. (N.P.) 452.

It is improper to issue letters to a surviving partner without citing the widow or next of kin under G. C., § 10617; if residents of the county, for the purpose of accepting or rejecting the appointment, although thirty days have gone since the partner's death and no application for administration has been made by any of them. The failure to make such application does not constitute a waiver of the right to appointment: *Warnock v. Page*, 14 O. D. (N.P.) 278 [reversing *In re Warnock*, 1 O. N. P. (N.S.) 287, 49 Bull. 44, affirmed, *Page v. Warnock*, 15 O. C. D. 695, 2 O. L. R. 528].

C. NOTICE.

The notice must be in a newspaper printed in the English language: *In re Ringwald*, 5 O. N. P. 496, 5 O. D. (N.P.) 452.

A notice of appointment is good, though the fact of the appointment is not expressly and explicitly stated therein, and the notice consists merely of a demand, officially signed by the administrator, that all persons indebted to the estate come forward and make payment, and that all persons having claims against the same are notified to present the same: *Gilbert v. Little*, 2 O. S. 156, I Longsdorf's Notes, 1036.

The filing of proof of publication forms no part of the notice to creditors required to

be given within three months after the giving of bond, and is not for the benefit of creditors: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

Proceedings brought by the executor of the estate for the allowance of a claim of his own against the estate, is governed by G. C., § 10746, providing that, "No executor or administrator, after having given notice of his appointment, shall be held to answer to the suit of any creditor, unless it is commenced within four years from the time of his giving bond": *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

The filing in the probate court of proof of publication of notice of appointment by an executor or administrator required by G. C., § 10713, is a mode of perpetuating the evidence of such notice, and is for the convenience and protection of the executor or administrator: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

Although proof of publication is not filed in the probate court until after the expiration of a year from the giving of bond, the two year limitation within which actions may be brought provided by G. C., § 10746, will begin to run from the date of the giving of the bond: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

D. REFUSAL TO ACT.

If the executor named in the will does not accept the trust, he is not the representative of the beneficiaries, and notice to him of proceedings to probate the will should not be, by construction, extended to them: *Feuchter v. Keyl*, 48 O. S. 357, IV Longsdorf's Notes, 420.

E. HEARING.

Where a case is revived in the name of the administrator of the original plaintiff, the question of his appointment becomes a determined fact and proof thereof is unnecessary, in the absence of any allegations or specific denial of the appointment in the pleadings: *Osseforth v. Traction Co.*, 9 O. N. P. (N.S.) 360, 20 O. D. (N.P.) 285.

F. REVIEW.

The court of common pleas has jurisdiction to review an order of the probate court denying the right to administer the estate of a deceased person which G. C., § 10617, confers upon the next of kin, if a suitable person: *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963.

Although error may be prosecuted to an order denying the right of certain persons

to administer an estate, under G. C., § 10617, this can not be done on an order removing an administrator under G. C., §§ 10629 and 10630: *Ferguson v. Ferguson*, 3 O. N. P. (N. S.) 549, 16 O. D. (N.P.) 486.

G. COLLATERAL ATTACK.

The appointment of an administrator can not be questioned in a collateral proceeding: *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888; *Railway v. Beard*, 20 O. C. C. 681, 11 O. C. D. 406.

Probate courts being courts of plenary and exclusive jurisdiction in the matter of appointing administrators, their records can not be collaterally impeached; accordingly, in an action by an administrator of a deceased partner for an accounting of partnership property by the surviving partner, the right of plaintiff to maintain the action can not be raised: *Peters v. Firestone*, 12 O. N. P. (N.S.) 609, 22 O. D. (N.P.) 296.

In replevin by an administrator the defendants denied jurisdiction to appoint by reason of his nonresidence. It was held that the appointment is conclusive against collateral attack, for the probate court has power to decide on its own jurisdiction: *Astram v. Ten Eck*, 11 Dec. Rep. 665, 28 Bull. 265. *Contra, Gorman v. Railroad*, 28 Bull. 209, (editorial).

Jurisdiction of the probate court to appoint the plaintiff an administrator—as here by averment that decedent was not a resident of the county—can not be collaterally attacked, as in his action for negligently causing decedent's death: *Railway Co. v. Gilday*, 16 O. C. C. 649, 9 O. C. D. 27. See also JUDGMENT.

An order of the probate court appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court, but if made in the exercise of proper jurisdiction over the subject-matter and estate, although based upon erroneous conclusions of law or fact, it can not be collaterally attacked: *Trust Co. v. Telegraph Co.*, 79 O. S. 89, IV Longsdorf's Notes, 1044 [reversing *Telegraph Co. v. Trust Co.*, 20 O. C. D. 380, which reversed, *Smith v. Telegraph Co.*, 7 O. N. P. (N.S.) 609, 19 O. D. (N.P.) 537].

IX. TERMINATION OF AUTHORITY.

A. MARRIAGE.

Marriage of a *feme sole* when she is sole administratrix did not determine her powers, though the husband had to join with her as co-plaintiff. It was only when she was a co-administratrix with another that marriage

ended her powers: *Caldwallader v. Evans*, 12 Dec. Rep. 811, 1 D. 585.

Marriage of a *feme sole* executrix or administratrix extinguishing her authority (G. C., § 10636, only allowed one already married to be appointed). It is not revived by her becoming a widow: *In re Fagin*, 10 Dec. Rep. 180, 19 Bull. 149, Goebel, 149.

Under a former statute (Swan's Statute's, 344 § 28) when a woman, who was an administratrix, married, that extinguished her authority as administratrix. But if an order of sale was once begun in her favor, it was not abated by her marriage: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

B. DEATH.

Ordinarily, the authority delegated to an agent ceases on the death of the principal: *Phipps v. Hope*, 16 O. S. 586, II Longsdorf's Notes, 804.

An administrator *de bonis non* procured a reopening of his predecessor's account and a finding of an amount due the predecessor. After appeal and the death of the administrator *de bonis non*, it was held that the proceedings were not ended by his death and may be revived: *In re Ziegler*, 4 O. N. P. 182, 6 O. D. (N.P.) 244.

In case there is a surviving coexecutor the estates of both the administrators must be exhausted before suit can be brought against the surety on his bond for the surviving administrator's default: *Eckert v. Myers*, 45 O. S. 525, IV Longsdorf's Notes, 295.

In case of the death of the administrator it was questioned whether it is the duty of his administrator to render his account of the first estate: *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953; *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

If the predecessor died in office no suit is given his successor. G. C., § 10634, giving suit on the bond of an administrator who has resigned, or been removed does not change the common law so far as to give a suit when the appointment is by reason of the predecessor's death: *Blizzard v. Filler*, 20 O. 479, I Longsdorf's Notes, 920; *Herckelrath v. Van Nes*, 1 O. D. (N.P.) 263, 31 Bull. 35.

For administrator *de bonis non*, see ADMINISTRATOR DE BONIS NON, XIII, herein.

C. DISCOVERY OF LATER WILL.

Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequent to such settlement, the executor can not compel the former ad-

ministrator to account for the money or property by him received and paid over: *Barkaloo v. Emerick*, 18 O. 268, I Longsdorf's Notes, 847.

Where an administrator is appointed and proceeds to execute his duties but is superseded by the discovery of a will, naming an executor, his *mesne* acts and proceedings are valid: *Bigelow v. Bigelow*, 4 O. 138, I Longsdorf's Notes, 212.

D. RESIGNATION.

The probate court for good cause shown, may accept the resignation of an executor or administrator: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

Acceptance is necessary to give validity to the resignation: *Reiter v. State*, 51 O. S. 74, IV Longsdorf's Notes, 530.

While G. C., § 10627 provides that the court may receive the resignation of an administrator "if it think fit, and upon good cause shown," the absence of a specific finding that the court thought it fit or thought the cause sufficient can not defeat what was actually done: *State, ex rel., v. Moffitt*, 13 O. C. C. (N.S.) 152, 23 O. C. D. 238 [affirmed, without opinion, *State, ex rel., v. Moffitt*, 82 O. S. 433].

Making the appointment of a successor is not essential to the taking effect of the acceptance of the resignation of administrator, notwithstanding the provision of G. C., § 10627, that the court upon receiving such resignation shall "appoint an administrator in his place," and that in G. C., § 10628, that "the acceptance of such resignation and the appointment of another administrator, shall not affect the liability of such former executor or administrator," etc.: *State, ex rel., v. Moffitt*, 13 O. C. C. (N.S.) 152, 23 O. C. D. 238 [affirmed, without opinion, *State, ex rel., v. Moffitt*, 82 O. S. 433].

The court after ascertaining the amount due the estate from an administrator who had resigned or been removed, has power to order him to pay it to his successor, this being a judgment and not an order of distribution: *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

Resignation of the administrator accepted pending settlement does not take away the court's jurisdiction over him personally or over his accounts, and exceptions thereto may be heard and the amount due the estate ascertained, and this in the absence of fraud and collusion will be conclusive not only on him, but on his sureties: *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

Where the court accepts the resignation and discharges the administrator, he will not be liable for maladministration in failing to

answer a summons served on him thereafter in a proceeding involving the estate: *State v. Moffitt*, 13 O. C. C. (N.S.) 152, 23 O. C. D. 238 [affirmed, without opinion, *State, ex rel., v. Moffitt*, 82 O. S. 433].

It was the duty of the trustee to resign when requested. And a promise by the beneficiaries, in consideration that he would resign, to cause a note and mortgage, given by him to a third party in trust for the beneficiaries for trust funds which he had converted to his own use, to be cancelled and surrendered, in addition to procuring him allowance for his services, is void: *Withers v. Ewing*, 40 O. S. 400, IV Longsdorf's Notes, 34.

A resignation in Mississippi of an executor of an estate in Ohio, accepted by the Orphans' court of the former state, is void because of want of authority in the state of Mississippi to accept such resignation: *Veasie v. McGugin*, 40 O. S. 365, IV Longsdorf's Notes, 32.

E. REMOVAL FOR CAUSE.

The probate court, for good cause, may remove an executor or administrator: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

The reasons for the removal of an administrator under G. C., § 10629, are not jurisdictional, and it is not necessary that they affirmatively appear in the journal entry in order to sustain the regularity of such removal: *In re Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

In a proceeding for the removal of an executor, based upon a motion filed under G. C., § 10629, and the gist of the charge being fraud, it is error to grant an order of removal where no attempt has been made to show fraud: *In re Breckinridge*, 7 O. C. C. (N.S.) 86, 17 O. C. D. 688.

That the executor purchased at his own sale is not proof of fraud, waste or mismanagement. Nor that he released a favorable contract with attorneys for services, and permitted them to have such compensation as the court should allow, for such contract is personal to himself: *Fox v. Keister*, 6 O. N. P. 327, 9 O. D. (N.P.) 316.

The fact that an administrator is a debtor of the estate is not ground for removal, for if he denies it, exceptions to his account will raise the issue: *Fox v. Keister*, 6 O. N. P. 327, 9 O. D. (N.P.) 316.

Failure to return an inventory within three months, upon the order of the court, is ground for removal: *In re Pickards*, 5 O. N. P. 493, 7 O. D. (N.P.) 476.

The application for removal of an executor must state the facts constituting the ground for removal, as definitely as in a petition.

It is not sufficient merely to allege mismanagement or gross neglect in the language of the statute: *Fox v. Keister*, 6 O. N. P. 327, 9 O. D. (N.P.) 316.

A will contest resulting in setting the will aside does not annul the appointment of an administrator with will annexed so as to authorize appointment of a receiver, for it does not act on the possession. The administrator is not released from his duties until the probate court so orders: *Sanker v. Matison*, 20 O. C. C. 229, 11 O. C. D. 125.

A dormant judgment in favor of an administrator who is removed can not be revived in his name. His authority over assets not received, is ended as well as over those received, and the judgment, though a merger, is the former: *Weaver v. Reese*, 6 O. 418, I Longsdorf's Notes, 347.

When an administrator has been removed and a successor has been appointed and qualified, he ceases to be an officer in the administration of the estate: *In re Miller*, 8 O. N. P. 385, 11 O. D. (N.P.) 624.

A settlement of the account of an executor who has been removed, does not bar a subsequent suit by him, against his successor, upon a demand existing in the lifetime of his testator: *Sharp v. Pontius*, 2 O. C. C. 7, 1 O. C. D. 331.

F. FILING FINAL ACCOUNT.

A settlement by agreement with the heirs in final except as to minors, who may, on coming of age, disaffirm same and compel a final settlement to be made in a proper court: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

As long as there are assets in the administrator's hands, his authority to administer the same is not extinguished by an order made upon what purports to be the settlement of his final account, directing that he be discharged from his trust: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

Merely filing the executor's final account within six months does not end his duty, but he has the further duty of defending the account if it is unjustly assailed. That is, he still stands in a fiduciary capacity and may therefore appeal from a judgment sustaining exceptions to the account without giving an appeal bond: *In re Sidwell*, 67 O. S. 464, IV Longsdorf's Notes, 933.

Matters in dispute having been duly heard and determined by the court can not again be called in question by either of the same parties on the hearing of a subsequent account, without leave of court. And G. C., § 10835, does not authorize the probate court to open up or vacate, at the instance of either party, a former order by the court

of common pleas on appeal, in the settlement of a former account: *In re Stayner*, 33 O. S. 481, III Longsdorf's Notes, 685.

An administrator, having in good faith settled up an estate and distributed a small balance to those entitled, and another debt having turned up and been reduced to judgment against him and his bondsmen, he is entitled to proceed against the decedent's land, though partitioned among the heirs and by them sold: *Faran v. Ewing*, 17 O. S. 242, II Longsdorf's Notes, 830.

An executor's office does not end until all outstanding assets are administered. Thus new assets were administered over twenty years after distribution: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499; *Laferty v. Shinn*, 38 O. S. 46, III Longsdorf's Notes, 953.

Testator left his property to his wife "after payment of his debts," and upon her death or remarriage, to his children, "after all her debts had been paid." When the executor had paid all debts of the testator, and the balance to the widow, he presumably had no remaining duty to perform. It was not his duty to pay the widow's debt, nor to divide the estates in remainder: *Flickinger v. Saum*, 40 O. S. 591, IV Longsdorf's Notes, 43.

When an executor or administrator has filed in the probate court an account of final distribution, and the same has been approved and confirmed by the court and the executor or administrator discharged, such account is conclusive unless impeached for manifest error or for fraud within four years after the discovery of the fraud: *Henry v. Doyle*, 82 O. S. 113.

The only purpose of G. C., § 10842, is to enable the executor or administrator to perpetuate the evidence of his payments, and make that evidence conclusive against those who signed the receipts, unless objected to by them within the time limited by it: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

The authority of an executor or administrator to represent the estate, unless terminated in one of the modes provided by statute, continues until the estate is fully settled. The probate court, for good cause, may remove him or accept his resignation. But while assets of the estate remain in his hands unadministered, his authority to administer the same is not extinguished by an order, made upon what purports to be the settlement of his final accounts, directing that he be discharged from his trust: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

The fact that an account purporting to be final has been settled in the probate court is no bar to an action under G. C., § 10871, to

recover assets not accounted for by the executor. Previous to such suit it is not necessary that the probate court should find or fix the amount of the legacy, or order its payment: *Mighton v. Dawson*, 38 O. S. 650, III Longsdorf's Notes, 1000.

A statement that there were no assets, and no claims presented to the administrator, does not, in the absence of an order to that effect, operate as a discharge of such administrator: *Fewlass v. Keeshan*, 10 O. F. D. 355, 88 Fed. Rep. 573.

Where an administrator submits to the probate court his resignation, to become effective on a certain day named, and files what he denominates "an account of final distribution," and an entry is made reciting that the account has been found correct, and is allowed by the court, and the "administrator is discharged," the discharge will be construed to be general and final, and not simply a discharge as to matters found in the account: *State, ex rel., v. Moffitt*, 13 O. C. C. (N.S.) 152, 23 O. C. D. 238 [affirmed, without opinion, *State, ex rel., v. Moffitt*, 82 O. S. 433].

An administrator finally discharged can not be held liable for maladministration, in that he failed to answer when thereafter served with summons in a proceeding involving among other things a chose in action belonging to the estate of the decedent, and in consequence of such failure default judgment was taken against the estate: *State, ex rel., v. Moffitt*, 13 O. C. C. (N.S.) 152, 23 O. C. D. 238 [affirmed, without opinion, *State, ex rel., v. Moffitt*, 82 O. S. 433].

The court can not allow an administrator's commissions after accepting his final account without opening up the account after due notice: *Snider v. Graham*, 14 O. C. C. 386, 8 O. C. D. 3.

The administrator's fiduciary relation to the land does not terminate when the land is struck off and sold at public auction, but continues until the title of the purchaser becomes perfect by the payment of the purchase money and the delivery of the deed of conveyance whereby the title passes from the heirs of the estate, unincumbered by any charges in favor of the administrator or the estate arising out of the sale: *Barrington v. Alexander*, 6 O. S. 189, II Longsdorf's Notes, 229.

G. NATURE AND EFFECT OF ORDER OF REMOVAL.

The acts of an executor or administrator, who is afterwards superseded by removal or otherwise, are as valid as if he had continued to perform the trust until the final settle-

ment of the estate: *Bigelow v. Bigelow*, 4 O. 138, I Longsdorf's Notes, 212.

All parties in interest are bound to take notice of the removal of one, and the appointment of a second administrator, and when a removed executor or administrator has settled with the court and the balance in his hands is ascertained, suit may be sustained against his sureties without first obtaining a personal and separate judgment against him; and in such suit it is not necessary to aver that the removed administrator has had notice of his successor's appointment: *Treasurer v. McIlvain*, 5 O. 200, I Longsdorf's Notes, 265.

Where letters of administration are revoked and an administrator *de bonis non* appointed, *scire facias* can not be sued in the name of the removed administrator to revive a judgment rendered in his favor while in office: *Weaver v. Reese*, 6 O. 418, I Longsdorf's Notes, 347.

The removal of the executor or administrator terminates his authority over the assets received, as well as over those not received: *Weaver v. Reese*, 6 O. 418, I Longsdorf's Notes, 347.

The court has broad discretion as to removal of an executor, but narrow as to appointment thereof: *In re Sultsbach*, 5 O. N. P. 218, 5 O. D. (N.P.) 524; *In re Sells*, 5 O. N. P. (N.S.) 629, 52 Bull. 610.

H. REVIEW.

1. Appeal.

(a) Before 95 v. 406.

Appeal does not lie to an order removing an executor or administrator: *Perrine v. Pritz*, 1 Dayton Term Rep. (Iddings) 64.

G. C., § 10859 must be construed with the rest of the statute of 1857, of which it originally formed a part; hence no appeal lies to a refusal to appoint an administrator: *Ebersole v. Schiller*, 50 O. S. 701, IV Longsdorf's Notes, 523.

The authority of the probate court to remove an executor is complete and exclusive; and if the court exercises its discretion, its action can not be questioned by any appellate proceeding: *Stafford v. Missionary Association*, 22 O. C. C. 399, 12 O. C. D. 442.

Appeal to the common pleas will not lie to a removal of an administrator by the probate court: *In re Still*, 15 O. S. 484, II Longsdorf's Notes, 942; *contra*, *Walker v. Webb*, 2 Dec. Rep. 568, 4 W. L. M. 32.

Application to recover concealed assets, and for the removal of the administrator, may be joined in one proceeding. This will in no wise affect or change the character of either proceeding, and appeal will lie from

the final order in the proceeding to recover assets, but not with reference to the removal proceedings: *Harris v. Westervelt*, 15 O. C. C. 534, 8 O. C. D. 367.

(b) *After 95 v. 406.*

When an order is made by the probate court removing an executor, it is directed against him and he is affected by it, and he has the right of appeal therefrom, notwithstanding he is not an heir, devisee or other interested person under the will: *In re Sells*, 8 O. N. P. (N.S.) 175, 19 O. D. (N.P.) 567.

The right conferred by G. C., § 11206, of appeal to the common pleas from an order of the probate court removing an executor, is not in conflict with the provision of G. C., § 10492, giving the probate court exclusive jurisdiction to grant and revoke letters testamentary: *In re Sells*, 8 O. N. P. (N.S.) 175, 19 O. D. (N.P.) 567.

A decree the payment of money to a *de jure* and *de facto* administrator will not be denied on the ground that an appeal has been taken from the overruling of a motion for the revocation of his letters of administration: *Melanpy v. Loan Co.*, 13 O. D. (N.P.) 192.

2. *Error.*

(a) *Before 95 v. 392.*

G. C., § 11035, vests the probate court with complete and exclusive jurisdiction to remove a trustee appointed by it under a will, and an order of such court removing such trustee is not subject to review on petition in error: *Safford v. Missionary Society*, 22 O. C. C. 399, 12 O. C. D. 442.

Upon the removal of an executor under G. C., § 10629, said executor, not being an heir, devisee, legatee or creditor of the estate, and not being interested therein otherwise than as executor, can not prosecute error for the reversal of the order of removal. His individual rights are not prejudiced, and the jurisdiction of the probate court is exclusive and its exercise can only be reviewed for fraud, or for manifest abuse of power, and upon complaint by a party whose substantial rights are affected: *Munger v. Jeffries*, 7 O. N. P. 55, 10 O. D. (N.P.) 12 [affirmed *Monger v. Jeffries*, 62 O. S. 149, IV Longsdorf's Notes, 827].

(b) *After 95 v. 392.*

Error can not be prosecuted to an order removing an administrator under G. C., § 10629: *In re Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

The reasons for removal of an administrator are not jurisdictional facts, and such facts need not appear affirmatively in the journal entries to sustain their regularity in proceedings on error: *Ferguson v. Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

Error can not be prosecuted by an executor to an order of the probate court removing him: *Munger v. Jeffries*, 62 O. S. 149, IV Longsdorf's Notes, 827 [affirming, *Munger v. Jeffries*, 7 O. N. P. 55, 10 O. D. (N.P.) 12]; *contra Fox v. Kiester*, 6 O. N. P. 216, 8 O. D. (N.P.) 636.

The circuit court is without jurisdiction to review by a proceeding in error an order of the common pleas court removing an administrator in a proceeding brought into that court on appeal from the probate court: *Smith v. Bracey*, 13 O. C. C. (N.S.) 529, 22 O. C. D. 393.

Although the refusal of the probate court to consider the application of the next of kin or of a creditor for letters of administration, may be reviewed in the common pleas court, that court will not disturb a finding of the probate court to the effect that the next of kin is "evidently unsuitable," or that the applying creditor is incompetent, within the meaning of G. C., § 10617, unless it appears that the probate court abused its discretion: *McCallip v. Sharp*, 13 O. D. (N.P.) 650 [affirmed *Schumacher v. McCallip*, 69 O. S. 500, IV Longsdorf's Notes, 963].

An order of the probate court removing an executor is not the subject of review on petition in error in the court of common pleas: *Munger v. Jeffries*, 62 O. S. 149, IV Longsdorf's Notes, 827; *Campbell v. Miner*, 62 O. S. 659, IV Longsdorf's Notes, 845; *Martin v. Bershem*, 65 O. S. 556, IV Longsdorf's Notes, 891; *North v. Smith*, 5 O. C. C. (N.S.) 495, 17 O. C. D. 365.

For error in excluding evidence and for failure to prove fraud, where fraud was the only ground alleged for removal, the circuit court reversed the order of the court of common pleas, which removed an executor in a proceeding on appeal from the order of the probate court refusing to remove such executor: *In re Breckenridge*, 7 O. C. C. (N.S.) 86, 17 O. C. D. 688.

X. ADMINISTRATOR DE SON TORT.

An administrator *de son tort* is not recognized by Ohio laws, accordingly a creditor of a decedent can not sue one who has goods of the estate in his possession: *Dixon v. Cassell*, 5 O. S. 533, I Longsdorf's Notes, 310; *Benjamin v. LeBaron*, 15 O. S. 517, I Longsdorf's Notes, 729.

Where a widow assumed to act as administratrix without taking out letters of administration and she took a renewal note for a debt owed the estate, it was held that the maker could make the same defense as to usury that he could have made against a renewal note given to the intestate or his legal representative: *Van Ausdal v. Potterf*, 41 O. S. 677, IV Longsdorf's Notes, 82.

A bill in equity to subject the real estate of a decedent in Ohio, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, can not be sustained. The creditor may himself take letters of administration, and thus have complete remedy at law: *Bustard v. Dabney*, 4 O. 68, I Longsdorf's Notes, 203.

XI. ANCILLARY ADMINISTRATOR.

Our statutes provide for administration in this state, on the estate of a nonresident leaving an estate in Ohio: *Williams v. Welton*, 28 O. S. 451, III Longsdorf's Notes, 415.

If a non-resident decedent has property here and also creditors, the administrator will be appointed here; the creditors will not be driven to the foreign jurisdiction: *In re Fallon*, 3 O. N. P. 82, 4 O. D. (N.P.) 395.

The nonresident decedent must have been engaged in business in the state at the time of his decease, and not merely at some former time, to give the court jurisdiction to appoint an administrator under G. C., § 10625: *In re McCreight*, 6 O. N. P. 479, 9 O. D. (N.P.) 450.

Ancillary administration is not favored by the laws of Ohio, and should only be granted when required to preserve an estate or secure payment of a claim of a resident creditor. The conduct of a resident creditor and the condition of the estate may be such that a court will refuse to appoint an ancillary administrator, until all remedies against the foreign administrator have been exhausted: *In re McCreight*, 6 O. N. P. 481, 9 O. D. (N.P.) 454.

If the creditor's claim is disputed, and there are sufficient funds in the foreign administrator's hands to pay it, and all property here was sold or divided with the creditor's acquiescence, and there have been and may yet be abundant opportunities to sue the administrator in this state, and four years have gone by since the decedent's death, ancillary administration will be refused: *In re McCreight*, 6 O. N. P. 481, 9 O. D. (N.P.) 454.

It is jurisdictional to the right to appoint under G. C., § 10625, that the applicant be

a creditor. The court can not decide this finally, but should hear preliminary evidence showing a strong probability thereof: *In re McCreight*, 6 O. N. P. 481, 9 O. D. (N.P.) 454.

Notice to next of kin is not necessary to an ancillary appointment under G. C., § 10625, but if not given, the court should give a hearing to a motion to annul the appointment: *In re McCreight*, 6 O. N. P. 481, 9 O. D. (N.P.) 454.

It is mandatory upon the court to appoint an administrator on the application of a creditor under G. C., § 10625. The doctrine of *lis pendens* does not apply in a proceeding under G. C., § 10625: *In re Worthington*, 4 O. D. (N.P.) 38].

Ancillary administrations should be limited to the necessity out of which they arise, that is, to collect assets, pay debts due to citizens of the state, and remit the balance to the state of decedent's domicile, subject, however, to the court's discretion, first to distribute their shares to resident distributees. As foreign administrators may sue here, ancillary administration is seldom necessary: *Sicearington v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671.

A creditor of a nonresident decedent who owned land here, has a right to have an administrator appointed here, though there is a will and a foreign administrator: *Bustard v. Dabner*, 4 O. 68, I Longsdorf's Notes, 203.

A bill in equity to subject real estate of a decedent in Ohio, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, can not be sustained. The creditor may himself take letters of administration, and thus have a complete remedy at law: *Bustard v. Dabney*, 4 O. 68, I Longsdorf's Notes, 203.

An administration granted here on assets of a nonresident under G. C., § 10625, is ancillary. Hence, having been wound up, a balance left over and paid into court must be awarded to the foreign administrator and not to the widow as distributee: *Meswald v. Marks*, 19 O. C. C. 605, 10 O. C. D. 355.

Where deceased died in a foreign country, and left property, and was engaged in partnership business in Cuyahoga county, and the entry of the court in the matter of appointing as administrator included these words, 'It is ordered that said Mitchell be appointed administrator on the estate of deceased, late of the city of Marine, Michigan,' this is substantially a finding that deceased was not at the time of his death a resident of Ohio. In such case an order to the administrator appointed here to pay money in his hands into court is properly made under G.

C., § 10625: *In re Meswald*, 19 O. C. C. 605, 10 O. C. D. 355.

A court of Michigan, having jurisdiction on the ancillary administration of a will, proved and allowed in another state, may require an accounting from the executor or administrator appointed by it to be made to it: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

That the petitioner is unsuitable to administer is of no consequence; while the court may refuse to appoint the petitioner, it can not refuse to appoint anyone else, unless conditions warranting an administrator do not exist: *In re Worthington*, 4 O. D. (N. P.) 381.

XII. FOREIGN ADMINISTRATOR.

A. PRIORITY OF ADMINISTRATORS.

Where an administrator is appointed in another state for one who died there, and an administrator is appointed in this state, the former can not collect assets here; the latter will be preferred. The court will not examine the advisability of the latter's appointment. But instead of denying recovery to the former, will suspend judgment to enable an application to be made to the probate court to revoke the letters granted here: *Purcell v. Heinberger*, 3 Dec. Rep. 343, 1 Gaz. 205.

B. NON-RESIDENT.

An appointment here of an administrator of the estate of A, "late of Michigan," sufficiently finds that he was a nonresident: *Meswald v. Marks*, 19 O. C. C. 196, 10 O. C. D. 355.

An executor, resident out of the state, never having given bond here, is not entitled to appeal, without giving an appeal bond with security: *Work v. Massie*, 6 O. 503, I Longsdorf's Notes, 354.

C. EFFECT OF TREATY.

The treaty between the United States and the Argentine Republic provides that the consul of that government shall have the right to intervene in the administration of the estate of a decedent who was a citizen of that country, and under the most favored nation clause of the Italian treaty the same right extends to an Italian consul in the case of the death in this country of a citizen of Italy, notwithstanding the provisions of G. C., § 10617, as to whom letters of administration shall be granted: *In re Arduino*, 9 O. N. P. (N.S.) 369, 20 O. D. (N.P.) 461.

Under the most favored nation clause in the treaty between the United States and Austro-Hungary, a provision in the treaty

between the United States and the Argentine Confederation, which provides that if a citizen of either country dies in the other intestate, the consul general of the nation to which the deceased belonged or his representative in his absence shall have priority in settling the estate of the decedent, is to be read into the treaty between the United States and Austro-Hungary: *In re Stingacs*, 12 O. N. P. (N.S.) 107, 22 O. D. (N.P.) 88.

Where the accredited representative of the Austro-Hungarian government appoints a representative to act, in his absence, as administrator of a deceased citizen of the Austro-Hungarian Monarchy, and the appointment is made a matter of record in the probate court of the county in which the death of the decedent occurred, it becomes the duty of the probate court to appoint such accredited representative as administrator of the estate of the said decedent, statutory provisions to the contrary notwithstanding: *In re Stingacs*, 12 O. N. P. (N.S.) 107, 22 O. D. (N.P.) 88.

D. EFFECT OF FOREIGN JUDGMENT.

A decree of a foreign court is inoperative to transfer title to lands in Ohio: *Salmond v. Price*, 13 O. 368, I Longsdorf's Notes, 643; *Blake v. Davis*, 20 O. 231, I Longsdorf's Notes, 907; *Price v. Johnson*, 1 O. S. 390, I Longsdorf's Notes, 991.

Where one of the heirs assents to a decree of a foreign court purporting to transfer title to lands in Ohio, acts as one of the commissioners to execute it, and assents to the sale, he thereby passes his own title in equity: *Salmon v. Price*, 13 O. 368, I Longsdorf's Notes, 643.

It is a generally accepted rule that the power of an administrator or executor over the estate of the decedent emanates from the laws of the state where he receives his appointment, and is confined to the territory of such state. It does not, *de jure*, extend to other states and can not confer, as a matter of right, any authority to collect assets of the deceased in any other state. Such assets are to be collected and administered by virtue of the laws of such state, and accounted for to the proper court thereof. And the rule is the same whether the administration is general or with the will annexed: *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938 [affirming *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605].

The statutes of Michigan do not by comity or otherwise, accord the right of an executor appointed in another state, to administer the trust as to property in Michigan by force of the laws of such other state. Whatever right such executor acquires as to such

assets must be obtained by virtue of the laws of Michigan and he must account for the disposition thereof to the proper court of that state. Hence an Ohio probate court, although it has admitted to probate an Ohio will, and has issued letters testamentary to the executor therein named, has not power to review the accounts of such executor, respecting property situated in the state of Michigan and for which he has duly accounted to the proper court of that state: *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938 [affirming *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605].

E. WRONGFUL DEATH.

A foreign administrator is not restricted in Ohio to suits to recover the assets of the deceased, but may bring an action to recover damages for the death of his intestate, occurring outside of the state: *Railway v. Thieband*, 114 Fed. 918, 52 C. C. A. 538, 12 O. F. D. 254.

Under G. C., § 10764, a foreign administrator may sue for wrongful death: *Popp v. Railway*, 96 Fed. 465, 10 O. F. D. 4.

F. POWERS.

1. To Sue and Be Sued.

A foreign trust company, appointed and qualified to act as executor under the will of a foreign testator, may sue in the courts of this state, where the will includes real property situated here: *Trust Co. v. Railroad*, 6 O. N. P. (N.S.) 454, 53 Bull. 180.

Foreign executors are subject to suit in the same manner they are permitted to sue, and constructive service may be had in an attachment suit against a nonresident executor, where the property of the decedent which is attached is within the state: *Wire Co. v. Meyers*, 11 O. N. P. (N.S.) 652, 22 O. D. (N.P.) 733.

G. C., § 10763, authorizing action against a foreign executor, is constitutional: *Craig v. Railroad*, 2 O. N. P. 64, 3 O. D. (N.P.) 146.

Personal service within the state upon a foreign executor is good, although neither the executor nor the decedent was domiciled in Ohio; and although decedent left no property in Ohio: *Craig v. Railroad*, 2 O. N. P. 64, 3 O. D. (N.P.) 146.

Foreign executors having debts owing them here as executors are liable to action here on a rejected claim if service can be made on them: *Williams v. Welton*, 28 O. S. 451, III Longsdorf's Notes, 415.

Although if letters of administration are also issued to them here they are, as to assets in Ohio, under the control of our

courts (G. C., § 10763). Yet service by publication can not be had where a mere money judgment is sought and no property is seized by provisional remedy or is otherwise to be directly affected by the judgment: *Williams v. Welton*, 28 O. S. 451, III Longsdorf's Notes, 415.

The general administration laws of the state are, by G. C., § 10764, made applicable to the settlement of the estates of non-residents leaving property in Ohio, as fully as if intestate was domiciled within the state at the time of his death: *Williams v. Welton*, 28 O. S. 451, III Longsdorf's Notes, 415.

An administrator appointed in Michigan is without capacity to maintain in a federal court in Ohio an action for a wrongful death occurring in Illinois: *St. Bernard v. Shane*, 11 O. L. R. 43.

Executors named in a foreign will can not act here until such foreign will is recorded here: *Blake v. Graham*, 6 O. S. 580, II Longsdorf's Notes, 259.

2. To Settle Estate.

The statutes of Ohio clothe a foreign administrator with full power and authority to make a complete settlement of the estate of a deceased nonresident. Therefore, ancillary administration will only be granted when required to preserve an estate or secure payment of a claim of a resident creditor: *In re McCreight*, 6 O. N. P. 481, 9 O. D. (N.P.) 454.

3. To Sell.

An executor with power to sell real estate under a foreign will, a copy of the probate of which is recorded here, can sell without a new appointment and bond here: *Veazie v. McGugin*, 40 O. S. 365, IV Longsdorf's Notes, 32.

4. Action.

Where a married woman, domiciled in Ohio, dies intestate, leaving children, and her surviving husband afterward obtains letters of administration in Pennsylvania, and a report is made on his final settlement there, and his children except, they can not maintain a suit here for distribution while the settlement in Pennsylvania is pending: *Adams v. Adams*, 7 O. S. 83, II Longsdorf's Notes, 273.

An Ohio probate court, although it has admitted to probate an Ohio will, and has issued letters testamentary to the executor therein named, has no power to review the accounts of such executor respecting property situate in the state of Michigan, and for which he has duly accounted to the

proper court of that state: *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938 [affirming *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605].

Where the executors of a will, to whom letters testamentary had been granted in Ohio, had assigned a promissory note which formed a part of the assets of the estate, to children and legatees, in part payment of their shares of the state, and administration of the same estate had been granted in Virginia to another person, and the maker of the note had been compelled, by a decree of a court of chancery in Virginia, to pay the amount of the note to the administrator appointed in that state. It was held that the assignees could not recover in a suit on the note against the maker, though the assignment was made before the granting letters of administration and bringing of suit in Virginia: *Brown v. Winstanly*, 18 O. 67, I Longsdorf's Notes, 836.

Where a foreign administratrix brings suit here, and after answer and counterclaim, dismisses her petition and takes leave to answer the counterclaim and goes to trial, she can not object to the jurisdiction: *Hamilton v. Taylor*, 13 Dec. Rep. 975, 2 C. S. C. R. 402.

A foreign administrator can not be compelled to defend in our courts, though he can do so voluntarily; hence, on death of a defendant, a revivor in his foreign administrator's name can be objected to. An appointment in Ohio would reach the difficulty: *Lampton v. Nichols*, 13 Dec. Rep. 765, 2 C. S. C. R. 55.

A foreign administrator may collect a debt here. And the payment to him with notice that an administrator had been appointed here will relate back to the promise to pay, made without such notice, for the liability attached then, and the latter can not recover: *Weizell v. Savings Institution*, 1 Dec. Rep. 54, 1 W. L. J. 393.

The existence or nonexistence of debts is immaterial, so far as the admitting of the will to probate and the granting of letters of administration are concerned: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605.

XIII. ADMINISTRATOR DE BONIS NON.

A. QUALIFICATION AND NATURE.

The qualification of the successor to an administrator is not a jurisdictional fact, and such fact need not affirmatively appear in the journal entries to sustain its regularity in proceedings on error: *Ferguson v. Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

An administrator *de bonis non* is an officer not properly existing in Ohio. The officer

is rather a successor in the trust, since he takes not only assets remaining in specie, but also the rights of the estate against his predecessor: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308.

B. WHEN APPOINTED.

Where there are no assets to be administered upon and no debts not barred by limitation, no administrator *de bonis non* can be appointed, G. C., § 10631. If the former administrator, who died in office, had converted the assets this is a complete administration, and the estate is closed and an administrator *de bonis non* should not be appointed, and his appointment will be revoked: *In re Herckelrath*, 7 O. N. P. 531, 1 O. D. (N.P.) 696, 5 O. D. (N.P.) 565, 33 Bull. 49.

Where there is no personal property and no debts, there can be no appointment under G. C., § 10631: *Gurley v. Armentraut*, 6 O. C. C. (N.S.) 156, 17 O. C. D. 199.

Where, by a will executed in this state, there passes to one not related to the testator personalty and real estate situate in this state, and such legatee and devisee is appointed sole executrix, and after acceptance of the trust resigns without compliance with the duties enjoined by G. C., § 5331 and following sections known as the collateral inheritance tax law, it becomes the duty of the probate court to appoint an administrator *de bonis non* with the will annexed, to comply with the requirements of such statute and complete the settlement of such estate: *Chamberlain v. Stecher*, 78 O. S. 271, IV Longsdorf's Notes, 1041.

The giving of bond by such executrix as residuary legatee is not a substitute for the presence of the legal representative to complete the settlement of the estate, and affords no ground for refusing to appoint an administrator *de bonis non*, nor for removal after such appointment: *Chamberlain v. Stecher*, 78 O. S. 271, IV Longsdorf's Notes, 1041.

Where a widow received the balance remaining in the hands of the administrator after settlement of her husband's estate without making any claim for an allowance for her first year's support, it is not competent for the probate court after the lapse of nearly forty years to grant an application for the appointment of an administrator *de bonis non* for the sole purpose of setting off to her said allowance: *Evans v. Evans*, 9 O. N. P. (N.S.) 589, 20 O. D. (N.P.) 676 [affirmed *Evans v. Evans*, 13 O. C. C. (N.S.) 62, 21 O. C. D. 635; affirmed, without opinion, *Evans v. Evans*, 83 O. S. 482].

Though the administrator may have disposed of all the estate of an intestate, yet, if he die, no legal proceeding can be had to charge that estate without appointing an administrator *de bonis non*: *Piatt v. St. Clair*, 5 O. 555, I Longsdorf's Notes, 314.

It was questioned "whether the probate court has the power to appoint an administrator *de bonis non*, in the absence of assets and an averment of the existence of unpaid debts": *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888.

Where executors have paid out the principal of a trust fund to the life beneficiary, believing that justified by the discretionary powers given in the will and their final account has been confirmed and approved, the probate court has no jurisdiction to say the payment was wrongful; and hence, will not appoint an administrator *de bonis non*, as if there was an unadministered estate: *In re Hess*, 3 O. N. P. 62, 4 O. D. (N.P.) 413. See also COURTS.

C. RELATION BETWEEN EXECUTOR AND EXECUTOR DE BONIS NON.

An administrator *de bonis non* takes the estate from his predecessor in the same condition he left it. All acts lawfully done in the discharge of his trust by the former administrator are binding on his successor. The law recognizes a privity of estate between them: *Bray v. Darby*, 82-O. S. 47.

An administrator *de bonis non* can only charge what his predecessor could have charged; that is, if the latter had charged six per cent. on the first \$1,000, the former must charge the lower rate on subsequent collections, and can not again charge on money received from his predecessor, but the court may make an allowance: *In re Waring*, 7 O. N. P. 553, 5 O. D. (N.P.) 415, 1 Goebel, 146.

An executor *de bonis non* is not permitted to deny the debts of his predecessor in continuing a profitable business: *Rembold v. White*, 7 O. C. C. (N.S.) 509, 18 O. C. D. 427.

Where an executor dies without filing any account of the administration of his trust it is the duty of his personal representative to file such an account for him and pay over to the successor in the trust any balance that may be found due the estate from the deceased executor: *Black v. White*, 87 O. S. 413.

D. ACTION.

1. Against Executor or Administrator on Bond.

The administrator *de bonis non* may sue his predecessor's bond, though there are no debts outstanding: *Webb v. Roettinger*, 12

O. C. C. 730, 4 O. C. D. 270 [affirmed, without opinion, *Webb v. Roettinger*, 55 O. S. 686].

Without legislative aid, an administrator *de bonis non*, whose predecessor's powers have ceased by death, can have recourse only to the administration bond of the deceased administrator: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

Assets converted to his own use by the preceding administrator, as well as those remaining in specie, are included in "personal effects and assets unadministered" in G. C., § 10634, and the debt therefor is recoverable on his bond by the successor: *Slagle v. Entreklin*, 44 O. S. 637, IV Longsdorf's Notes, 241.

Followed in case of an executor who had been removed: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308.

A finding by the probate court of the amount due, gives no right of action for it to the successor, his only remedy being on the bond, as where the administrator of an administrator filed the account of the original estate, and on exceptions by the administrator *de bonis non* the court found the amount due from one estate to the other, and the administrator *de bonis non* began suit for it: *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953.

Assets received and not accounted for by a removed administrator gives a recovery on his bond for their value to the administrator *de bonis non* by our statute: *O'Connor v. State*, 18 O. 225, I Longsdorf's Notes, 844.

The act giving a right of action on his predecessor's bond to the administrator *de bonis non*, which he did not have at common law, is not void as impairing the obligation of contracts, or as retroactive: *Chatfield v. Faran*, 12 Dec. Rep. 750, 1 D. 488.

The act (G. C., § 10634) permitting an administrator *de bonis non* to sue on the bond of his predecessor is remedial, and should be liberally construed. It created a cause of action against the executor and his sureties, and this cause of action survived, though no action was brought until after the predecessor's death: *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069.

In an action by the administrator *de bonis non* against the executor of his predecessor no rights of the sureties of the predecessor could intervene to prevent a judgment: *Tracy v. Card*, 2 O. S. 431, 1 Longsdorf's Notes, 1069.

Notice to the removed administrator of the appointment of a successor is not necessary before suit. All parties are bound to take notice of it: *Treasurer v. McElvain*, 5 O. 200, I Longsdorf's Notes, 265.

Judgment against the removed administrator is not necessary before action by his successor on the bond: *Treasurer v. McElvain*, 5 O. 200, I Longsdorf's Notes, 265.

Costs can not be recovered in a suit against an administrator *de bonis non* brought within a year of his appointment, though the time for his predecessor to settle had long before elapsed: *Freer v. Love*, W. 414, I Longsdorf's Notes, 33.

An administrator *de bonis non* has no remedy either at common law or in chancery against his predecessor, or the estate of his predecessor, or on his bond, for he only represented the decedent. His only right of action is what the statute gives, and that is on the bond: *Blizzard v. Filler*, 20 O. 479, I Longsdorf's Notes, 920; *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

An administrator's recovery of assets in the hands of a predecessor is only had by force of a statute: *Wilson v. Pelton*, 40 O. S. 306, IV Longsdorf's Notes, 24.

No liquidation of the amount or ascertainment by court is necessary before suit: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397; *Montgomery v. Goepper*, 7 Dec. Rep. 581, 4 Bull. 67.

Where an executor dies or resigns without filing any account of the administration of his trust it is the duty of his successor in the trust to compel an accounting and payment to him of any balance due from such executor to said estate: *Black v. White*, 87 O. S. 413.

2. Against Third Persons.

An administrator *de bonis non* can sue for and recover assets of the estate in the hands of third persons: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

3. Against Personal Representatives of Executor.

The personal representative of an executor who died in office, before an account was due or filed in reference to the trust, is not liable under G. C., § 10634, to the administrator *de bonis non* of the testator in an action brought against him alone as such personal representative, to recover for unadministered assets of the estate of such testator where none of such assets came into the possession or under the control of such personal representative: *Jones v. Willis*, 66 O. S. 114, IV Longsdorf's Notes, 900.

A, being administrator of B, died without having settled his account with the estate. The administrator of A filed in the probate court the account of A, as such administrator, to which the administrator *de bonis non* of B filed exceptions, and the

court, on hearing, found a balance due from the estate of A to the estate of B. The administrator *de bonis non* of B brought suit against the administrator of A on the finding of the probate court, to recover the balance so due to the estate of B. It was held that the administrator *de bonis non* can not maintain an action, on such finding, against the representatives of the deceased administrator, but that he must seek his remedy, under the statute, on the administration bond of the decedent: *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953.

XIV. ADMINISTRATOR WITH THE WILL ANNEXED.

An administrator *cum testamento annexo* is a trustee of an express trust in the management, direction and control of an estate for a term of years, and is subject to the approval and direction of the probate court; the position of such trustees is similar to that of a guardian, whose duties require him to hold the estate until the happening of a certain event, and, while holding it, to loan or invest the money within a reasonable time after he receives it, as provided in G. C., § 10933: *Guthrie v. Gas & Electric Co.*, 2 O. N. P. (N.S.) 117, 15 O. D. (N. P.) 23.

Where an administrator with the will annexed has been appointed prior to the commencement of an action to contest the will, and where, after the case has been taken to the circuit court on error, an application for the first time is made for a receiver, such application should not be granted: *Sanker v. Mattison*, 20 O. C. C. 229, 11 O. C. D. 125.

An executor or administrator *cum testamento annexo* may be garnished by a creditor of a legatee and anything coming to him thereon on final settlement will be bound. G. C., § 11851, is broad enough to cover such officer: *Sampsell v. Sampsell*, 17 O. C. C. 455, 9 O. C. D. 510.

Power to sell lands, given to an executor by a will, can not be executed by an administrator with the will annexed: *Wills v. Couper*, 2 O. 124, I Longsdorf's Notes, 112.

XV. TITLE TO PROPERTY OF DECEDENT.

A. PERSONALTY.

1. In General.

Where testator bequeathed all his personal estate, after funeral expenses and debts paid, to his wife, remainder to his heirs, and not requiring or directing the executor to distribute any personal estate at her

death, the property passes directly to the widow, and the executor can not be held responsible for any use made by the widow of the estate; nor can he be required to account therefore in the probate court: *Posegate v. South*, 46 O. S. 391, IV Longsdorf's Notes, 333.

The title of the administrator, when appointed, to the personalty relates back to the time of death: *Sommers v. Boyd*, 48 O. S. 648, IV Longsdorf's Notes, 434.

The personalty does not go to the heirs by descent, but to the administrator: *Luce v. Treasurer*, W. 654, I Longsdorf's Notes, 51.

The right of the distributee of personal estate vests at the death of the intestate, subject to administration. And upon the death of such distributee before distribution, the right passes to his or her personal representative: *Armstrong v. Grandin*, 39 O. S. 368, III Longsdorf's Notes, 1037.

The right of the widow to take personal property at the appraisement is not limited to the time of making the appraisement, but she may, at any time within the three months allowed the administrator for selling the same, exercise this right, until the property is put up for sale; and her right is not affected by any changes that may, in the meantime, have taken place in the market value of the property: *Overturf v. Wear*, 26 O. S. 538, III Longsdorf's Notes, 327.

Money recovered by an administrator in an action for causing wrongful death, is not to be treated as part of the general estate of the intestate: *Steel v. Kurtz*, 28 O. S. 191, III Longsdorf's Notes, 398.

The personal property of a deceased person does not vest in his heirs; but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 991.

Materials and contracts for building a house not as an investment but as a home, do not go to the heir as realty, and if completion of the house will be a loss to the estate, the heir can not insist on its completion nor enjoin a sale of the materials as personalty: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 359.

Where an executor is to use the personal property to support testatrix's husband, and he receives a sum of money from a third person, which is, in fact, derived from a sale of the heir's land, for which they had been induced to sign a deed, but the executor does not know that the money was the proceeds of sale of land, and uses the money to support such husband, having previously distributed an equivalent amount of

the personal property to the heirs, no injustice has been done them, and they can not follow the land or money: *McDonald v. Boardman*, 17 O. C. C. 209, 9 O. C. D. 533. See also TRUSTS.

2. Choses in Possession.

Chattels on which there is a mortgage pass to the administrator and not to the mortgagee, even after condition broken: *Lingler v. Wesco*, 79 O. S. 225, IV Longsdorf's Notes, 1045.

All interests for a definite space, measured by years, months or days, are deemed chattel interests, and, independent of statutory provision, go to the administrator; but he has no interest in a lease: *Warner v. Tanner*, 38 O. S. 118, III Longsdorf's Notes, 960.

Shares in railroad companies are personal property: *Johns v. Johns*, 1 O. S. 350, I Longsdorf's Notes, 986.

Materials prepared by decedent for building are to be regarded as personal property: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 358.

Lease of lands for ninety-nine years, renewable forever, is a chattel that, upon the owner's decease, passes to his executor or administrator as any other chattel interest: *Murdoch v. Ratcliff*, 7 O. 119, I Longsdorf's Notes, 364.

Growing timber, under a rescinded contract of the decedent, belongs to the personal estate, and an action to rescind such contract is for the benefit of the personal representatives and not for the benefit of the devisees: *Isham v. Stave Co.*, 2 O. C. C. (N.S.) 1, 15 O. C. D. 167.

Money held by a person which belongs to the estate is part of the estate, and is, in law, in the hands of his administratrix, and should be subjected to the payment of a judgment obtained against the administratrix, by a proceeding in aid of execution: *Lauer v. Smith*, 1 O. C. C. (N.S.) 121, 14 O. C. D. 47.

Where a tenant for life leased a farm on August 15, 1892, to be farmed for a year at a rent of eight hundred dollars and dies August 22, 1893, and the crops had then all been harvested except corn, which was laid by in July and harvested in November, 1893, the note for rent, although not made payable until 1894, is not to be apportioned with the remainderman, but is assets of the life tenant's estate, for the rent had been earned before death and the deferring of its payment is mere matter of agreement: *Noble v. Tyler*, 61 O. S. 432, IV Longsdorf's Notes, 813.

3. *Choses in Action.*(a) *Debts Due from Executor.*

On death of a legatee the right to receive the legacy goes to his administrator and a payment to his heir's guardian direct is not a discharge, but this was questioned if it had been proved that the money had reached the heir after coming of age or been expended for his benefit: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

Where the mortgagor dies in possession of the goods and chattels covered by the mortgage, even after condition broken, and his administrator has taken possession of said goods and chattels in his trust capacity, the mortgagee can not maintain replevin against such administrator for their possession. In such case, if the mortgage is valid, the interest of the mortgagee in the property under mortgage is transferred to the fund arising from the sale by the administrator: *Lingler v. Wesco*, 79 O. S. 225, IV Longsdorf's Notes, 1045.

An executor as such has no power before final settlement to turn over, without an order of the probate court, notes held by the estate to a creditor of the estate, and one holding notes so turned over does not have a valid title to them upon which to sue the maker: *Surety Co. v. Houghton*, 13 O. C. C. (N.S.) 523, 22 O. C. D. 138.

A corporation knowing that an executor had misappropriated stock certificates held by him as trustee for the granddaughter of the testatrix, required the executor to obtain the granddaughter's power of attorney, ratifying all his transactions with the stock. She was then twenty-two years old, but feeble, and not as capable of business as the average woman, and had been living with the executor's family as a daughter. She did not read the writing, did not know its contents, nor that he had converted and squandered her funds; he told her it empowered him to draw her funds and deposit them in another bank, and she trusted him implicitly as a father. It was held that the company is chargeable with notice of the fraud, being warned by him of his dread to disclose the truth to her. At that time she had no power over the *corpus* of the fund. For both these reasons the company can not take benefit of the writing: *Mook v. Savings & Loan Co.*, 87 O. S. 273.

Soon after A had invested money in stock of a building and loan company, taking the certificates in the name of her granddaughter B, thirteen years old, with a parenthetic clause after the name ("A or other legal guardian may draw") and A retaining possession of them, A died leaving a will wherein she named her lawyer C as executor (with

out bond) and trustee of the property she should die possessed of, for the use and benefit of the granddaughter B. She gave to her executor all moneys held by her in trust for B, declaring in the will her intention to make her executor her successor in said trust, to hold for B and pay to her or for her benefit the income, till she be thirty years old. The executor qualified as such, having in his possession the certificates which the testatrix placed in his hands, and he sent the company a copy of the will with notice that he held the certificates under the will, and requested that dividends be paid to him as trustee. Thereafter he borrowed money from the company for his personal use pledging the certificates as collateral security, and canceled and turned in some for cash, signing the transfers and the written pledges as trustee. He squandered the money and died insolvent. It was held that the company was a party to this breach of trust and conversion, and it must surrender to the plaintiff as successor in the trust, the pledged securities, and pay to him the value of those canceled with accumulated dividends and interest: *Mook v. Savings & Loan Co.*, 87 O. S. 273.

(b) *Debts Due from Others.*

A claim for wrongful death is a chose in action, and as such is property and a part of the special estate of the decedent, to be recovered in the name of the administrator for the benefit of the beneficiaries named in the statute: *In re Arduino*, 9 O. N. P. (N.S.) 369, 20 O. D. (N.P.) 461.

When deceased held notes for collection as agent, the agency does not pass to his administrator, unless the deceased had an interest: *Johnson v. Johnson*, W. 594, I Longsdorf's Notes, 46.

Promissory notes payable to the wife or bearer, unsold but remaining in the possession of the husband, during coverture, without suit or assignment, are not assets of the husband's estate, and go to the wife or her heirs: *Dixon v. Dixon*, 18 O. 113, I Longsdorf's Notes, 839.

Choses in action belonging to the wife at the time of the marriage, and not reduced to possession during coverture, will go to her representatives, yet such *choses* may be reduced to possession by the husband by means of a judgment obtained thereon during coverture, in his own name alone, or by an assignment by him to another party for a valuable consideration, or by taking new securities in his name alone, and when this is done, they become part of the assets of his estate: *Dixon v. Dixon*, 18 O. 113, I Longsdorf's Notes, 839.

For the husband's right of property in the choses of action of his wife is dependent upon his reducing them into possession during coverture: *Needles v. Needles*, 7 O. S. 432, II Longsdorf's Notes, 310.

A lease for years, being a chattel interest, passes, at the death of the lessee, to the personal representative who becomes, by virtue of his office, assignee of the term; and if he enters into possession and receives the profits of the land premises, he becomes personally liable to the lessor for the rent to the extent of such profits so received: *Becker v. Waiworth*, 45 O. S. 169, IV Longsdorf's Notes, 267.

The lessor has an election either to look to the estate of the deceased for his rent or to hold the representative personally liable: *Becker v. Waiworth*, 45 O. S. 169, IV Longsdorf's Notes, 267.

Notes owned by a decedent at the time of his death are personal property and assets of his estate, the title to which is in the administrator, and the heirs have no right to enforce their payment. But notes treated as evidence of advancement form no part of the estate: *Tobias v. Richardson*, 5 O. C. C. (N.S.) 74, 10 O. C. D. 81.

On a note payable to A, administrator of B, if A dies his administrator and not the administrator *de bonis non* of B must sue: *McCoy v. Gilmore*, 7 O. (pt. 1) 268, I Longsdorf's Notes, 380.

No right of action on a promissory note belonging to a deceased person is shown by a party by proof of possession, and that he is the sole heir of the decedent: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 1002.

B. REALTY.

1. In General.

Lands, on the death of the ancestor, intestate, descend to the heirs, and may be sold on execution against the heirs, but subject to the rights of the administrator, in case they are needed for the payment of the ancestor's debts: *Douglass v. Masse*, 16 O. 271, I Longsdorf's Notes, 762.

Lands descend to the heir at once, upon intestate's death, and are his, charged, however, with the ancestor's debts. But until sold by the personal representative, the heir is entitled to the possession, rents, and profits thereof, and should pay all taxes levied thereon after the ancestor's death. Further, he can not, by bidding in such lands at a tax sale, divest the ancestor's creditors of their lien thereon: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

Where a testator makes no disposition of his real estate, other than directing that it

be sold, and the proceeds paid to a trustee for the benefit of certain legatees, the legal title descends to his heirs, subject to the execution of the power conferred on the executors; but the right of possession passes with the will to the executors, to enable them to effect the objects of the testator: *Elsner v. Fife*, 32 O. S. 358, III Longsdorf's Notes, 638.

A provision in a will that the executor should hold certain real estate for ten years and then dispose of it as required by the will, vests the title to such real estate in the executor as trustee: *Severer v. University*, 2 O. N. P. (N.S.) 333, 14 O. D. (N.P.) 686.

The right to charge decedent's lands in the hands of heirs no longer exists. Such land must be converted into personalty by the administrator to pay debts. The heir holds the lands free from the ancestor's debts, if the creditor does not assert his claim within the statutory period: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

Lands directed by will to be sold and converted into money are treated as personal estate: *Ferguson v. Stuart*, 14 O. 140, I Longsdorf's Notes, 660; *Collier v. Collier*, 3 O. S. 369, II Longsdorf's Notes, 35.

An adopted daughter who has been absent and unheard of for eleven years, retains her interest in real property left by her foster father, as against a mortgage executed by her foster mother after becoming a widow, and accounting after having first been made in favor of the mortgagee for the value of the widow's dower and any resulting trust in her favor: *Oglesby v. Rose*, 11 O. N. P. (N.S.) 188, 21 O. D. (N.P.) 291.

Title to property left by foster parents is not extinguished by the mere fact that the adopted child has been absent and unheard of for eleven years, notwithstanding the estates of the parents have been administered upon their decease during the intervening period: *Oglesby v. Rose*, 11 O. N. P. (N.S.) 188, 21 O. D. (N.P.) 291.

Where those children, to whom the entire estate of one who died without debts was devised, divided it up, an administrator, subsequently appointed, has title and is entitled to judgment against each child for the part taken by him, but not for part taken by nonresident children by the connivance of the defendant child: *In re Sattler*, 10 Dec. Rep. 440, 21 Bull. 161, Goebel, 183.

A title as devisee is not acquired until probate of the will (G. C., § 10541). Accordingly, where, before probate, a son, to whom real estate was devised, conveyed the property to his wife (without warranty), he conveyed only what he then had, that is, his inheritance, and the subsequent probate of the will gave him a new title, which his

creditors can assert against the grantee: *Douglass v. Miller*, 3 O. N. P. 220, 4 O. D. (N.P.) 414.

Death of the devisee before probate gives his heirs title, same as if the probate had preceded death: *Hawkins v. Barrow*, 15 O. C. C. 141, 8 O. C. D. 251. See also WILLS, LEGACIES AND DEVISES.

When the lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate if there was not sufficient personal estate for distribution out of which to deduct them: *Keever v. Hunter*, 62 O. S. 616, IV Longsdorf's Notes, 843. See also DESCENT AND DISTRIBUTION.

Where a railway wrongfully takes land as by entering on a highway, the fee of which is in the abutting owners, and also by injuring access to the land, as distinguished from appropriation without payment, the owner's title is not divested and his right of recovery after his death descends to the heir, and the administrator can not maintain the action. The right to sue for damages accruing in his lifetime, for which trespass or case would lie does not pass to the heir: *Railway v. O'Harra*, 50 O. S. 667, IV Longsdorf's Notes, 522.

2. Emblements.

An administrator's right to crops sown by his decedent, whether severed or not (G. C., § 10642), applies to crops sown by a life tenant, and if the life tenant has transferred the right by leasing the land to another for a money rent, the money rent belongs to the life tenant's administrator, though not payable until the year after the tenancy has ceased: *Noble v. Tyler*, 61 O. S. 432, IV Longsdorf's Notes, 813.

The statute gives to the administrator emblements severed before December 31st, if the death occurred after March 1st. Corn planted several years after the owner's death by a cropper can not be levied on a judgment against the administrator: *Green v. Cutright*, W. 738, I Longsdorf's Notes, 58.

Tenant for life rented a farm to H in March upon which to raise a crop of corn, and died in July. In November, when the crop was gathered the cropper paid the rent to the executor of the life tenant. The tenant in reversion brought suit to recover a proportionate share of the rent, as so much money paid for his use to the executor. It was held that he was not entitled to recover any portion of it: *Van Hayes v. West*, 3 O. C. C. 64, 2 O. C. D. 37.

Growing grapes are emblements: *Mason v. Lemon*, 3 O. N. P. 116, 4 O. D. (N.P.)

322 [affirmed, without opinion, *Mason v. Lemon*, 56 O. S. 793, 38 Bull. 197].

Farm lands being leased with the rent payable at fixed periods, the fact that the land is to be farmed will not convert the rent into emblements: *Dye v. Dimmick*, 4 O. N. P. 185, 6 O. D. (N.P.) 231.

A tenant for a year on shares planted the crop after the landlord's death. The heirs, and not the executor, get the lessor's share of the crop: *Millikin v. Welliver*, 37 O. S. 460, III Longsdorf's Notes, 927. See also EMBLEMENTS.

3. Estate for Years.

A permanent leasehold estate is not a chattel, but is realty, subject to all the laws and rules that attach to land: *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565.

On a lease for the lessee's life, with a right to remove the buildings at its termination, the administrator's heir can not sue the lessor for conversion of the buildings after death of the lessee: *Warner v. Tanner*, 38 O. S. 118, III Longsdorf's Notes, 960. See also LANDLORD AND TENANT.

4. Rents.

The rents of the land of an insolvent estate, accruing between the death of the intestate and a sale of the lands for the payment of debts, by the administrator, belong to the heir and not to the administrator: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

A lease for years is a chattel interest, and passes to the personal representative. If the latter enters into possession of the leased premises, and receives the profits thereof, he becomes personally liable to the lessor for accruing rents to the extent of the profits: *Becker v. Walworth*, 45 O. S. 169, IV Longsdorf's Notes, 267.

XVI. INVENTORY AND APPRAISEMENT.

The filing of an inventory by an administrator *de bonis non* can be omitted unless in the opinion of the court it is necessary: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

An inventory is required to be filed, although the will seeks to excuse it, and it is the duty of the court to require it, although the demand for it is made not by any heirs, but by a county officer who shows no interest, and the executors are nonresidents, and hence would not pay taxes here: *In re Pickards*, 5 O. N. P. 493, 7 O. D. (N.P.) 476.

The year's allowance to the widow and children probably is not part of the inven-

tory, so as to permit the widow to avail herself of G. C., § 10639: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

It is doubtful whether the allowance to the widow is part of the inventory, since it must be in a separate schedule and returned with the inventory: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

Where the appraisers of the personal estate of a decedent first appointed fail to make to the widow any allowance for her year's support, and the widow makes application to the probate court for the appointment of new appraisers for that purpose, the executor or administrator should have notice of the making and time of hearing of such application: *Heck v. Heck*, 34 O. S. 369, III Longsdorf's Notes, 722.

But the irregularity of failing to serve such notice should be corrected in the probate court; and where the record shows that an application was made to that court to set aside an order for the appointment of appraisers, on the ground stated, and was overruled, and the record does not show that any injustice was done, there is no ground for reversal: *Heck v. Heck*, 34 O. S. 369, III Longsdorf's Notes, 722.

The fact that an administrator may be ordered by the court to include in the inventory and appraisement, the real estate of intestate does not enlarge his powers over such real estate. That belongs absolutely to the heirs, subject only to the administrator's right to sell to pay debts: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 722.

The fact that a widow as the executrix of her deceased husband's estate, fails to file an account of a claim against his estate or institute proceedings for its allowance and collection, the same being paid by her, raises a presumption that she did not intend to charge it, but intended that it should inure to the benefit of her children, and, in the absence of proof to the contrary, an exception will not be sustained to the inventory of her estate for failure to include such claim among the assets of her estate: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

An exception will lie to an inventory of the estate of a deceased executrix of her husband's estate for omitting to include in the assets of her estate a charge of an account paid by her against her husband's estate, appearing in her account filed in the settlement of his estate as "Paid by Bridget Glenn, widow": *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

The question whether the person claiming to be the widow of a decedent is in fact his widow and therefore entitled to an allowance from his estate for her first year's support,

should be raised by exception to the inventory, and the finding of the probate court with reference thereto is appealable to the court of common pleas: *In re Scott*, 8 O. N. P. (N.S.) 279, 19 O. D. (N.P.) 577.

XVII. POWERS AND DUTIES.

A. GENERAL SCOPE.

The common law as to an administrator's powers is in force here except as modified by statute: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

An administrator has no power to create a trust: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

Whatever rights an executor acquires as to assets outside the state of his appointment are obtained by virtue of the laws of such state: *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938 [affirming *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605].

The application of the rule that remedial statutes are to receive such construction, to the extent their language will permit, as will accomplish the apparent object of the legislature to statutes conferring powers on executors and administrators, is not forbidden by the principle that executors and administrators have only such powers as may be conferred on them by statute: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

It was questioned whether an administrator can release an equity of redemption in lands, except under a decree of court. This doubt is sufficient ground for the decree: *Bank v. Piatt*, 5 O. 540, I Longsdorf's Notes, 312.

Executor with power to sell property can not give the consent required by G. C., § 9105, to the erection of a street railway along abutting street: *Rapp v. Railway*, 9 Dec. Rep. 302, 12 Bull. 119.

During the contest of a will the executor has no right to control real estate specifically devised: *In re Sultzbach*, 5 O. N. P. 218, 5 O. D. (N.P.) 516.

The administrator of a deceased guardian should file the account of the deceased guardian, and turn over the money in his hands to the newly appointed guardian, immediately after his appointment: *In re Bruckman*, 1 O. N. P. (N.S.) 7, 48 Bull. 637.

An administrator is required to diligently pay the debts of the deceased in the order of their priority. Within one year after his appointment, if he has not received notice of demands against the estate, he may proceed to pay those of which he had notice. Within eighteen months after giving bond, he is required to file his first account, showing receipts and disbursements: *Green v.*

State, 2 O. S. 574, I Longsdorf's Notes, 1085.

An executor has no power to prefer one creditor by turning over notes held by the estate, and no title is conferred thereby: *Surety Co. v. Haughton*, 13 O. C. C. (N.S.) 523, 22 O. C. D. 138.

Executors and trustees under a will, upon making collection of a balance due and secured under a trust impressed upon the title of real estate, have authority to convey such property before or after the time fixed by will for the cessation of their powers: *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267.

An executor is not bound to defend a contest of the will, and the costs of such contest will not be allowed, when the will is adjudged invalid. (But the body of this opinion seems to hold that such costs will not be allowed in any event): *Andrews v. Andrews*, 7 O. S. 143, II Longsdorf's Notes, 284. *Contra*, *In re Laws*, 10 Dec. Rep. 39, 18 Bull. 198; *In re Wolfe*, 4 O. N. P. 336, 7 O. D. (N.P.) 220.

B. TO COLLECT ASSETS.

A collection of assets means that the personal property shall be reduced to money, and after the payment of all debts and the collection of all assets, then the estate is ready for distribution. The only thing that the statute contemplates as assets for distribution is money: *Young v. Roberts*, 7 O. C. C. 105, 3 O. C. D. 685 [affirmed, without opinion, *Young v. Roberts*, 54 O. S. 622].

An administrator *de bonis non* has the right and power to sue for and recover assets of the estate wherever found: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

A judgment creditor of the sole distributees of an estate can not enjoin the administrator from collecting a judgment in favor of the estate, although on averments that there are no other creditors and that the debtors are insolvent. While a creditor of the estate may sometimes enjoin, the creditor of an heir can not. An injunction would interfere with the administrator's legal duty to collect the debt. A court of equity can not in Ohio interfere with an administrator's duty: *Harshman v. Houston*, 1 Dayton Term Rep. (Iddings) 127.

A watch belonging to a deceased railroad conductor is neither "wearing apparel" nor an ornament within the meaning of G. C., § 10654, which provides that certain assets need not be administered on in the settlement of the estates of decedents in certain cases: *In re Post*, 8 O. L. R. 492, 55 Bull. 382.

The executor or administrator of a surviving partner, who dies while he is engaged in settling the partnership business, is entitled to the possession of the partnership, and must complete such settlement, unless relieved by contract, or by order of the court: *Dayton v. Bartlett*, 38 O. S. 357, III Longsdorf's Notes, 974.

Shares of stock in a corporation are not "debts due and owing to" a testator, and an exchange of shares in one company for shares in another company formed as a reorganization of the former, made by executors without leave of court and under a clause in a will authorizing them to "compromise and adjust all debts due, and owing to," a testator, is without authority and void: *Marriott v. Railway*, 16 O. D. (N.P.) 135.

The common pleas court has no jurisdiction to compel an administrator to receive payment of an unmatured note from an executor of another estate under G. C., § 10735: *Denmead v. Sharp*, 14 O. D. (N.P.) 300.

The time allowed for the collection of assets may be extended for a period of five years from and after the date of the administration bond: *Bray v. Darby*, 82 O. S. 47.

Where no bond has been required, the five years provided for by § 63 of the act of March 23, 1840 (S. & C. 585), begins to run from the date of executor's qualification: *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

The probate court is armed with the power of refusing the application for further time, unless the funds in the hands of the executor or administrator have been substantially disbursed: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

G. C., § 10684, seems to recognize that an executor should have at least one year in which to collect assets and to ascertain the condition of the estate: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

An action can not be maintained by an administrator appointed under the laws of this state, to recover money, the proceeds of lands lying in Pennsylvania (the property of the intestate), which were sold by a guardian as the property of his ward, on the order of the orphan's court of that state; for as the administrator could not reach the lands there, he can not reach the proceeds: *Donley v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

An administrator of an insolvent estate may maintain a suit in equity to recover personal property transferred by the decedent in fraud of his creditors. "Assets" means property, real or personal, tangible or intangible, legal or equitable, which can

be made available for the payment of debts: *Insurance Co. v. Bank*, 173 Fed. Rep. 390.

An administrator may not compromise, adjust and settle claims against the estate for less than their face, and put the difference in his own pocket, either directly or indirectly, through his attorney: *Cow v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

C. TO MANAGE ESTATE.

A duty is devolved upon an executor or administrator to preserve his decedent's estate and protect it from loss, and to this end he may do whatever is necessary for that purpose. The fact that decedent invested his property in particular stocks and securities will not, alone, justify the executor or administrator in continuing the investment in the face of facts which would induce a prudent man to change the investment to avoid loss; and, where no directions have been given by testator in his will as to the continuing or changing of investments made by him, the ordinary rules of prudence and diligence apply, and an executor or administrator, as the case may be, is not justified in continuing the investment that he would not be justified himself in making: *Guthrie v. Gas & Electric Co.*, 2 O. N. P. (N.S.) 117, 15 O. D. (N.P.) 23.

An executor has authority to make needed repairs on a building specifically devised with the direction to turn the property over to the devisee within five years and at any time after one year from the death of the testator, but such repairs should only go to the extent of keeping the property in as good condition as the executor found it: *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370 [modifying and affirming *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803].

Where administration is granted upon the estate of a deceased ward, the assets vest immediately in the administrator, whose title dates back to the time of the decease. He, and not the former guardian, is the proper person to list the personal estate for taxation: *Sommers v. Boyd*, 48 O. S. 648, IV Longsdorf's Notes, 434.

Where administrators of an estate reside in different counties, "moneys, credits and investments" belonging to the estate must be listed for taxation under G. C., § 5371, in the county where the administrator having actual possession and control of the property to be listed, resides at the time of listing: *Brown v. Noble*, 42 O. S. 405, IV Longsdorf's Notes, 120. See also TAXATION.

To render valid a proxy given by an executor it must be accompanied by a specific

direction as to the manner in which the vote is to be cast, with no discretion whatever in the holder of the proxy, but authority only to perform the purely ministerial function of voting the stock as directed: *State, ex rel., v. Voight*, 1 O. C. C. A. 125.

D. TO CARRY ON BUSINESS.

Where an administrator continues the business of the decedent in good faith at a profit, a subsequent administrator *de bonis non* will not be permitted to deny the validity of claims presented by sons and heirs of the decedent on account of services rendered and money advanced in connection with the business and which resulted in increasing that part of the estate: *Rembold v. White*, 7 O. C. C. (N.S.) 509, 18 O. C. D. 427 [affirmed, without opinion, *White v. Rembold*, 77 O. S. 595].

Where the business of a decedent was carried on without any authorization of law and at a loss, heirs who joined therein, although acting in the best of faith, will be charged with knowledge of the want of capacity of the administrator, and can not thereafter assert their claims for contributions of money or services, either against the assets involved in the business or the general assets of the estate, in preference to the claims of original creditors: *Rembold v. White*, 7 O. C. C. (N.S.) 509, 18 O. C. D. 427 [affirmed, without opinion, *White v. Rembold*, 77 O. S. 595].

A continuance of the testator's business by the executor in order to pay debts and keep it going for children, in good faith, but without authority, does not render the rest of the estate liable for debts so incurred. The general estate not embarked in such business can not be made liable for its prosecution in the absence of explicit authority in the will. Devisees as well as creditors have an interest in the estate that can not be incumbered by the executor's unauthorized acts: *Lucht v. Behrens*, 28 O. S. 231, III Longsdorf's Notes, 400 [reversing *Behrens v. Lucht*, 13 Dec. Rep. 864, 2 C. S. C. R. 217].

A creditor of the business claiming equality with or priority over creditors of the decedent on the ground that the business had been continued with their consent should state how long they had agreed to carry on the business and whether they were paid after plaintiff furnished anything to the business or from any fund which he helped to produce: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

A will directing the whole personal estate to be used in continuing a business is subject to the law requiring payment of debts

first, and only the balance can be used for the business. Accordingly, a creditor of the business can not complain that creditors of the decedent had been paid before him nor be subrogated to any claim of the trustee against them: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

A petition on a debt of the testator's business incurred by the executor as trustee under the will to carry it on, must aver that he had given bond as trustee under G. C., § 10591: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

Continuation by executor and survivor, pursuant to an agreement between them authorized by the will, is a new partnership, death having immediately dissolved the old one, the terms of which if not expressly agreed on may be implied from the manner of conducting the business to be the same as those of the old firm: *McGrath v. Cowen*, 57 O. S. 385, IV Longsdorf's Notes, 722.

The will of a partner, providing for continuing his capital in a firm, does not authorize the executors to invest further funds therein, nor does it implicate the rest of the estate for subsequent business debts. And their consent to a change of the articles by admitting new partners and increasing the capital will not implicate the estate beyond the amount invested: *Peters v. Campbell*, 2 Dec. Rep. 526, 3 W. L. M. 587.

Where the will of the deceased partner provides that the survivor shall continue the business for joint benefit, only so much of the decedent's estate as is embarked in the business is hazarded: *Bank v. Wight*, 4 O. N. P. 173, 6 O. D. (N.P.) 350.

Where the debts sued on are notes given by the survivor for a debt of the firm incurred in the lifetime of the decedent, but the holder never presented the original claim to the executors for allowance, and only presented the notes after over three years, he has abandoned the original claim: *Bank v. Wight*, 4 O. N. P. 173, 6 O. D. (N.P.) 350.

A partnership is terminated by the death of one of the partners; from that time it becomes the duty of the executor to wind up the affairs of the partnership. In order to bind the executor as partner evidence must be adduced to show that such an agreement was entered into: *Russell v. Fenner*, 21 O. C. C. 527, 11 O. C. D. 754.

E. TO INVEST FUNDS.

1. Diligence Required.

G. C., § 11214, which provides for the investment of funds in the hands of executors and administrators, is permissive and not

mandatory: *Willis v. Brancher*, 79 O. S. 290, IV Longsdorf's Notes, 1046.

When the will makes full provision for the investment of funds G. C., § 11214, does not apply: *Willis v. Brancher*, 79 O. S. 290, IV Longsdorf's Notes, 1046.

In making investments the administrator or executor is only required to use common prudence and skill of competent men, and not that of the most cautious and money making men: *Spencer's Appeal*, 2 Dec. Rep. 510, 3 W. L. M. 408; *Armstrong v. Miller*, W. 562, I Longsdorf's Notes, 44, 6 O. 118, I Longsdorf's Notes, 327.

A trustee can not delegate to another discretion to change investments with which she was vested by the terms of the will: *Allen v. Insurance Co.*, 10 Dec. Rep. 204, 19 Bull. 198.

The probate court has authority under G. C., § 10704, to order the sale by an administratrix with the will annexed of securities in danger of depreciation, and the reinvestment of the proceeds therefrom: *Guthrie v. Gas Co.*, 2 O. N. P. (N.S.) 117, 15 O. D. (N.P.) 23.

2. Liability.

Where the will authorizes it and the executor is not guilty of bad faith in investing funds of the estate, and exercises ordinary business ability in the investment he is not personally liable: *Willis v. Brancher*, 79 O. S. 290, IV Longsdorf's Notes, 1046.

An administrator investing funds of the estate so as to bear interest, is chargeable with the amount earned by the interest bearing fund: *In re Craig*, 10 O. D. (N.P.) 733.

Before the last amendment to G. C., § 10843, in 95 v. 364, it was held that interest would be charged against the administrator on funds which he was ready to distribute, but could not because the heirs were unknown; it was his duty to invest the money for them. "May" in the old statute means "must." The statute now uses "shall" instead of "may": *In re Thornton's Estate*, 7 O. N. P. 335, 5 O. D. (N.P.) 151.

Money in the hands of an administrator which has yielded him no profit, and which he has not been ordered to pay out, or which is tied up by litigation in good faith, does not bear interest; and this rule is applicable to debts which the administrator owes to the estate, and which are chargeable against him as money in his hands: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

An administrator investing funds of the estate in real estate, which was sold at a profit, is chargeable with such profits: *In re Craig*, 10 O. D. (N.P.) 733.

Where a change in the investment of a trust fund has been made by the trustee

without any specific designation of the new investment at the time of the change, as that of the trust fund, but leaving it open so as to make it possible for him to claim it as his own should it be profitable, or treat it as the trust should it prove disastrous, the *cestuis* can elect whether they will consider the investment as made of the trust fund, or require the trustee to account for the trust and a reasonable income from it: *Brown v. Williams*, 9 O. C. C. (N.S.) 307, 19 O. C. D. 25 [affirmed, without opinion, *Williams v. Brown*, 78 O. S. 424].

Where the income of a trust fund is bequeathed to the legatee, her share at her death to go to her surviving children, such children are not, after the death of the mother, bound by any election or ratification of changes in the investment of the trust fund which prove injurious to them: *Brown v. Williams*, 9 O. C. C. (N.S.) 307, 19 O. C. D. 25 [affirmed, without opinion, *Williams v. Brown*, 78 O. S. 424].

An administrator is not chargeable with interest on money which comes into his hands as the representative of a deceased person, unless he employ it in his own business, derive some benefit from the loan of it, or is guilty of unreasonable and unnecessary delay in the settlement of his accounts with the court: *Cooch v. Irwin*, 7 O. S. 23, II Longsdorf's Notes, 267.

F. TO ATTACK UNFILED MORTGAGE.

The administrator in possession of chattels can protect that possession for the benefit of the creditors against an unfiled chattel mortgage, though the decedent could not have done so: *Kilbourne v. Fay*, 29 O. S. 264, III Longsdorf's Notes, 465.

Where a creditor of a decedent held a chattel mortgage, which he failed to refile, such mortgage is void as to other creditors of the estate: *Whitely v. Weber*, 2 O. C. C. 336, 1 O. C. D. 517.

An unfiled chattel mortgage is not a lien as against creditors: *Whitely v. Weber*, 2 O. C. C. 336, 1 O. C. D. 517.

An unrecorded mortgage is superior to the lien of general creditors: *Gill v. Pinney*, 12 O. S. 38, II Longsdorf's Notes, 546.

G. TO SET ASIDE FRAUDULENT CONVEYANCE.

1. What Constitutes Fraudulent Conveyance.

The purchase, by the son of an appraiser, of land ordered sold to pay decedent's debts, it appearing that the father withdrew sums equal to the cash payment and that the son thereafter disclaimed any interest in the

property and conveyed it to his mother who had become guardian of the father, amounts to a secret trust for his father and was in fraud of the estate owning the land at the time the sale was ordered: *Brickman v. Shale*, 11 O. C. C. (N.S.) 41, 20 O. C. D. 372 [affirmed, without opinion, *Brickman v. Shale*, 82 O. S. 425].

Sale by an administrator to a trustee, to place the property beyond the reach of creditors, under an agreement or understanding with the trustee that he should hold it for the benefit of the heirs and such of the creditors as they saw fit to pay, is void: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her. Such conveyance is not void as to creditors of the husband, unless the amount of consideration is grossly disproportionate. The transaction is not fraudulent unless *mala fides* be shown: *Singree v. Welch*, 32 O. S. 320, IV Longsdorf's Notes, 636.

Mere indebtedness of grantor is not sufficient to set aside a deed as in fraud of creditors. And a debt barred by the statute of limitations will not support an action to set aside a deed as fraudulent against creditors: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

2. When Action May be Brought.

An administrator can only impeach a fraudulent conveyance by his decedent if the property is required to pay debts. If the personal property is sufficient for all debts except those amply secured by mortgage, the administrator can not obtain an order to sell other lands conveyed in fraud of creditors in order to pay such mortgages: *McCall v. Pixley*, 48 O. S. 379, IV Longsdorf's Notes, 421.

An administrator can not maintain an action to impeach a fraudulent conveyance of the intestate except when authorized by statute: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

A conveyance of personalty in fraud of creditors by the decedent can not be attacked by the administrator, for he only represents the decedent as to whom the transfer was valid; hence, the vendor having no right, he has none: *Benjamin v. Le Baron*, 15 O. 517, I Longsdorf's Notes, 729.

An administrator can not maintain an action of trover to recover goods transferred by his intestate to defraud his creditors. The remedy, if there be any, is in chancery: *Benjamin v. Le Baron*, 15 O. 517, I Longsdorf's Notes, 729.

An administrator primarily represents the creditors, and secondarily the heirs and where the estate is insolvent and the interests of the heirs merely technical his duties are analogous to those of an assignee. He may maintain a suit in equity to recover personal property transferred by the decedent in fraud of his creditors: *Insurance Co. v. Bank*, 173 Fed. Rep. 390.

The case provided for in G. C., § 10777, forms no exception to the general rule that interests in real estate go to the heirs and not to the administrator. Since the intestate has transferred his land to defraud his creditors, the title could not descend to his heirs: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

3. Method of Procedure.

If the estate is insolvent, the administrator as trustee for the creditors may, under G. C., § 10777, sue to set aside a fraudulent conveyance, or, if an innocent person has bought the land, may sue the fraudulent grantee for its value: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661 [reversing *Doney v. Dunnick*, 8 O. C. C. 163, 4 O. C. D. 380].

An administrator may within four years choose two methods of procedure to reach land fraudulently conveyed by the decedent: (1) Ejectment either before or at the time of suing in the probate court, to sell to pay debts. (2) Action to set aside the conveyance and for sale. These two remedies must be sought in the common pleas. He can not obtain an avoidance of the conveyance in the common pleas, and then file suit in the probate court to sell to pay debts: *Longley v. Sewell*, 2 O. N. P. 376, 4 O. D. (N.P.) 1.

The remedy is to set aside the fraudulent conveyance and not to have personal judgment against the grantee: *Doney v. Dunnick*, 8 O. C. C. 163, 4 O. C. D. 380. See also FRAUDULENT CONVEYANCES.

4. Jurisdiction.

The filing of the petition in the probate court gives that court exclusive jurisdiction to determine every question in the case, and the court of common pleas has no jurisdiction to set aside a sale made and confirmed by order of the probate court, except where a fraudulent judgment has been procured: *Baker v. Lamkin*, 11 O. C. C. 103, 5 O. C. D. 54.

5. Effect of Order Setting Aside Conveyance.

After an action by an administrator to set aside a conveyance made by his intestate as fraudulent, and after decision to that

effect in a proper court, but without any order for the sale of the property, the administrator may apply to the probate court to have such property sold to pay debts: *Lowman v. Sewall*, 16 O. C. C. 466, 9 O. C. D. 177 [reversing *Longley v. Sewell*, 2 O. N. P. 376, 4 O. D. (N.P.) 1].

The death of a debtor and appointment of his administrator does not deprive the creditor of the right to attack the fraudulent conveyance. G. C., § 10777, is not exclusive. But after the conveyance is set aside the assets can be administered through the personal representative: *Hoffman v. Kiefer*, 19 O. C. C. 401, 10 O. C. D. 304.

After sale of real estate has been set aside as fraudulent, it may be sold to pay the widow's yearly allowance: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884.

Lands conveyed to defraud creditors can not be ordered sold until the conveyance has been set aside in a proceeding commenced for that purpose in the court of common pleas.

An order of the probate court for the sale of such lands upon a judgment of its own, setting aside the conveyance as null and void, is of no validity whatever, and may be impeached in a collateral proceeding to recover the land: *Spoors v. Coen*, 44 O. S. 497, IV Longsdorf's Notes, 226.

6. Limitation.

While the action to set aside a fraudulent conveyance is pending in the common pleas, and four years have elapsed since decedent's death, the probate court has no jurisdiction; the statute does not permit him to split his action: *Longley v. Sewell*, 2 O. N. P. 376, 4 O. D. (N.P.) 1.

The action to set aside a fraudulent conveyance must be brought within four years: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

7. Pleading.

An averment that there is no personal property sufficient to pay debts is imperative, and is not dispensed with by an allegation that the land in question had been fraudulently conveyed by the decedent: *Baen v. Weller*, 12 O. D. (N.P.) 128.

But the answer of a guardian *ad litem* for the minor heir, alleging his ignorance of the matters contained in the petition, and praying that the rights of his wards may be protected, has the effect of a general denial, and requires the production of proof of all the material allegations of the administrator's petition: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

An executor's petition to sell lands to pay debts, including those fraudulently conveyed, G. C., § 10777, will not reach money paid by the decedent to clear his wife's land of a mortgage, nor to reach the proceeds of land in the heir's hands after a fraudulent sale by decedent, for these are claims for money and not to sell: *Webster v. Ballard*, 4 Dec. Rep. 419, 2 Clev. L. Rep. 137.

For the general discussion of the subject of pleading, see PLEADINGS.

H. CONTRACTS OF DECEDENT.

The executor may generally perform or obtain a release from personal contracts of the decedent according to the interests of the estate and with the court's approval: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 358.

The probate court is not expressly vested with jurisdiction to order an administrator, against his objection, specifically to perform an agreement alleged to have been made by his intestate; and such an order so made merely on motion of a party to the agreement and not necessarily to effectuate some power expressly referred, is *coram non judice*, and void: *Jones v. Green*, 21 O. C. C. 96, 11 O. C. D. 548.

A contract to buy real estate made by the decedent can be rescinded by his administrator having no assets to pay, and the vendor consenting, and chancery will not aid the heir to set it up again: *Howard v. Babcock*, 7 O. (pt. 2) 73, I Longsdorf's Notes, 387.

A rescission of a contract to buy real estate by the vendee's administrator in good faith and for the heirs' advantage will not be disturbed after the lapse of many years: *Ludlow v. Cooper*, 4 O. S. 1, II Longsdorf's Notes, 67.

A contract of decedent being made to sell real estate, his will authorizing his executor to sell his lands gives no power to agree to sell to such buyer at a less price. But the buyer on tender of the price is entitled to a deed: *Pollock v. Pine*, 2 O. C. C. 359, 10 O. C. D. 529.

The right of action to declare void a contract, whereby one now deceased sold certain standing timber at a grossly inadequate price, is in the personal representative of the decedent, and not in the devisees of land from which the timber is being removed: *Isham v. State Co.*, 2 O. C. C. (N.S.) 1, 15 O. C. D. 167.

Proceedings and judgment under G. C., § 11922, to carry out decedent's contract to convey, are void for want of jurisdiction if the contract was void, as where it was made by a married woman. The parties thereto

having acted under a mutual mistake as to their rights, are not estopped to claim the inheritance: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

If the decedent conveyed land absolutely, but took back a collateral contract showing it was security for a loan and would be re-conveyed on payment, if after his death the value of the land did not exceed the debt, the executors could release the right to redeem, and let the grantee keep the land for the debt. At all events, the heirs being all adults, though two were married women, not barred by limitations, can not twenty-seven years afterwards claim a right to redeem: *Piatt v. Smith*, 12 O. S. 561, II Longsdorf's Notes, 584.

I. TO BIND ESTATE BY ADMISSIONS.

An administrator's admissions as to a claim are not competent to bind the estate when not made in the course of duty, as in accepting or rejecting the claim, because they are not against interest. Nor if he is an heir, if there are other heirs who would be prejudiced: *Hueston v. Hueston*, 2 O. S. 488, I Longsdorf's Notes, 1076.

Admissions of an administrator are competent against the estate, in favor of a creditor. Creditors need not go behind them: *Mattoon v. Clapp*, 8 O. 248, I Longsdorf's Notes, 431.

An administrator's declaration that the estate was indebted to a person is not competent evidence in an action by such person against the succeeding administrator, the predecessor having died: *Bird v. Hueston*, 10 O. S. 418, II Longsdorf's Notes, 447.

An administrator or executor has no power by a new promise to revive a claim or debt already barred by the statute of limitations: *Drouillard v. Wilson*, 1 Dec. Rep. 555, 10 W. L. J. 385.

J. TO BIND ESTATE BY CONTRACT.

An administrator can not bind the estate by his contracts; hence, his note to an attorney for services in settling the estate can not be sued on at law against his successor, until the probate court has ordered its allowance as reasonable: *Mellen v. West*, 5 O. C. C. 89, 3 O. C. D. 46; *McBride v. Brucker*, 5 O. C. C. 12, 3 O. C. D. 7.

Where from the nature of the contract and her inability to perform such contract individually, the executrix will be held to have executed the contract in her representative capacity: *Coles v. Kearney*, 8 Dec. Rep. 733, 9 Bull. 245.

A trust to executors—as to dispose of land—is personal and can not be delegated. Accordingly, an executor's contract authorizing

a person to change locations, redeem such parts of the land as had been sold for taxes, and do what is necessary to perfect and secure the title for half the land as compensation, is not authorized: *Taylor v. Gallo-way*, 1 O. 232, 1 Longsdorf's Notes, 72.

The rule of immunity of estates against indebtedness incurred by the personal representatives does not apply where the estate and minor heirs derived a benefit from the use by a third person of his own money at the request of the executrix, in paying taxes and thus saving the property from sacrifice; and this is true, notwithstanding the maladministration of the executrix: *Stillman v. Holmes*, 9 O. N. P. (N.S.) 193.

If an executrix who is also legatee for life of stock, with power of disposition, gives a third person power of attorney to sell them and change investments at discretion, and he has the corporation transfer them to himself, and sells them, the corporation is liable to the estate for the wrongful transfer. The trustee can not delegate her discretion, and the corporate officers knowing of the will are bound to know its contents: *Allen v. Insurance Co.*, 10 Dec. Rep. 204, 19 Bull. 198 [reversed, without stating the grounds, *Allen v. Insurance Co.*, 32 Bull. 374].

The probate court is without jurisdiction, in advance of the settlement of the estate, to entertain an application by the administrator to fix a sum as a maximum to be expended by such administrator for the purpose of a tombstone or monument and order the administrator, in the event that such monument is not procured by the widow or next of kin, to erect such monument and charge the expense to the estate: *In re Ferguson*, 81 O. S. 58 [affirming *In re Ferguson*, 6 O. N. P. (N.S.) 417, 18 O. D. (N.P.) 374].

A employed defendants as attorneys to secure her appointment as administratrix of her husband's estate, procure sureties and manage her affairs, both personal and as administratrix. Defendants collected money of the estate and held it subject to their fees and to secure the sureties as agreed. It was held that, though an administrator can not pledge assets for his own obligations, yet no rights of creditors appearing to be in jeopardy the court will not assist in the repudiation of the contract: *Bugher v. Wright*, 22 Bull. 381.

K. TO BORROW MONEY.

An administrator may borrow money to pay a debt of the estate to save land from forced sale: *Welsh v. Perkins*, 8 O. 52, 1 Longsdorf's Notes, 413.

L. TO SELL PROPERTY OF ESTATE.

1. *Personality.*

At common law an executor or administrator has power to sell the assets of the estate, including notes and mortgages, without an order of court: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

An administrator or executor may sell the personal property of the estate at public sale without an order of court: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

An executor or administrator has no power to sell promissory notes, claims, demands, right of action, bonds and stocks, except in case of desperate claims, and bonds and stocks necessary to be sold to pay debts: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

An administrator has no power to sell or transfer notes secured by mortgage which belonged to deceased at time of his death: *Miller v. Stark*, 61 O. S. 413, IV Longsdorf's Notes, 812.

An executor must sell the personal property belonging to the estate, except promissory notes and other rights in action which can be collected: *Weyer v. Watt*, 48 O. S. 545, IV Longsdorf's Notes, 428.

An executor as such has no power before final settlement to turn over, without an order of the probate court, notes held by the estate to a creditor of the estate, and one holding notes so turned over does not have a valid title to them upon which to sue the maker: *Surety Co. v. Haughton*, 13 O. C. C. (N.S.) 523; 22 O. C. D. 138.

Under G. C., § 10704, the probate court has authority to order the sale of securities in danger of depreciation and the reinvestment of the proceeds therefrom: *Guthrie v. Gas Co.*, 2 O. N. P. (N.S.) 117, 15 O. D. (N.P.) 23.

Omission by the probate court to fix the lowest price at which corporate stock belonging to the estate of a decedent may be sold at private sale, does not invalidate a sale made in all other respects in conformity with the statute, without collusion or fraud and at the market price: *Burch v. Trust Co.*, 14 O. C. C. (N.S.) 346, 23 O. C. D. 358 [affirming *Burch v. Trust Co.*, 12 O. N. P. (N.S.) 86, 22 O. D. (N.P.) 6].

No order of court or authority to sell stock at private sale being given, an approval of an account containing a report of the sale at a good price is equivalent to a previous order. If all the debts are paid, and the executor is residuary legatee and alone interested, his successor can not attack the sale: *Hicks v. Stone*, 9 Dec. Rep. 132, 11 Bull. 67.

If an administrator disposes of the personal property of the estate without proper security for its payment he is guilty of a breach of official duty and for any damage or loss thereby occasioned to the estate, he and his sureties are liable: *White v. Moe*, 19 O. S. 37, II Longsdorf's Notes, 924.

At a sale of personalty on credit, the administrator can not arbitrarily reject notes tendered to him, if the sureties thereon have all the statutory qualifications, but if his decision as to such qualifications is made in good faith and with due caution, it should stand: *Hamilton v. Bonham*, 20 O. C. C. 252, 10 O. C. D. 834 [reversed on other grounds, *Bonham v. Hamilton*, 66 O. S. 82, IV Longsdorf's Notes, 899].

Where, at an administrator's sale of goods, upon terms of credit of nine months with approved security, a bid is accepted, but it is stipulated that the transaction is to be a sale if surety be given by ten o'clock the next day, but if not given the goods to be again offered for sale, and the sureties tendered by the bidder are not approved by the administrator, and the goods are thereupon offered and sold to another, the title to the goods does not pass to the first bidder and he can not maintain replevin for their possession: *Bonham v. Hamilton*, 66 O. S. 82, IV Longsdorf's Notes, 899.

2. Realty.

(a) Nature of Power.

The power of an administrator to sell lands is strictly a legal one, and if a sale is sought, the question is triable at law: *Lieby v. Park*, 4 O. 469, I Longsdorf's Notes, 236.

An administrator having a right to subject lands to pay debts may in a proper case proceed like an ordinary lienholder to marshal liens and sell instead of proceeding under the administration act: *Calkins v. Johnston*, 20 O. S. 539, II Longsdorf's Notes, 1015.

(b) Power Given by Will.

(aa) How Power Given.

(aaa) Express Power.

Power to sell realty does not authorize executors to lease: *Breuer v. Hayes*, 10 Dec. Rep. 391, 21 Bull. 29; *Breuer v. Hayes*, 10 Dec. Rep. 583, 22 Bull. 144.

Power to sell lands does not authorize an exchange or barter, but a sale for money only: *Taylor v. Galloway*, 1 O. 232, I Longsdorf's Notes, 72; *Fleischman v. Shoemaker*, 2 O. C. C. 152, 1 O. C. D. 415.

Discretionary power to sell lands given by will can not be delegated: *Railroad v. Hutch-*

ins, 37 O. S. 282, III Longsdorf's Notes, 912; *Allen v. Insurance Co.*, 10 Dec. Rep. 204, 19 Bull. 198.

Executors authorized by will to sell lands must take out letters of administration before being empowered to sell: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605.

No express authority having been given to the executors of a will to carry out a provision to sell certain lands and distribute the proceeds thereof to certain devisees, that power will be deemed conferred by a provision for the appointment of the executors "firmly believing that they will fully carry out the directions of the will": *Schaupp v. Jones*, 3 O. C. C. (N.S.) 176, 13 O. C. D. 649.

An executor obtains no title and has no power to convey real estate unless there are words expressly granting him title, and then only for the purpose of realizing money to pay debts, or as a trustee to carry out designated trusts: *Helmig v. Meyer*, 8 O. N. P. 31, 10 O. D. (N.P.) 308.

An imperative direction to sell real estate, and an unconditional requirement to distribute the proceeds among certain beneficiaries, are powers coupled with an interest; and, by the force of the will, the title to the real estate of the testator vests in fee in his executors, and does not descend to his heirs: *Martin v. Spurrier*, 13 O. C. D. 110 [reversed, without opinion, *Spurrier v. Martin*, 69 O. S. 533].

Unless authorized by the will, an executor can, in no case, sell real estate without first obtaining an order of court. And an administrator can not convey title to real estate without first obtaining an order to sell same in the manner prescribed by law; for to divest the heirs of their title to real estate by sale through the personal representative, the sale must be made in substantial compliance with the law: *Goforth v. Longworth*, 4 O. 129, I Longsdorf's Notes, 210.

A will giving power to an executor to sell lands will be so construed as to carry out the intentions of the testator: *Williams v. Veach*, 17 O. 171, I Longsdorf's Notes, 802.

A power conferred on executors in this language, "giving them full and complete power as I myself possess to dispose of my property," etc., is a power coupled with an interest: *Williams v. Veach*, 17 O. 171, I Longsdorf's Notes, 802.

Where the testator has made the contract to sell the lands in his life-time, and in his will empowered his executor to sell the same, and give deeds, the executor can not agree with the purchaser in the contract to sell the lands for less than the contract price: *Pollock v. Pine*, 2 O. C. C. 359, 1 O. C. D. 529.

Power given to executors to sell land ceases to exist when the estate is settled or all claims against it are presumptively satisfied by lapse of time: *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

Payment of the purchase notes on the purchase of land from an executor required by the will to sell to the executor's indorsee is the same as payment to the executor himself: *Sater v. Kocher*, 8 O. C. C. 390, 6 O. C. D. 276, 2 O. D. (N.P.) 587 [affirmed, without opinion, *Sater v. Kocher*, 51 O. S. 622, 31 Bull. 348].

A clause reading "I do invest him with full, ample, and complete power to dispose (after my decease), in such manner as he thinks proper, all my estate of every description, real and personal, and invest him with full power to settle and adjust all my worldly affairs, as he pleases; meaning expressly to invest him with as full power to that effect as I might possess, not incompatible with the tenor and substance of this last will and testament," give an executor full power to sell and dispose of the estate: *Steele v. Worthington*, 2 O. 182, I Longsdorf's Notes, 115.

(bbb) Implied Power.

Authority given by will to an executor to convert realty into money is the equivalent of authority to sell: *Dean v. Lowenstein*, 6 O. C. C. 587, 3 O. C. D. 597.

A will devised "my house to be sold and the proceeds divided" specifying the legatees thereof and naming executors to carry out the intention of the will. It was held that where some of the legatees elect to take the property, and others to take the proceeds, a sale thereof is necessary. Hence, although power of sale is not implied in an executor in the absence of express authority, unless a substantial necessity exists, yet a sale of the house is authorized in a case like the above: *Schaupp v. Jones*, 12 O. D. (N.P.) 197.

Where a will provided that the executrix should hold property in trust for five years, and collect the rents, and that then the property should be sold and the proceeds divided, this gave the executrix implied power to sell the real estate: *Lawton v. Lawton*, 5 O. N. P. 441, 7 O. D. (N.P.) 493.

A devise in trust "to invest, manage and control" as the trustee may deem best to combine safety with productiveness, confers upon the trustee power of sale at his discretion: *Sargent v. Sibley*, 6 Dec. Rep. 1219, 13 Am. L. Rec. 33, 11 Bull. 177.

Merely naming a person as executor in a will directing that property be sold and the proceeds divided does not give that person authority to sell: *Weymouth v. Irwin*, 5 O. N. P. 248, 7 O. D. (N.P.) 91.

The power to sell lands and distribute the proceeds in accordance with the will is a power that may be inferred from the expression in the will, "firmly believing they (the executors) will carry out the directions of my will," in the absence of express power thereunto: *Schaupp v. Jones*, 3 O. C. C. (N.S.) 176, 13 O. C. D. 649.

(bb) Who May Execute Power.

If only one qualifies, he may execute a power to sell: *Taylor v. Galloway*, 1 O. 232, I Longsdorf's Notes, 72.

But no number less than all who are acting can execute the power: *Fleischmann v. Shoemaker*, 2 O. C. C. 152, 1 O. C. D. 415.

Although one executor can not purchase lands of his coexecutors, yet such a sale may be confirmed by the subsequent assent and ratification of the heirs: *Mitchell v. Dunlap*, 10 O. 117, I Longsdorf's Notes, 493.

Whether a power of sale given by will to three executors can be exercised by a sole surviving executor was queried but not decided in *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

Where a will directs land to be sold by the executors, but they resign without so doing, the sale, or conveyance, or both, may be made by an administrator with the will annexed: *Eltner v. Fife*, 32 O. S. 358, III Longsdorf's Notes, 638.

In the absence of such a statute as G. C., § 10590, authority to sell lands, given by will to an executor, could not be executed by the administrator with the will annexed: *Wills v. Cowper*, 2 O. 124, I Longsdorf's Notes, 112.

Where a will confers powers upon an executor to sell lands, it will be so construed as to carry out the intentions of the testator: *Williams v. Veach*, 17 O. 171, I Longsdorf's Notes, 802.

(cc) When Power May Be Executed.

Power given to executors by will to sell and convey land becomes legally inoperative and ceases to exist when the estate is settled, or all claims against it are presumptively satisfied, by lapse of time, and no object of the testator remains to be attained: *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

A devise to certain relatives with power to the executor to sell and convey the property so devised, if necessary, for the purpose of distributing it, was a devise in fee to the relatives, and the power of sale vested in the executor was a naked power only, not a power coupled with an interest, and could only be exercised, if necessary, for the purpose of making distribution: *Hoyt v. Day*, 32 O. S. 101, III Longsdorf's Notes, 622.

An executor's bill in equity to sell to pay debts will not be sustained without showing that his more summary remedy at law in the common pleas as a probate's court is inadequate: *Leslie v. Willey*, W. 147, I Longsdorf's Notes, 14.

(dd) How Power May Be Executed.

Power to sell land, given in a will, ceases to exist when an executor, after accepting his trust, resigns. But the power may be transferred to an administrator with the will annexed. In case the administrator then resigns, his power under such will wholly ceases, and a deed made by him afterward, of land sold by him while in office, conveys no title: *Eltner v. Fife*, 32 O. S. 358, III Longsdorf's Notes, 638.

If testator empowers his executor to sell by the terms of the will, and only one of the executors named qualifies, such executor may sell under such power: *Taylor v. Galloway*, 1 O. 232, I Longsdorf's Notes, 72.

Under an order of court authorizing an executor to sell an entire tract of land, he may sell a part thereof: *Ewing v. Higbee*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

Where the will gives great discretion in the execution thereof, in the absence of fraud such discretion will not be interfered with: *Is re Reynolds*, 3 O. N. P. 292, 2 O. D. (N. P.) 11.

Power given to an executor to sell lands when advantageous, and proceeds to be distributed to children as they come of age, is a power connected with a trust, and executor entitled to possession of land: *Dabney v. Manning*, 3 O. 321, I Longsdorf's Notes, 174.

Where testator bequeathed residue to his two daughters and their heirs "and in case the said daughter Eliza shall decease without lawful heirs of her body, her share to pass to the other sister and her heirs," it was the executor's duty to make distribution as expressly directed, and such distribution was a complete administration of his trust. It was queried but not decided whether the bequest over on the death of Eliza is void, because inconsistent with the bequest to her and her heirs, or is valid: *Ratliff v. Warner*, 32 O. S. 334, III Longsdorf's Notes, 637.

Levy of attachment in an action against a devisee will not defeat or prevent the execution of a power of sale given by the testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale: *Smyth v. Anderson*, 31 O. S. 144, III Longsdorf's Notes, 568.

Under a will directing the sale of real estate and the distribution of proceeds in a prescribed manner, the executors take the

fee in the real estate, and with it the right of possession; and the executors may maintain an action for possession, under G. C., § 11903, against one wrongfully in possession, and the heirs are not necessary parties: *Martin v. Spurrier*, 13 O. C. D. 110.

(c) Statutory Proceedings.

(aa) History of Legislation.

Neither the earlier territorial law, nor the execution law of Feb. 1805, authorized a sale of decedent's lands on judgment against executors or administrators: *Gray v. Askew*, 3 O. 466, I Longsdorf's Notes, 183.

Previous to August, 1795, there was no law in the Northwest Territory authorizing executors or administrators to sell decedent's estates. Under the act of 1803, the common pleas had jurisdiction to order sale of real estate of decedent. The law of 1795 authorizing such sale was repealed by the act of Feb. 22, 1805: *Ludlow v. Johnson*, 3 O. 553, I Longsdorf's Notes, 195.

Between 1805 and 1808 the law did not authorize the sale of a decedent's estate by his personal representative, where the estate was insolvent: *Paine v. Skinner*, 8 O. 159, I Longsdorf's Notes, 420.

Under the law of 1816, equitable interests in land were assets for the payment of debts, and could be sold as real estate by order of the court granting administration: *Avery v. Dufrees*, 9 O. 145, I Longsdorf's Notes, 471.

Prior to the amendment in 1891 of G. C., § 10791, the common law applied, and an administrator could sell assets without an order of court, including notes and mortgages taken at his sale of land to pay debts, and a buyer thereof in good faith for full value and without notice, though after maturity, without notice of the administrator's wrongful intent, acquires a good title and need not see to the application of the purchase money, and though the court had previously decreed the administrator to surrender the notes to trustees: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

An action can not be brought to subject the lands of a deceased debtor in this state to sale for the payment of his debts, even though the heirs and representatives of his estate reside in another state. The creditor may take out letters of administration and thus has a complete remedy: *Bustard v. Dabney*, 4 O. 68, I Longsdorf's Notes, 203.

Where a *scire facias* was issued and levied on lands after the defendants death, it was held that a sheriff's sale conferred no title: *Cartney v. Reed*, 5 O. 221, I Longsdorf's Notes, 269.

(bb) Necessity of Statutory Provisions.

Independent of statute there is no power of sale: *McCall v. Pixley*, 48 O. S. 379, IV Longsdorf's Notes, 421.

The power of an administrator to sell lands of an intestate is entirely statutory. Though an order be made for the carrying of the law into effect, yet, if the statute be repealed before the order is executed, its effect is at an end, and no valid sale can be affected: *Ludlow v. Wade*, 5 O. 494, I Longsdorf's Notes, 307.

(co) Repeal of Statute.

If the statute is repealed after the order of court is made, but before it is executed, the effect of the order is at an end, and no valid sale can then take place: *Ludlow v. Wade*, 5 O. 494, I Longsdorf's Notes, 307.

The words "suit or prosecution"—in the saving clause of a repealing statute—will not include an order allowing an administrator to sell land, and if not executed its effect is ended: *Ludlow v. Wade*, 5 O. 494, I Longsdorf's Notes, 307.

If the order to sell was procured under a statute enabling the court to make it, a repeal of the statute ends the power to sell, and a sale thereafter conveys no title: *Perry v. Clarkson*, 16 O. 571, I Longsdorf's Notes, 785.

The legislature has power to repeal a law authorizing sale of land to pay debts even as to estates in course of settlement. The rights of creditors therein are not vested: *Ludlow v. Johnston*, 3 O. 553, I Longsdorf's Notes, 195.

Where an order of sale was granted under the act of 1795, and the sale made after the repeal of that act by the act of 1805, such sale conferred no title upon the purchaser: *Perry v. Clarkson*, 16 O. 571, I Longsdorf's Notes, 785.

Where administrators were ordered by the court to sell real estate under the statute, and before the sale was made the law was repealed, the power of the administrators to sell terminated: *Bank v. Dudley*, 1 O. F. D. 233.

(dd) Jurisdiction.

An administrator's petition in the probate court to sell to pay debts gives that court exclusive jurisdiction to determine all questions in the case and an independent suit will not lie in the common pleas to set aside the sale unless there was fraud upon the court itself as where an administrator collusively allowed a claim by his wife and allowed her to buy the property without paying anything, all of which was known to the probate court: *Baker v. Lamkin*, 11 O. C. C. 103, 5 O. C. D. 54. See also COURTS.

An administrator's power to sell real estate of intestate for payment of debts is strictly a legal power. If a sale be made, the question is triable at law, and when, at law, it has been decided that no authority existed, equity can not set it up: *Lieby v. Park*, 4 O. 469, I Longsdorf's Notes, 236.

The probate court has jurisdiction to try any question of fact arising in the action for the sale of real estate, or it may afford the parties a trial by jury when appropriate. All persons claiming an interest in the land should be brought before the court, and all questions of title adjudicated. This is a civil action under the code: *Doan v. Bitely*, 49 O. S. 588, IV Longsdorf's Notes, 472 [affirming *Bitely v. Doan*, 4 O. C. C. 7, 2 O. C. D. 388].

If the land is incumbered by mortgages or other liens, the court must settle priorities and order a sale free from such liens. Probate court not authorized to make an order to sell land subject to mortgage or other liens: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

The probate court has no equity power to set aside a deed: *Fleming v. McGuffey*, 12 O. N. P. (N.S.) 19, 21 O. D. (N.P.) 387 [for former opinion, see *Fleming v. McGuffey*, 8 O. N. P. (N.S.) 430, 19 O. D. (N.P.) 521].

Under the act of 1803, jurisdiction to order the sale of lands of a decedent in a proper case lay in the courts of common pleas: *Ludlow v. Johnston*, 3 O. 553, I Longsdorf's Notes, 195.

In whichever court the action is brought, the rights of the several parties may be determined by such court: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

The probate court having exclusive jurisdiction to settle the accounts of executors and administrators, it is incompetent, where such a suit is brought in the common pleas, for that court to attempt to fix the costs and expenses of administration: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

Where a widow claims real estate standing in her deceased husband's name to be hers by virtue of a lost unrecorded deed from him to her, and thereupon procures a decree restoring such deed without making judgment creditors of the husband parties, such judgment creditors may file a suit to set aside such decree and deed, for it is not an administrator's province to do so. Such suit is in the nature of a creditor's bill and therefore is properly brought in the common pleas, for the probate court has no jurisdiction in a suit to sell to pay debts to recover real estate: *Fleming v. McGuffey*, 12 O. N. P. (N.S.) 19, 21 O. D. (N.P.) 387.

Court of common pleas had jurisdiction of an action brought in 1840, under the admin-

istration act of March 12, 1831, to subject an intestate's real estate to payment of debts: *Cadwallader v. Evans*, 12 Dec. Rep. 811, 1 D. 585.

The power to order the real estate to be sold by necessary implication includes the power to decide whether the land was the property of the deceased: *Doan v. Biteley*, 49 O. S. 588, IV Longsdorf's Notes, 472 [affirming *Biteley v. Doan*, 4 O. C. C. 7, 2 O. C. D. 388].

The decree of another state authorizing an administrator to sell Ohio lands to pay debts is wholly void, and no title to the lands passes by the sale: *Nowler v. Coit*, 1 O. 519, I Longsdorf's Notes, 99; *Beall v. Price*, 13 O. 368, I Longsdorf's Notes, 643; *Blake v. Davis*, 20 O. 231, I Longsdorf's Notes, 907; *Price v. Johnston*, 1 O. S. 390, I Longsdorf's Notes, 991; *Henry v. Doctor*, 9 O. 49, I Longsdorf's Notes, 461.

The buyer at a sale made by an order of a foreign court can not compel the heirs to reimburse him, but the court will require the taxes to be repaid as a condition of quieting the title: *Nowler v. Coit*, 1 O. 519, I Longsdorf's Notes, 99.

A bill in equity to subject the real estate of a decedent in Ohio to payment of debts, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, can not be sustained. The creditor himself may take letters of administration, and thus have a complete remedy at law: *Bustard v. Dabney*, 4 O. 68, I Longsdorf's Notes, 203.

Where a void decree is made by a Virginia court, for the sale of Ohio lands, one of the heirs who assents to the decree, and aids in executing it, passes his own title in equity: *Beall v. Price*, 13 O. 368, I Longsdorf's Notes, 643.

(ee) Venue.

Lands in another county may be ordered sold to pay debts by the court which appointed the administrator: *Avery v. Pugh*, 9 O. 67, I Longsdorf's Notes, 462; *Avery v. Dufrees*, 9 O. 145, I Longsdorf's Notes, 471.

Under the law of 1795 for settling intestate's estates, the Orphans' court could not direct sales of land by administrators, except of lands lying in the county where the court sat: *Ludlow v. McBride*, 3 O. 240, I Longsdorf's Notes, 163.

The heirs partitioned land, and the administrator, needing it to pay debts, instead of a proceeding to sell to pay debts in the county of the intestate's last residence, filed suit in the common pleas of the county where the lands were to marshal liens and sell, and served the owners by publication under the civil code § 72. It was held, if

such suit were unauthorized, yet the court had jurisdiction of the subject-matter and of the parties, and the sale thereunder was voidable and not void, and unless reversed on error the titles thereunder were good: *Calkins v. Johnston*, 20 O. S. 539, II Longsdorf's Notes, 1015.

In a proper action brought for the purpose of selling realty, the probate court of the county appointing a testamentary trustee has jurisdiction to order the sale of real estate belonging to the trust located in another county of the state: *Boals v. Olingan*, 6 O. N. P. (N.S.) 609, 16 O. D. (N.P.) 267.

Appointing an administrator is not the commencement of a suit, hence, on the formation of a new county the original court has no power to order a sale of lands in the new county under a saving clause as to pending cases: *Davis v. Livingston*, 6 O. 225, I Longsdorf's Notes, 333.

(ff) Purpose of Sale.

(aaa) Power Only to Pay Debts.

(aaaa) Personalty Insufficient.

An administrator under the laws of Ohio has no jurisdiction over the real estate of his decedent, except when the personal assets are insufficient to pay the debts of the estate: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

A legacy is not considered in determining sufficiency of personalty since it is chargeable against the personalty and not against the estate generally: *Guion v. Guion*, 5 Dec. Rep. 205, 3 Am. L. Rec. 475. See also WILLS, LEGACIES AND DEVISES.

G. C., §§ 10774, *et seq.*, regulating the manner in which lands may be sold by an executor or administrator for payment of debts of decedent, are intended to place strict limits upon such sales and prevent the making thereof except when necessary: *Kummer v. Lapp*, 1 O. N. P. (N.S.) 209, 13 O. D. (N.P.) 491.

The introduction of evidence showing the necessity to sell is not jurisdictional and it is not necessary that it affirmatively appear in the journal entry in order to sustain the regularity of the order to sell: *In re Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

It is an abuse of the provision of G. C., § 10786 to institute such proceedings for the mere purpose of settling disputes regarding the title of lands. There must be actual necessity for selling the land for payment of *bona fide* debts: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

The personal estate is primarily liable for debts of decedent unless by a will he has exonerated it and imposed that burden upon

the real estate: *Skinner v. Blackburn*, 4 O. C. C. 325, 2 O. C. D. 574.

(bbbb) Amount.

It is the duty of the administrator to apply for a sale of sufficient of the realty if there is a deficiency in the personal assets: *Abbott v. Cole*, 5 O. 86, I Longsdorf's Notes, 249.

Where the administrator has used up all the personal estate to pay debts, and afterward, an action is brought against him on a debt contracted by intestate, resulting, though properly contested, in a judgment against such administrator, the latter is entitled to an order for the sale of such of the real estate as may be necessary to satisfy the judgment, even though it has already been partitioned among the heirs, and by them sold to other parties. The debts of decedent are a lien on his realty, and purchasers from his heirs take same *cum onere*: *Faran v. Robinson*, 17 O. S. 242, II Longsdorf's Notes, 830.

(cccc) Set-off.

The lien of a magistrate's judgment may be set up in a proceeding in the probate court to sell the property of a decedent to pay debts, where the party against whom the lien was obtained has an interest in the property as an heir: *In re Seitz*, 11 O. C. C. (N.S.) 204, 21 O. C. D. 32.

The setting up of the lien of a magistrate's judgment against an heir in a proceeding to sell property of decedent to pay debts is not one requiring the issuance of summons for the party against whom the lien was obtained, and an order directing the administrator to pay the claim can not be collaterally attacked: *In re Seitz*, 11 O. C. C. (N.S.) 204, 21 O. C. D. 32.

(dddd) Termination of Right.

Debts of deceased are a lien on his land, whether the lands be devised or cast by descent, which can be removed only by payment of the debts or the lapse of time: *Ramsdall v. Craighill*, 9 O. 197, I Longsdorf's Notes, 476.

The power to sell real estate ceases when the estate is fully settled and all claims presumptively satisfied by lapse of time: *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

An action may be maintained in the probate court to sell real estate to pay debts although foreclosure proceedings are pending in the court of common pleas, unless the administrator is a party to the latter proceed-

ings: *Bateman v. Morris*, 4 O. N. P. 397, 7 O. D. (N.P.) 387.

The fact that an heir has, without an order of court, sold lands of decedent at private sale, and applied the proceeds in satisfaction of preferred claims, does not bar the administrator from selling the land to pay debts: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

(eeee) Pleading.

In a suit to sell real estate, an averment that there is no personal property sufficient to pay debts is imperative, and this requirement is not dispensed with by an allegation that the land had been fraudulently conveyed by decedent: *Baen v. Weller*, 12 O. D. (N. P.) 128.

If a guardian could procure an order of sale of land for the support of the widow and children, an administrator could only sell to pay debts, hence, if the guardian and administrator join in a petition to sell for support of the wards, and the sale was executed by the administrator, it was void: *Newcomb v. Smith*, 5 O. 447, I Longsdorf's Notes, 299.

For the general discussion of the subject of pleading, see PLEADINGS.

(bbb) Validity of Debt in Issue.

Alimony payable in monthly installments is a valid obligation according to the terms of the decree: *Hassaurek v. Markbreit*, 68 O. S. 554, IV Longsdorf's Notes, 948.

Denial of the validity of the debts by a surviving husband, subject to whose curtesy a sale is asked, is no resistance to the order, because the probate court can not adjudicate the validity of debts, and because his interest is not affected: *Pirmann v. Gerhold*, 7 O. N. P. 664, 5 O. D. (N.P.) 414, 1 Goebel 142.

A judgment is conclusive evidence of indebtedness of the estate, and can not be collaterally impeached except for fraud or mistake, or perhaps culpable negligence of the administrator in defending: *Faran v. Robinson*, 17 O. S. 242, II Longsdorf's Notes, 830.

(ccc) Year's Allowance.

The allowance of support to a widow and children is made a debt of the estate by G. C., § 10714, and land may therefore be sold to pay the same: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884.

The widow is not entitled to her year's support out the proceeds of lands sold to pay debts, as against judgment liens covering more than such proceeds: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

(ddd) Taxes.

Where there is not enough personal property to pay taxes levied on property of decedent prior to his demise, his personal representative may apply for and obtain an order to sell lands for that purpose: *Welsh v. Perkins*, 8 O. 52, I Longsdorf's Notes, 413.

Taxes and assessments and the liens for them are preferred over the liens securing the claims of general creditors: *Trust Co. v. Stich*, 71 O. S. 459, IV Longsdorf's Notes, 985; *Building Association v. Hanson*, 5 O. N. P. 162, 7 O. D. (N.P.) 179.

The county auditor's certificate of a sale of land for taxes, upon the death of the holder, passes to the heir at law: *Rice v. White*, 8 O. 216, I Longsdorf's Notes, 426.

(eee) Legacies.

When the will does not provide for payment of money legacies out of real estate, but the executors are given general power to sell the real estate as they think best, and also to pay the legacies out of the estate, it will be presumed that the testator expected that the money arising from the sale of his real estate should be used to pay off the money legacies as freely as that arising from his personal property, and both classes of property are chargeable therewith: *Hunt v. Hayes*, 19 O. C. C. 151, 10 O. C. D. 388.

The right of an executor to bring an action under G. C., § 10817, to sell real estate to pay legacies is barred if not brought within six years after the executor learns that the personality is insufficient to pay such legacies: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 405, 18 O. D. (N.P.) 484.

Where the devisee of land, charged by the testator with the payment of legacies and the costs of administration, paid the legacies and tendered to the executors the amount of costs of administration, the executors were not entitled to an order for the sale of the land to pay a per cent. on the legacies. In such case, the executors are not entitled to a per cent. on the legacies: *Williams v. Williams*, 8 O. S. 300, II Longsdorf's Notes, 343.

(fff) Costs of Administration.

Lands of intestate descend to heirs, subject to payment of debts, the year's allowance to the widow and minor children, and charges of administration incident to a sale of the land. They can not be sold to pay the costs of administration alone: *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888.

Neither the fees of an attorney of an administrator in an action brought by him to sell real estate to pay debts, nor the general

costs of administration, nor premiums due a surety company upon administrator's bond are included in the costs and expenses "of the sale" under G. C., § 10809, and can not, therefore, in the order of distribution of the fund realized from the sale be allowed prior to the claim of the first mortgagee; nor can it be allowed as extraordinary expenses under G. C., § 10838: *Sherman v. Mil-lard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

(gg) Bond to Prevent Sale.

The heirs at law can prevent a sale of real estate to pay debts and have partition of the lands only by giving bond for the payment of debts, etc., as provided by G. C., § 10785: *Stout v. Stout*, 82 O. S. 358.

If the heirs furnish the administrator with money sufficient to pay debts of deceased, in order to save the real estate from being sold, he must account for such money as assets: *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

The widow entitled to dower is a person interested under G. C., § 10785, who may give bond to prevent a sale of the land to pay debts, and having given bond and paid to the administrator the amount of the debts and charges of administration, is in a partition case by the heirs entitled to be subrogated to the administrator's right, if he does not claim under G. C., § 10818, for a share to repay her, and may be reimbursed out of the proceeds: *Corey v. Hayes*, 13 O. C. C. 185, 7 O. C. D. 272.

A bond by heirs to pay debts in order to prevent sale, given after an order of sale, though the statute (G. C., § 10785) provided it could be given before order of sale, is, nevertheless, binding and enforceable by the executor: *Davison v. Burgess*, 31 O. S. 78, III Longsdorf's Notes, 562.

Partition of a deceased's real estate can not be had within one year after his death unless it is averred and proved (1) that there is sufficient to pay deceased's debts, (2) that the debts are paid, or (3) that the debts are secured as provided in G. C., § 10785: *Smith v. Montag*, 1 O. D. (N.P.) 224, 32 Bull. 153; *Suihart v. Suihart*, 7 O. C. C. 338, 4 O. C. D. 624.

The giving of bond by the executrix as residuary legatee is not a substitute for the presence of the legal representative to complete the settlement of the estate, and affords no ground for refusing to appoint an administrator *de bonis non*, nor for removal after such appointment: *Chamberlin v. Strecher*, 78 O. S. 271, IV Longsdorf's Notes, 1041.

The bond of a residuary legatee to pay the debts of the estate is a lien as against the legatee upon realty conveyed in trust for

protection of the surety on the bond: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

An action to sell the realty conveyed in trust for the protection of the surety on the bond of a residuary legatee given to pay the debts of the estate, has all the essentials of a civil action, and may be brought in either the court of common pleas or the probate court, and in either court in which the suit may be brought, or on appeal, the rights of the several parties in the subject-matter may be determined: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

(hh) What Interest May Be Sold.

(aaa) Equitable Interest.

An equitable interest of a decedent in land, as where he had conveyed it by a trust deed to pay debts with a right to redeem, is real estate subject to sale to pay debts: *Biggs v. Bickel*, 12 O. S. 49, II Longsdorf's Notes, 547.

A perfect equity in lands held by an intestate passes to the heirs and may be sold by the personal representative for the payment of the debts of the estate: *Avery v. Dufrees*, 9 O. 145, I Longsdorf's Notes, 471.

As a general rule, the personal representative of the estate may, in his own discretion, perform or rescind any personal contract of his intestate imposing an obligation on him, as may be for the best interests of the estate, but subject to the approval of the court: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 358.

An administrator may sell and convey such title as his testator possessed, whether legal or equitable: *Ewing v. Higbee*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

When an administrator makes a beneficial arrangement to rescind an unexecuted contract of the intestate for the purchase of land a court of equity will not interfere to aid the heirs to revive and enforce the rescinded contract: *Howard v. Babcock*, 7 O. (pt. 2) 73, I Longsdorf's Notes, 387.

(bbb) Property Conveyed in Fraud of Creditors.

An order made by the probate court for the sale of lands conveyed in fraud of creditors, upon a judgment of its own, setting aside the conveyance as null and void, is of no validity whatever, and may be impeached in a collateral proceeding to recover the land: *Spoors v. Coen*, 44 O. S. 497, IV Longsdorf's Notes, 226.

A creditor can not join with the administrator as coplaintiff in a petition to sell lands fraudulently conveyed: *Webster v. Ballard*, 4 Dec. Rep. 419, 2 Clev. L. Rep. 137.

(ccc) Property Incumbered by Liens.

A sale of real estate to pay debts is not authorized to be ordered by the probate court, subject to a mortgage or other liens. The court is to settle priorities and order sale free of liens: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

If a grantee of realty has given a purchase money mortgage for the unpaid part of the purchase price before his marriage, and after his death the realty is sold by the executors to pay the mortgage debt, his widow is not to be endowed of the entire proceeds, but only of the surplus which remains after satisfying the mortgage: *Nichols v. French*, 83 O. S. 162 [approving and following *Culver v. Harper*, 27 O. S. 464, III Longsdorf's Notes, 368, and distinguishing, *Kling v. Balleintine*, 40 O. S. 391, IV Longsdorf's Notes, 33 and *Mandel v. McClave*, 46 O. S. 407, IV Longsdorf's Notes, 334].

Where the mortgagor dies in possession of the goods and chattels covered by the mortgage, even after condition broken, and his administrator has taken possession of said goods and chattels in his trust capacity, the mortgagee can not maintain replevin against such administrator for their possession. In such case, if the mortgage is valid, the interest of the mortgagee in the property under mortgage is transferred to the fund arising from the sale by the administrator: *Lingler v. Wesco*, 79 O. S. 225, IV Longsdorf's Notes, 1045 [for opinion below, see *Lingler v. Kraft*, 3 O. N. P. (N.S.) 653, 16 O. D. (N. P.) 474].

(ddd) Dower and Homestead Rights.

Where the dower interest of a widow, in property sought to be converted into assets, is manifest, it will be protected, although she may not have filed an answer: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

A homestead having been assigned by metes and bounds to the widow and minor children in a proceeding to sell to pay debts, an order to sell to pay debts subject to the homestead, and while occupied as such, is not voidable, but void, for want of jurisdiction: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036.

Where a wife joins her husband in a mortgage containing a renunciation of dower, a sale of the land by the administrator of the husband for the payment of his debts extinguishes the right of dower, and transfers an unincumbered title to the purchaser: *St. Clair v. Morris*, 9 O. 15, I Longsdorf's Notes, 457. *Contra*, *Kling v. Ballentine*, 40 O. S. 391, IV Longsdorf's Notes, 33.

Dower interest where there are purchase money mortgage incumbrances and the pro-

ceeds of the sale exceed the mortgages is computed on the entire proceeds and payable out of the residue after satisfying the mortgages: *Hickey v. Conine*, 3 O. N. P. (N.S.) 209, 15 O. D. (N.P.) 709, 6 O. C. C. (N.S.) 321, 17 O. C. D. 369 [affirmed, without opinion, *Hickey v. Conine*, 71 O. S. 548, IV Longsdorf's Notes, 986].

A former wife of decedent, divorced because of his aggressions, is dowerable of his lands: *Arnold v. Donaldson*, 46 O. S. 73, IV Longsdorf's Notes, 313.

On petition of an administrator to sell to pay debts, it is not error in the probate court to decree exemption in lieu of homestead to the family out of the proceeds, though not demanded under G. C., § 11733, until distribution: *Evans v. Staggaman*, 8 Dec. Rep. 244, 6 Bull. 636. See also EXECUTION, WRIT OF.

In allowing homestead to the widow under G. C., § 10795, on executor's proceeding to sell to pay debts, the dower interest need not cover the same part of the ground as the homestead so assigned: *Anonymous*, 11 Dec. Rep. 159, 25 Bull. 102.

The right of a widow to have a homestead set off to her under G. C., § 11732, on an executor's proceeding to sell to pay debts, gives her no right to ask sale and allowance of \$500 in lieu of homestead out of the proceeds, nor to have other property set off in lieu of homestead. G. C., §§ 11737 and 11738, do not apply: *Bliss v. Fuhrman*, 6 O. C. C. 203, 3 O. C. D. 416.

If an executor is about to sell land to pay debts under a power in the will, the widow with a minor child is entitled to homestead in addition to dower: *Wanzer v. Smith*, 2 Dec. Rep. 323, 2 W. L. M. 426.

On administrator's sale of real estate to pay debts of one who left no homestead, the widow is not entitled to the allowance in lieu of homestead: *Wolverton v. Paddock*, 3 O. C. C. 488, 2 O. C. D. 279.

The only right of a widow to a homestead in her deceased husband's land was under G. C., § 11732, which expires when the unmarried children arrive at age. She had no such right under G. C., § 11730: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

On administrator's petition to sell lands, making the widow, heirs, and mortgagee of part parties, dower for the whole was assigned in the mortgaged part, and on sale subject to dower the proceeds were paid to the mortgagee and the rest sold free of dower. On A's subsequent suit to foreclose it was held that he was concluded as to the dower. The court had jurisdiction to determine whether there was dower in the

mortgaged premises: *Affleck v. Snodgrass*, 8 O. S. 234, II Longsdorf's Notes, 337.

On executor's sale of realty to pay debts the probate court has jurisdiction to allow the surviving husband to be made party and to sell with his consent free of curtesy and award him curtesy out of the proceeds: *Clark v. Harlan*, 9 Dec. Rep. 830, 17 Bull. 320, Goebel 106.

(eee) Estates in Common.

An order to sell a tract of land, one undivided fourth of which belonged to some one else than the heirs, means to sell what belonged to the decedent, that alone having been appraised, excluding the outstanding fourth: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

(ii) What Property May Be Sold.

It will not affect the title of the purchaser if the whole tract was ordered sold and sale made of only a part: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

An executor or administrator may, at his discretion, sell in parcels a tract that is ordered sold entire, but he is responsible for the exercise of this discretion: *Stall v. Macalester*, 9 O. 19, I Longsdorf's Notes, 458.

A monument purchased by deceased during his life time, but never fully paid for, may be sold to pay the debt: *In re Willard*, 9 O. D. (N.P.) 824, 41 Bull. 71.

(jj) Parties.

(aaa) Plaintiff.

A creditor can not join with the administrator as coplaintiff in a petition to sell lands fraudulently conveyed: *Webster v. Ballard*, 4 Dec. Rep. 419, 2 Clev. L. Rep. 137.

Consent of a guardian, if authorized by a statute, is probably not warranted in a proceeding commenced by himself and in his own interest, and where his position is adverse to his ward: *Ream v. Wolls*, 61 O. S. 131, IV Longsdorf's Notes, 803.

Where a debtor conveys land to his creditor in trust to sell and from the proceeds to satisfy the debt and pay the balance to the debtor; and the debtor dies without having paid the debt, and without having elected to take the land instead of its proceeds, his personal representative is the proper party to compel the execution of the trust by a sale of the lands: *Craig v. Jennings*, 31 O. S. 84, III Longsdorf's Notes, 563.

(bbb) Defendant.

A petition to sell land to pay debts, whether in the probate court or common

pleas, is a civil action, and every person claiming an interest may and ought to be made a party. The parties are not merely those mentioned in G. C., § 10780. Accordingly, claimants of an adverse title are proper and necessary defendants: *Doan v. Biteley*, 49 O. S. 588, IV Longsdorf's Notes, 472.

A judgment creditor of an heir or devisee is not a necessary party to a suit to pay the debts of the deceased ancestor or deviser. Protection to his rights is found in G. C., § 10816: *Kummer v. Lake*, 1 O. N. P. (N.S.) 209, 13 O. D. (N.P.) 491.

In a proceeding to sell to pay debts judgment creditors of one of the heirs are not necessary parties, and their cross petitions will be stricken from the files on motion: *Anonymous*, 11 Dec. Rep. 159, 25 Bull. 102 editorial.

A mortgagor who has parted with his title to the land mortgaged and is not in possession thereof, is not a necessary party to a proceeding brought by the executor of the purchaser to obtain an order to sell the land for the payment of debts: *Dennison University v. Manning*, 65 O. S. 138, IV Longsdorf's Notes, 883.

Where claimants of the title on the land are made defendants with the widow and heirs, and relief is asked against them, a dismissal of the petition will not bar an action by the widow and heirs to recover the land: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

Where the purchaser has been in possession, but not having paid in full no deed was ever made, and the administrator did not rescind, but got a decree in equity to sell to pay the vendor's lien and the sale was made and a deed ordered. It was held that the heirs are not necessary parties to the latter suit. The buyer took all the equities of the parties, and hence, had the right to require a deed from the administrator of all the title of the heirs: *Cozzens v. Farnan*, 30 O. S. 491, III Longsdorf's Notes, 541.

Prior to 1858 a mortgagee was not a necessary party to the action: *Defrees v. Greenham*, 11 O. S. 486, II Longsdorf's Notes, 522.

A party loaning money to an executor and taking the executor's note as evidence of such loan, is not a necessary or even proper party: *Smith v. Hayward*, 5 O. N. P. 501, 5 O. D. (N.P.) 462 [affirmed, 25 Bull. 102].

For the general discussion of the subject of parties, see PARTIES.

(ccc) Appearance by Guardian.

In an action by an administrator to sell real estate to pay debts, heirs who are idiots become parties to the record by the filing

of an answer and cross petition by their guardian, wherein the allegations of the petition are admitted, service of summons waived, and the court is asked to grant the prayer of the petition and are bound by the sale: *Segal v. Building Co.*, 11 O. C. C. (N.S.) 481, 21 O. C. D. 519.

If minor heirs were not named as defendants, but their appearance was entered by their guardian, they were, under the act of 1824, allowing process to be served on the guardian, bound by the sale, and the purchaser's title was not affected: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370; *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

In proceedings under G. C., § 10604 and the following sections on executors and administrators, infant heirs may appear by their general guardian: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370; *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

Persons who enter an appearance in the case are parties on the record, though not named in the petition, and though the statute literally requires them to be named therein, and being parties, can maintain error proceedings: *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

A proceeding to sell land to pay debts under the act of 1831, like the act of 1824, was *in rem*, and pursuant to repeated decisions of this court must be followed as a rule of property, that the want of personal service on infant heirs required by the statute does not affect the jurisdiction or render the sale void, and service on the guardian *ad litem* is sufficient: *Benson v. Cilley*, 8 O. S. 604, II Longsdorf's Notes, 370.

The law of 1824 did not prescribe the mode of making the heirs defendants, and such proceedings having, before the statute, been *ex parte*, the court might direct the mode, and an appearance and answer made by their guardian *ad litem*, appointed by the court in the case, was a reasonable and proper mode under that statute: *Biggs v. Bickel*, 12 O. S. 49, II Longsdorf's Notes, 547.

An administrator's petition to sell land to pay debts was filed against the infant heirs—in the body of the petition three were named, but the fourth was not, nor anywhere in the record—a guardian *ad litem* was "appointed to the minor heirs" and acknowledged an appearance as such. The fourth child afterwards brought ejectment against the purchaser of the lands under the decree. It was held that the title obtained by the sale is valid against collateral attack. The appointment of the guardian is broad enough to include all the minors, and will be so presumed to sustain the jurisdic-

tion. The guardian's not answering is nothing; it is the appearance that gives the jurisdiction: *Snevely v. Lowe*, 18 O. 368, I Longsdorf's Notes, 851.

The proceeding is *in rem*. Minor defendants not served with process, but for whom a guardian *ad litem* was appointed and answered, are bound by the decree as against collateral attack as by ejectment. The statute required them to be made parties, but did not prescribe what notice: *Robb v. Irwin*, 15 O. 689, I Longsdorf's Notes, 739; *Lewis v. Lewis*, 15 O. 715, I Longsdorf's Notes, 740; *Sheldon v. Newton*, 3 O. S. 494, II Longsdorf's Notes, 57.

(ddd) Effect of not Being Made a Party.

Under the amendment of 1858, the lien of a mortgagee who is not made a party thereto remains unaffected by the order of sale and the proceedings thereunder: *Holloway v. Stuart*, 19 O. S. 472, II Longsdorf's Notes, 960.

This was not true before the amendment of 1858: *Defrees v. Greenham*, 11 O. S. 486, II Longsdorf's Notes, 522.

An administrator's sale under order of court, since 1824, without showing that the heirs were parties to the proceeding, is void: *Adams v. Jeffries*, 12 O. 253, I Longsdorf's Notes, 606.

To render the sale of lands by an administrator good, the heirs must have been made defendants: *Sprague v. Litherberry*, 4 McLean, 442, Fed. Cases No. 13251, 2 O. F. D. 574.

Where the sale is without making a divorced wife entitled to dower a party, and the buyer, being advised by counsel that the wife had no dower, buys at full value and pays the executor, and dower is afterwards assigned. It was held that *caveat emptor* applies, and the buyer can not recover back compensation: *Arnold v. Donaldson*, 46 O. S. 73, IV Longsdorf's Notes, 313.

(kk) Pleading.

In a suit by an administrator to sell real estate to pay debts, an averment that there is no personal property sufficient to pay said debts is imperative under G. C., §§ 10774-10779, and this requirement is not dispensed with by an allegation that the land in question had been fraudulently conveyed by the decedent: *Baen v. Weller*, 12 O. D. (N.P.) 128.

The order for sale can not be made on the joint petition of the executor and guardian to maintain the children and improve the property: *Newcomb v. Smith*, 5 O. 447, I Longsdorf's Notes, 299.

The administrator may obtain an order to sell realty to pay debts by a cross petition in a suit for partition. It is not necessary to wait for the expiration of one year from the ancestor's death: *Myers v. Myers*, 9 O. C. C. (N.S.) 449, 19 O. C. D. 396.

In an action for specific performance of a contract brought by a creditor of the decedent, a sale shall not be granted on the answer and cross petition of the defendant: *Pollock v. Pine*, 2 O. C. C. 359, 1 O. C. D. 529.

The answer of a guardian *ad litem* alleging his ignorance of the matters contained in the petition, and praying that the rights of his wards may be protected, has the effect of a general denial: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

In a proceeding by an administrator to sell land to pay judgments the heir may by cross petition attack the judgments for fraud and it is error to hold them conclusive of the fact and amount of the indebtedness, thus precluding inquiry into the alleged fraud and collusion: *Conway v. Duncan*, 28 O. S. 102, III Longsdorf's Notes, 392; *Jones v. Shields*, 14 O. 359, I Longsdorf's Notes, 615.

On petition to sell land to pay judgment creditors, an heir who has an interest may by cross petition attack the judgments for fraud. An heir who had sold the land on warranty still has such interest: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

For the general discussion of the subject of pleading, see PLEADINGS.

(ll) Process.

Before a valid decree can be made, it must affirmatively appear that the minor defendants have been served: *Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987.

Under the act of 1824 the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance without process, by either: *Sheldon v. Newton*, 3 O. S. 496.

A guardian can not enter appearance for his ward unless authorized by statute. Summons on the ward can not be waived by the guardian. The minor, on attaining majority, may prosecute error to the judgment for such defects: *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802.

Where the record of the probate court discloses that, in a proceeding brought by an administrator to sell property to pay debts, the court found that "the other defendants," which included certain minors "have been legally served with summons," said minors will not be permitted in a subsequent action

in foreclosure, brought against the purchaser at the administrator's sale to deny that the probate court obtained jurisdiction over them or to assert rights as tenants in common in the premises: *Loan Co. v. Whitehead*, 9 O. N. P. (N.S.) 501.

Where the order of sale shows due notice to have been given to interested parties, it is to be presumed that infant heirs received proper notice and the court had jurisdiction: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130.

The setting up of the lien of a magistrate's judgment against an heir in a proceeding to sell property of decedent to pay debts is not one requiring the issuance of summons for the party against whom the lien was obtained, and an order directing the administrator to pay the claim can not be collaterally attacked: *In re Seitz*, 11 O. C. C. (N.S.) 204, 21 O. C. D. 32.

(mm) Decree.

(aaa) Necessity.

An administrator can sell real estate only upon order of the court, after it has ascertained the necessity of such sale: *Avery v. Pugh*, 9 O. 67, I Longsdorf's Notes, 462.

Before 1891, the executor or administrator could sell notes and mortgages, as at common law, without an order of the court, and an innocent purchaser was not responsible if the executor or administrator converted the money so paid to his own use: *Jelke v. Goldsmith*, 52 O. S. 499, IV Longsdorf's Notes, 581.

A party is not prejudiced by two decrees to sell, one ordering an appraisal and the other an upset price, especially if the sale realizes more than two-thirds of the appraisal and more than the upset price fixed by the court: *In re Ferguson*, 3 O. N. P. (N.S.) 549, 16 O. D. (N.P.) 486.

A sale of land can not be helped by an order to sell other land—power to sell the one does not conduce to prove power to sell another. So of a sale of land excepted from the order of sale: *Ludlow v. Park*, 4 O. 5, I Longsdorf's Notes, 201.

(bbb) Effect.

Conveyance made by executors under a defective order of the court can not be aided in equity: *Tiernan v. Beam*, 2 O. 383, I Longsdorf's Notes, 135.

A purchaser's title is not divested by a subsequent reversal of the order of sale; even though he had notice, at the time of the sale, that an effort would be made to revise it: *Irwin v. Jeffers*, 3 O. S. 389, II Longsdorf's Notes, 40.

(ccc) Record.

An order of court to sell must appear of record, else the sale is void: *Goforth v. Longworth*, 4 O. 129, I Longsdorf's Notes, 210; *Exporting Co. v. Halley*, 7 O. (pt. 1) 11, I Longsdorf's Notes, 359.

If the order for the sale of decedent's real estate be not entered on the minute book of the court, it can not be valid. Parol proof or other memorandum can not be received: *Newcomb v. Smith*, 5 O. 447, I Longsdorf's Notes, 299.

The order of court, authorizing the administrator to sell intestate's lands, made subsequent to the sale, can not be given in evidence to sustain such sale: *Lieby v. Ludlow*, 4 O. 469, I Longsdorf's Notes, 236.

The word "allowed," written by the judge on the back of the petition for a sale is not sufficient to show an act of the court, which is only evidenced by its minutes and records. The court can not presume that a record was made and lost: *Newcomb v. Smith*, W. 208, I Longsdorf's Notes, 18, 5 O. 447, I Longsdorf's Notes, 299.

(ddd) Decree of Foreign Court.

A sale under order of a foreign court is void: *Nowler v. Coit*, 1 O. 519, I Longsdorf's Notes, 99.

Although a sale under order of a foreign court is void, it may be made valid by the assent of the parties in interest: *Beall v. Price*, 13 O. 368, I Longsdorf's Notes, 643.

The decree of a Virginia court, for the sale of lands lying in Ohio, is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable: *Price v. Johnson*, 1 O. S. 390, I Longsdorf's Notes, 991.

(nn) Determination of Equities and Priorities.

In proceedings for the sale of real estate, the court is to determine equities and fix the validity and priority of liens: *Brown v. Trottnor*, 11 O. C. C. 498, 5 O. C. D. 222.

Where the real estate is encumbered by mortgages and other liens, the court is to settle the priorities among lien holders, and order a sale free from such liens. It can not sell the same, subject to the mortgage or other liens: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

Where a mortgagee is made a party, and the widow asks for assignment of dower in the premises petitioned to be sold, and the mortgagee stands by and permits dower to be assigned to the widow, without resisting her claim, he is estopped from afterwards bringing an action to foreclose his mortgage upon the part of the premises in which

the widow's dower was assigned: *Affleck v. Snodgrass*, 8 O. S. 234, II Longsdorf's Notes, 337.

A creditor having a lien on one fund only may call upon a creditor having a prior lien on the same fund and also upon another, to exhaust that other first: *Bank v. Carpenter*, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

The proceeds of the sale of the lands are subject to all mortgage, judgment and other liens in the priority in which they attached to the land: *Bank v. Carpenter*, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

An administrator in an action to sell real estate which is incumbered by mortgage to pay debts, assumes the risk of the fund realized therefrom being insufficient to pay his own fees and those of his attorney and the court costs incident to the general administration; such fees and costs can not be paid from the fund to the prejudice of the mortgagee: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

Where the lien of a first mortgage is set up in the action commenced by the administrator to pay debts, it must be preserved in the fund realized from the sale of the mortgaged property; but should the mortgagee fail to set up his claim his lien is thereby cut off, and he becomes a general creditor, and the administrator owes him no duty beyond that of a general creditor: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

Where the widow as executrix brings the action to sell lands, and the court placed her dower and allowance for a year's support after the payment of certain liens, and decreed a sale, such order is final, and can not be set aside and a different distribution ordered at a subsequent term except by proceedings under G. C., §§ 11631 and 11643. The coming in of a new party after final order will not authorize vacation of the order on the motion of one of the original parties with whose consent such final order was entered: *Potter v. Jennman*, 4 O. N. P. 78, 5 O. D. (N.P.) 444.

A mortgagee may institute foreclosure against a deceased mortgagor in the court of common pleas, making all interested persons parties, and is not obliged to work out his rights in the probate court through the administrator or executor: *Bank v. Ide*, 20 O. C. C. 665, 10 O. C. D. 800.

The probate court has power to decide all questions among lien holders and to decide whether the land belongs to the decedent: *Doan v. Bitely*, 49 O. S. 588, IV Longsdorf's Notes, 472.

In either court in which the suit may be brought, or on appeal, the rights of the

several parties in the subject matter may be determined: *Tidd v. Block*, 4 O. C. C. (N. S.) 216, 16 O. C. D. 113.

The probate court has chancery powers to determine controversies between parties to a sale of a decedent's property to pay debts: *Borntraeger v. Borntraeger*, 7 Dec. Rep. 551, 3 Bull. 891.

Probate courts have jurisdiction to ascertain and adjust the liens on real estate to be sold for payment of debts of deceased, to settle priorities among lienholders and to apply the proceeds of sale in satisfaction thereof, in the same manner and to the same extent as a court of equity: *Bank v. Green*, 4 Fed. Rep. 609, 4 O. F. D. 674.

G. C., § 10809, makes express provision in regard to costs. It is an imperative rule that they be paid first: *Building & Loan Co. v. Gashe*, 18 O. C. C. 681, 6 O. C. D. 790.

Costs and commissions of the administrator shall be paid first, and then the liens in the order of their priority: *Alms v. Fitton*, 9 O. C. C. 255, 6 O. C. D. 415.

"The costs and expenses of the sale" do not include fees of the administrator's attorney, nor the general costs of administration, nor premiums due the surety company upon the administrator's bond, and these claims are therefore subsequent to the claim of a first mortgagee: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

In a proceeding to sell property of a decedent to pay debts, the lien of a magistrate's judgment obtained against a party having an interest in the property as heir may be set up. Such proceeding is not one requiring the issuance of summons for the party against whom the lien was obtained, and an order claim can not be collaterally attacked: *In re Seitz*, 11 O. C. C. (N.S.) 204, 21 O. C. D. 32.

Where there is a judgment lien on real estate, but subsequently the owner asserts a homestead claim on this property and occupies the same as a homestead until his death, during such occupancy giving a mortgage thereon, then in case of suit brought by the administrator to sell the land, the judgment lien has priority over the mortgage lien: *Smith v. Phillips*, 5 O. N. P. (N. S.) 502, 18 O. D. (N.P.) 429.

If there is no one to be paid except judgment creditors, equity in setting aside a deed may decree a sale and distribution to save the expense of administration: *Fleming v. McGuffey*, 12 O. N. P. (N.S.) 19, 21 O. D. (N.P.) 387.

Where a judgment is a lien on the debtor's lands at the time of his death, its payment is provided for in G. C., § 10809. But where it is no such lien, plaintiff's only method of obtaining satisfaction of his judgment is through the administrator in the regular

course of administration: *Miller v. Taylor*, 29 O. S. 257, III Longsdorf's Notes, 464.

In case of a judgment lien on a debtor's land at his death, it is not necessary thereafter to issue execution thereon in order to preserve the lien. It is entitled to share in the proceeds of land sold by the personal representative although more than five years have elapsed since its rendition or since the last execution: *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

Heirs giving new mortgages in substitution of the ancestor's mortgages, in order to prolong the time of payment, may be subrogated to the priority of the original mortgages: *Jacobs v. Jacobs*, 7 O. D. (N.P.) 486.

Liens on the land are transferred to the proceeds arising from the sale thereof only when the sale is regular, and when the lien holders have been made parties to the action: *Holloway v. Stuart*, 19 O. S. 472, II Longsdorf's Notes, 960.

A mortgage defectively executed is not entitled to priority over the lien of general creditors: *Straman v. Rechtime*, 58 O. S. 443, IV Longsdorf's Notes, 744.

After satisfying a purchase money mortgage the widow is entitled to dower computed on the full value of property: *Hickey v. Conine*, 6 O. C. C. (N.S.) 321, 17 O. C. D. 369.

Judgment lien precludes allowance in lieu of a homestead, when a homestead could have been set off: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

The year's allowance to the widow being a debt, must under G. C., § 10809, be postponed to judgment liens, although in all other cases it is a preferred debt: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

Where a creditor of an insolvent decedent's estate holding life insurance as collateral, delivered the policies to the administrator to collect, and got judgment on his claim which the administrator had rejected and the probate court awarded him a preference over other creditors as far as the insurance fund was concerned, it was held that the probate court has jurisdiction to determine whether part of a fund shall go to pay a particular debt: *Brown v. Trottnier*, 11 O. C. C. 498, 5 O. C. D. 222. See also COURTS.

On petition to sell lands of a decedent to pay debts, a probate court and common pleas court had no jurisdiction to adjust and cancel liens as mortgages, and so much of the decree is void: *Gilliland v. Sellers*, 2 O. S. 223, I Longsdorf's Notes, 1043.

The lien of a general creditor on a decedent's estate is superior to a mortgage defective in its certificate of acknowledgment:

Straman v. Rechtime, 58 O. S. 443, IV Longsdorf's Notes, 744. See also MORTGAGES.

The devisee of land incumbered by a mortgage is not entitled to have the debt paid out of personalty or realty specifically devised to others, but takes *cum onere* unless there is personalty or realty not specifically devised from which to pay the debt: *Tucker v. Lungren*, 12 O. C. C. 622, 5 O. C. D. 577. See also WILLS, LEGACIES AND DEVISES.

(oo) Appraisement.

No sale can be ordered by the court until after the appraisement has been returned: *Newcomb v. Smith*, 5 O. 447, I Longsdorf's Notes, 299.

The appraisement must be made upon actual view: *In re Slane*, 9 O. D. (N.P.) 830, 42 Bull. 89; *Mills v. Life Association*, 6 Dec. Rep. 827, 8 Am. L. Rec. 358, 4 Bull. 935, 7 Dec. Rep. 677.

The widow's right to take personalty at the appraisement need not be exercised at once, but at any time before it is put up for sale, and is not affected by its having nearly doubled in market value in the meantime: *Overturf v. Wear*, 26 O. S. 538, III Longsdorf's Notes, 327.

The executor should have notice of proceedings by the widow to have new appraisers appointed to make her year's allowance, the first appraisers having omitted to do so. The correction should be made by the original appraisers, and not by appointing new ones, but the irregularity should be corrected in the probate court, and its refusal to do so will not be reversed unless the record shows that injustice was done: *Heck v. Heck*, 34 O. S. 369, III Longsdorf's Notes, 722 [affirming *Heck v. Heck*, 7 Am. L. Rec. 13, 3 Bull. 363].

(pp) Notice of Sale.

Before a valid decree can be made, it must affirmatively appear that the minor defendants have been served: *Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987.

The title of a purchaser at an administrator's sale will be sustained, although the legal notice may not have been given, and the same protection must be given to those who have purchased at a guardian's sale: *Stall v. Macalester*, 9 O. 19, I Longsdorf's Notes, 458.

Four full weeks must elapse from the time of the first insertion until the day of sale. If made in a daily paper it should be once a week on the same day of the week: *Lemert v. Clarke*, 1 O. C. C. 569, 1 O. C. D. 318.

If the court is satisfied that the notice was published in a paper not of general circulation in the county, it may refuse to con-

firm the sale: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

Where the record recites that it was "shown to the court that due notice had been given defendants," it was held that this amounted to a finding by the court that the notice which the law required under the circumstances had been regularly given, and that evidence would not be received to contradict this finding of the court: *Richards v. Skiff*, 8 O. S. 586, II Longsdorf's Notes, 368.

(qq) Place of Sale.

The provision of G. C., § 10803, relating to sales by executors and administrators, that "the sale be made at public vendue, at the door of the court house in the county in which the order of sale shall have been made, or at such other place as the court may direct," is directory only, and not mandatory, and where the order of sale is silent as to the place where the sale shall be made, and the executor sells the property at auction on the premises, the purchaser takes a good title: *Smiley v. Cook*, 8 O. N. P. (N.S.) 191, 4 O. L. R. 737, 52 Bull. 156 [affirmed, without opinion, *sub nomine*, *Caito v. Smiley*, 79 O. S. 452].

It is not within the discretion of the court to set aside an executor's or administrator's sale on the ground that it was made upon the premises without any order of court so directing, where it appears that the property was properly advertised, and there was competitive bidding which resulted in a sale for considerably more than the appraised value, and the parties who are interested in the proceeds are satisfied with the sale: *Smiley v. Cook*, 8 O. N. P. (N.S.) 191, 4 O. L. R. 737, 52 Bull. 156 [affirmed, *sub nomine*, *Caito v. Smiley*, 79 O. S. 452].

(rr) Purchaser.

(aaa) Who May Be.

(aaaa) Administrator or Executor.

Purchase by an administrator or executor at his own sale may be set aside whether the property is held by him or any purchaser from him with notice: *Sheldon v. Newton*, 3 O. S. 494, II Longsdorf's Notes, 57.

If an administrator, trustee, or officer have a personal interest in a purchase at his own sale, the sale will be set aside: *Welsh v. Perkins*, 8 O. 52, I Longsdorf's Notes, 413.

If at an administrator's sale of land a purchase is made for the benefit of the administrator himself, it will be held to be in trust for the heirs, and if the conveyance to them can not be decreed because *bona fide* third persons have acquired the title, the ad-

ministrator must account for the difference between what he paid for the land and its then real value, which may be held to be its appraised value: *Glass v. Greathouse*, 20 O. 503, I Longsdorf's Notes, 922.

Where an administrator, having duly sold real estate on proceedings therefor, fails for six months to collect the purchase-money, and then assumes the buyer's bid and takes the property, the heirs can have the transaction set aside for violation of trust: *Barrington v. Alexander*, 6 O. S. 189, II Longsdorf's Notes, 229.

If an administrator acquires title under his own sale the heirs can insist on a resale without showing any fraud or unfairness. The fiduciary relation does not cease until a third person buys and fully pays. The administrator must account for rents and profits: *Barrington v. Alexander*, 6 O. S. 189, II Longsdorf's Notes, 229.

If an administrator procures a party to buy at his sale, and such party buys at two-thirds the appraisement, and at once conveys to a trustee for the administrator's wife and children, the transaction is fraudulent and void in the absence of clear explanation, of which the court is to decide: *Riddle v. Roll*, 24 O. S. 572, III Longsdorf's Notes, 192 [affirming *Roll v. Riddle*, 5 Dec. Rep. 232, 3 Am. L. Rec. 645].

An administrator can not be even indirectly interested as the agent of others in purchasing at his own sale with a view to profit, as where he advances the purchase-money to be reimbursed on a resale, even though the profits are to go to the person in whose name the purchase is made: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

A trustee can not so manage as to make a profit for himself, either directly or through an attorney, or alone or jointly with others: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

If an administrator procures the settlement of claims at less than their face, he can not credit himself with more than he paid. And so, though the attorney or agent effecting the settlement is acting for others, as well as the administrator, with a view to joint profit: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

If an administrator, c. t. a., procures an order of sale in carrying out the will, and sells, and the sale is confirmed, and procures a deed to himself from the purchaser on assuming his obligation to pay, the transaction is void, and the lands are still unadministered and subject to the trust, whether he acted in good faith or profited by the transaction or not: *Caldwell v. Cald-*

well, 45 O. S. 512, IV Longsdorf's Notes, 294.

After setting aside a sale by an administrator, because the buyer had conveyed to the administrator, the latter must account for all rents and profits obtained by him, deducting improvements made before action begun, but not those afterwards: *Caldwell v. Caldwell*, 45 O. S. 512, IV Longsdorf's Notes, 294.

If the trustee buys at partition sale he does not defeat the *cestui's* estate, and limitations can no more run in his favor after than before: *Williams v. Van Tuyl*, 2 O. S. 336, I Longsdorf's Notes, 1057.

A *bona fide* buyer from such trustee will only have to account to the *cestui* for unpaid purchase money: *Williams v. Van Tuyl*, 2 O. S. 336, I Longsdorf's Notes, 1057.

A trustee's indirect purchase at his own sale, i. e., through another, is only voidable, and can not be set aside as against a subsequent *bona fide* buyer: *Harrison v. Heckler*, 6 O. C. C. 443, 3 O. C. D. 530.

The record of a sale by the trustee to the nominal buyer and his immediate reconveyance to the trustee, is not constructive notice to a subsequent buyer through intermediate buyers: *Harrison v. Heckler*, 6 O. C. C. 443, 3 O. C. D. 530.

An executor, after resignation, buying stock from his coexecutor, whose very confidential friend and adviser he was, and within a week thereof, the sale is nevertheless valid if for full value and without actual fraud, and no one else would give as much, and the sale was not of his seeking: *Hicks v. Stone*, 9 Dec. Rep. 132, 11 Bull. 67. See also FRAUD AND DECEIT.

Where an infant purchases land at an administrator's sale for the administrator and immediately conveys to the latter, he can not disaffirm such sale on coming of age, as though the land belonged to him: *Sheldon v. Newton*, 3 O. S. 494, II Longsdorf's Notes, 57.

Purchase-money paid by an administrator upon sale of intestate's land can not be recovered of the heirs where the sale is declared inoperative and the heirs recover the land: *Nowler v. Coit*, 1 O. S. 519, I Longsdorf's Notes, 99.

One executor can not purchase land of his coexecutors, but such a sale may be confirmed by the subsequent assent and ratification of the heirs: *Mitchell v. Dunlap*, 10 O. 117, I Longsdorf's Notes, 493.

Where an executor, after resignation, bought in the property at his own sale, such sale will not be set aside when it does not appear that he did anything to stifle competition, and where he paid a fair value for

the property: *Woodward v. Curtis*, 19 O. C. C. 15, 10 O. C. D. 400.

(bbbb) Appraiser.

Appraisers can not purchase at the administrator's sale: *Bohart v. Atkinson*, 14 O. 228, I Longsdorf's Notes, 664.

If an appraiser buys the land at the sale, such transaction is voidable only, not void: *Terrill v. Auchauer*, 14 O. S. 80, II Longsdorf's Notes, 637.

Every person to whose integrity and judgment is committed the execution of any step necessary in making the sale will be excluded from purchasing thereat. So, the purchase by an appraiser, though without fraud and at full price, will be set aside by the court after confirmation at the instance of the heirs: *Armstrong v. Huston*, 8 O. 552, I Longsdorf's Notes, 456.

Where appraiser of lands to be sold by an administrator becomes a purchaser, the sale may be set aside on application of the heir, as infected with fraud: *Armstrong v. Huston*, 8 O. 552, I Longsdorf's Notes, 456.

Where an estate was hopelessly insolvent and would have received no part of the proceeds had a sale to pay debts been conducted with the utmost regularity, no actual fraud was committed upon the heirs of the decedent by the purchase of such land by the son of an appraiser, amounting to a secret trust for his father, and the lapse of thirty years together with their knowledge of the facts, actual and constructive, renders utterly stale their equity in respect to such technical fraud: *Brickman v. Shale*, 11 O. C. C. (N.S.) 41, 20 O. C. D. 372 [affirmed, without opinion, *Brickman v. Shale*, 82 O. S. 425].

The purchase, by the son of an appraiser, of land ordered sold to pay decedent's debts, it appearing that the father withdrew sums equal to the cash payment and that the son thereafter disclaimed any interest in the property and conveyed it to his mother who had become guardian of the father, amounts to a secret trust for his father and was in fraud of the estate owning the land at the time the sale was ordered: *Brickman v. Shale*, 11 O. C. C. (N.S.) 41, 20 O. C. D. 372 [affirmed, without opinion, *Brickman v. Shale*, 82 O. S. 425].

(bbb) Interest Acquired.

The purchaser acquires the land free from liens: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90; *Bank v. Carpenter*, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

A sale under a decree for the sale of certain real estate to pay debts subject to the widow's dower which is subsequently set off

by metes and bounds, passes title to the whole of such real estate, subject to such dower right, notwithstanding the subsequent election of the widow to take under the will which gave her a life estate in one-third of testator's real estate: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130.

The purchaser at an administrator's sale need not look behind the order of sale. It is of equal validity with a judgment, as far as the purchaser is concerned, but no farther, for it settles nothing: *Ludlow v. Wade*, 5 O. 494, I Longsdorf's Notes, 307.

The purchaser of lands sold to pay debts is not bound to look to the application of the proceeds of the sale of the real estate by the executor: *Sater v. Kocher*, 8 O. C. C. 390, 6 O. C. D. 276, 2 O. D. (N.P.) 587 [affirmed, without opinion, *Sater v. Kocher*, 51 O. S. 622].

An administrator's sale by order of court to pay debts, discharges the land of the liens of judgments got against the decedent and they must be asserted against the purchase money. The buyer gets a title free of them though no deed has been made: *Exporting Co. v. Holly*, W. 226, I Longsdorf's Notes, 20.

The purchaser of lands of a decedent at a judicial sale holds it discharged of liens for debts. But heirs hold it subject to debts, and a purchaser from them takes the incumbency with the title: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

A purchaser of the legal title to lands, having notice that such legal title was a trust for a decedent, takes the land subject to the trust: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

(ss) Terms of Payment.

If the sale is on credit, the administrator can not arbitrarily reject notes on which are qualified sureties, although his decision as to qualification made in good faith and with due caution should stand. In replevin by the buyer it is error to refuse testimony showing that the sureties were qualified, as G. C., § 10219 prescribes. Whether the property was actually struck off to the plaintiff is a question for the jury: *Hamilton v. Bonham*, 20 O. C. C. 252, 10 O. C. D. 834.

An executor can not sell land, contracted for by the testator during his life time, and giving the executor power to execute deeds, for less than one-third of the purchase price previously agreed on by the testator: *Pollock v. Pine*, 2 O. C. C. 359, 1 O. C. D. 529.

(tt) Confirmation.

If the court is satisfied that the notice was published in a paper not of general cir-

ulation in the county, it may refuse to confirm the sale: *Craig v. Fox*, 16 O. 563, I Longsdorf's Notes, 784.

An affidavit filed by the widow of the testator to whom a life estate has been given with a contingent remainder over "to be distributed in accordance with the laws of the state" in lieu of a final account, and published as notice of a final account, was not notice to anybody of a proceeding for a construction of the will or determination of the rights of the devisee under the will; and the action of the court in confirming the account was not intended to and did not have the effect of determining who were the distributees under the will or under the law: *Carnes v. McAfee*, 11 O. N. P. (N.S.) 517.

A defective administrator's sale of land to pay debts is ratified if the heirs settle or accept money after coming of age: *Longworth v. Goforth*, W. 192, I Longsdorf's Notes, 17.

(uu) Deed.

(aaa) Contents and Construction.

If the deed conveys "the equitable interest" of the decedent and all his "right, title and interest," it is sufficient to carry the legal title if he had it: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

The deed may be made to the assignee of the purchaser: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

If the administrator insert in the deed trusts intended for the benefit of heirs and creditors, the conveyance is not void: *Piatt v. St. Clair*, 7 O. (pt. 2) 165, I Longsdorf's Notes, 398.

Though an administrator's deed contains no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree. And an administrator does not vitiate the conveyance by attaching trusts to it, fairly intended for the benefit of heirs and creditors: *Piatt v. St. Clair*, 7 O. (pt. 2) 165, I Longsdorf's Notes, 398.

Inclusion of the wrong lands in the deed and also in a return of the appraisement may be reformed by an independent suit: *Gill v. Pelkey*, 54 O. S. 348, IV Longsdorf's Notes, 639.

An executor's deed under a power of sale of lands subject to all sales for taxes or otherwise, the intention being to quit-claim the heirs' title does not purport to convey lands conveyed by the testator by an unrecorded deed for the heirs had no title, hence the grantee could not claim for improvements: *Robinson v. Ward*, 1 Dec. Rep. 252, 5 W. L. J. 465.

(bbb) Covenants.

A covenant whereby an executor agrees to warrant and defend "as executors are bound by law to do" is not a personal covenant: *Day v. Brown*, 2 O. 345, I Longsdorf's Notes, 132.

In a deed of conveyance of real estate containing full covenants of seizin and warranty, the grantor names herself, "G. L., administratrix of S. M. L.," and subscribes the same as "G. L., administratrix of S. M. L.'s estate." In the covenanting part of the deed, she is named G. L. simply, and the deed contains no reference to any order of court authorizing a sale of real estate of an intestate. In an action for breach of covenants of seizin and warranty, it was held that the covenants were *prima facie* the covenants of G. L., in her individual capacity: *Lockwood v. Gilson*, 12 O. S. 528, II Longsdorf's Notes, 581.

The executor could not be authorized to make covenants of warranty: *Lockwood v. Gilson*, 12 O. S. 528, II Longsdorf's Notes, 581.

Covenants of warranty in the deed not authorized by the will or by the court do not bind the estate, but could only bind himself personally: *Dunlap v. Robinson*, 12 O. S. 530, II Longsdorf's Notes, 581.

An administrator, in selling lands of his decedent, which he conveys without covenants of warranty, can not render the estate of deceased liable in damages, by false representations as to the condition of the title, or the extent of existing incumbrances: *Dunlap v. Robinson*, 12 O. S. 530, II Longsdorf's Notes, 581.

In absence of fraud, the buyer buys at his own risk as to title, and executor can not bind the estate by a verbal warranty of title unless authorized by will or an order of the court: *Arnold v. Donaldson*, 46 O. S. 73, IV Longsdorf's Notes, 313.

(ccc) Execution.

The deed may be made to the assignee of the bid of the original buyer: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370.

An administrator's deed on sale ordered by court with but one witness conveys no legal title: *Exporting Co. v. Halley*, 7 O. (pt. 1) 11, I Longsdorf's Notes, 359.

If the deed contains no word of perpetuity it is not void, but as the power to convey in fee was given by court, the defective execution of it will be aided in equity: *Piatt v. St. Clair*, 7 O. (pt. 2) 185, I Longsdorf's Notes, 398.

Where wrong lands have been included in the appraisalment and in the administrator's

deed by mistake, a court of general jurisdiction in equity may correct the mistake in the probate court as well as that in the deed: *Gill v. Pelkey*, 54 O. S. 348, IV Longsdorf's Notes, 639.

Recital in a deed as to the assumption of assessments does not estop from contesting the validity of such assessments: *Walsh v. Sims*, 65 O. S. 211, IV Longsdorf's Notes, 884.

(ddd) Fraudulent Representations.

False representations by the executor as to the title or incumbrances do not make the estate liable: *Dunlap v. Robinson*, 12 O. S. 530, II Longsdorf's Notes, 581.

Fraud or concealment by the heir without the administrator's knowledge will not impeach the latter's sale: *Trevitt v. Converse*, 31 O. S. 60, III Longsdorf's Notes, 562.

The estate can not be made liable for the executor's unauthorized false representations. If the executor has sold and delivered land, and sues for the purchase money, the buyer, without offering to rescind, can not set up the executor's false representations either in defense or by recoupment or counterclaim, but can only sue him personally: *Westfall v. Dungan*, 14 O. S. 276, II Longsdorf's Notes, 653.

An agreement to protect the title or indemnify the purchaser against incumbrances, orally made by the executor, does not bind the estate without authority from the will or court: *Arnold v. Donaldson*, 46 O. S. 73, IV Longsdorf's Notes, 313.

(vv) Distribution.

The balance remaining from the sale of real estate remains real estate, and goes by descent to the heirs: *King v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

The surplus of the proceeds of a sale of real estate by an administrator, remaining in his hands on final settlement of his account, is to be considered and disposed of as real estate, and the intestate's widow is not entitled to any part thereof in her capacity as one of the distributees of the personal estate: *Griswold v. Frink*, 22 O. S. 79, III Longsdorf's Notes, 59.

Surplus remaining after settlement of the administrator's accounts is to be treated as realty: *McCall v. Pixley*, 48 O. S. 379, IV Longsdorf's Notes, 421.

Proceeds from sale of realty directed to be sold is not to be blended with personalty unless the will so provides: *Gilson v. Gilson*, 11 O. C. C. (N.S.) 49, 20 O. C. D. 322.

Where the real estate of an intestate, who had no issue at his decease, is sold to pay debts, and before final distribution of a bal-

ance remaining, after payment of same, and the satisfaction of the widow's dower, his posthumous child dies, the surplus money belonging to such child is subject to the law of distribution as personal property: *Pence v. Pence*, 11 O. S. 290, II Longsdorf's Notes, 502.

Although the surplus goes to the heirs in the line that real estate would go, such proceeds are personalty and are held as personalty by the heir, and as such pass from such heir: *Tuttle v. Northrup*, 44 O. S. 178, IV Longsdorf's Notes, 202.

Lands, upon which a widow gave a mortgage after her husband's death, having been sold to pay debts, the distribution of the funds arising therefrom must be, as to the widow, in accordance with the provisions of G. C., § 10714, providing in what order administrators shall pay debts, and not under the provisions of G. C., § 10687, providing how a fund from the sale of land shall be applied: *Neely v. Neely*, 1 O. N. P. (N.S.) 97, 48 Bull. 929.

Installments of street assessments, if they stand unsatisfied upon the tax duplicate, should be paid out of the proceeds of the sale, but if not due and payable they remain a lien upon the real estate in the hands of the purchaser, who has no right to have them paid out of the proceeds of the sale: *Markley v. Whitmore*, 61 O. S. 587, IV Longsdorf's Notes, 817.

The proceeds of lands sold to pay debts on the administrator's application therefor in the probate court, the heir having died before distribution and without descendants, are real estate in his hands, but the surplus, as the estate of the heir, is personalty, and, hence, passes from him to his mother as next of kin and not to his father's brothers and sisters: *Pence v. Pence*, 11 O. S. 290, II Longsdorf's Notes, 502. See also DESCENT AND DISTRIBUTION.

Debtor's death dispenses with further levy if the judgment is then a subsisting lien on his real estate, and it is entitled to share in the proceeds of sale of such real estate to pay debts, although more than five years have then elapsed since its rendition or since last execution. G. C., § 10809, means this: *Am-brose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803. See also JUDGMENT.

On sale of decedent's property to pay debts, since the act of 1858, the probate court can determine controversies between claimants involving priorities in distribution of the purchase money: *Borntraeger v. Borntraeger*, 7 Dec. Rep. 551, 3 Bull. 891. See also COURTS.

(wv) Limitation.

The proceeding provided for in G. C., § 10774, is subject to the statute of limitations and must be brought within six years from the discovery by the administrator that the personalty is not sufficient to pay debts: *Ling v. Strome*, 12 O. C. C. (N.S.) 161, 21 O. C. D. 569.

The right of an administrator to sell land of the decedent to pay debts being purely statutory, the bar of the statute of limitations under G. C., § 11222, falls in six years from the time the administrator ascertains that the personal estate in his hands is insufficient to pay all the debts of the decedent, and such knowledge will be attributed to him not later than the filing of his account: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

Inasmuch as liability to have title by decedent divested by a proceeding to subject the land to payment of debts of the ancestor is cast upon the heirs by statute, such a proceeding is not exempt from the statute of limitations, but must be brought within six years from the discovery by the administrator of the fact that the personalty is insufficient to pay the debts, and after the running of the statute it is the right of an owner of an estate in remainder, though not in possession, to bring an action to quiet his title in said estate against the claims of the administrator: *Ling v. Strome*, 12 O. C. C. (N.S.) 161, 21 O. C. D. 569.

But, however, it was decided in obiter that the six year statute of limitations would not run against the right of an administrator to bring an action for the payment of debts: *Fleming v. McGuffey*, 12 O. N. P. (N.S.) 19, 21 O. D. (N.P.) 387. [For former opinion in same case, see *Fleming v. McGuffey*, 8 O. N. P. (N.S.) 430, 10 O. D. (N.P.) 521].

An administrator's authority does not end until all outstanding assets are administered. Thus, assets coming twenty-three years after distribution of everything, as where a homestead set apart under G. C., § 11733, becomes available for sale, and a per centum of the debts is unpaid, are to be administered, and the administrator is entitled to an order of sale: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

An administrator obtained an order of sale in a partition suit brought twenty-one years after decedent's death: *Lafferty v. Shinn*, 38 O. S. 46, III Longsdorf's Notes, 953.

Allowance of administrator's commissions after final account accepted, without opening up the account and notice to interested parties, is not in the nature of a judgment, and such claim would be barred in six years:

Snider v. Graham, 14 O. C. C. 386, 18 O. C. D. 3.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

(xx) Review.

An action by an executor for the construction of a will, which prays also for an order to sell lands for the payment of legacies, is appealable: *Swing v. Townsend*, 24 O. S. 1, III Longsdorf's Notes, 155.

An administrator's proceeding to sell to pay debts is reviewable by the supreme court: *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

The proceeding by an administrator to sell real estate is appealable to the circuit court, and on such appeal the administrator need not give an appeal bond: *Dalton v. Davis*, 18 O. C. C. 878, 6 O. C. D. 133.

Under the present code of procedure (75 v. 648, 889), actions by administrators for the sale of real estate, brought originally in the court of common pleas, are appealable to the district court: *Metzger v. Meekers*, 6 Dec. Rep. 780, 8 Am. L. Rec. 98.

An appellate court, in reversing an order of distribution made by the probate court in an action by the administrator to sell property to pay debts, should under G. C., § 12272, either make the order of distribution, or in remanding the case to the probate court specifically indicate the items to which the fund for distribution should be applied: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

A proceeding by an administrator in the common pleas court to sell lands to pay debts is not appealable; it is strictly statutory, and reviewable only on *certiorari*, and it makes no difference that the petition includes a prayer to annul a fraudulent conveyance and sell, for the statute allows the administrator to sell land so conveyed by the decedent: *Steinbarger v. Steinbarger*, 19 O. 106, I Longsdorf's Notes, 867.

An executor's proceeding in the common pleas to sell lands to pay debts and set aside a fraudulent conveyance is not an action or a suit, but a statutory proceeding, and not appealable to the district court: *Webster v. Ballard*, 2 Clev. L. Rep. 137, 4 Dec. Rep. 419.

An order to sell to pay debts in the common pleas is not reversible on the grounds that the journal entry does not find the facts to be true: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

A bill in chancery will not lie to set aside a sale made by an administrator, claiming that the same is void because made without any order of sale of the court of common pleas, the sale in such case being void and

there being adequate remedy at law: *Mowhorter v. Armstrong*, 16 O. 188, I Longsdorf's Notes, 760.

The order of sale will not be reversed for want of a journal entry showing that the facts stated in the petition were found to be true. In such a case the reviewing court will presume that the judgment was founded on proper proof: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

An order of the probate court, on petition of the widow as executrix, to sell land to pay debts, finding priorities, and with her knowledge putting dower and year's support inferior to certain liens, and decreeing sale, is a final and not interlocutory order, and can not be set aside and a different distribution ordered after the term on motion or except by proceedings under G. C., §§ 11631 to 11643: *Potter v. Jennman*, 4 O. N. P. 78, 4 O. D. (N.P.) 444.

Where an administrator's petition to sell to pay debts a tract of land and an adjoining coal tract were appraised together and sold to A, but by mistake the return of the appraisement showed that the first tract was appraised with and as part of an adjoining tract bought by B, the mistake was carried into all the deeds, and B, who had neither bought nor paid for such tract, now brings ejectment against A, who had done both, and A by cross petition seeks reformation of the record and deeds, it was held that a court of general equity jurisdiction can correct the mistake in the proceedings as well as in the deed: *Gill v. Pelkey*, 54 O. S. 348, IV Longsdorf's Notes, 639. See also JUDICIAL SALES.

For the general discussion of the subject of appeal, see APPEALS.

For the general discussion of the subject of error, see ERROR.

(yy) Sale in Proceedings in Partition.

The real estate of a deceased person for the purpose of paying his debts becomes assets in the hands of the administrator, and where sold in partition proceedings it remains liable for and may be subjected to the payment of such debts which have been duly allowed by the executor but overlooked in the settlement of the estate and remained unpaid: *In re Cavagna*, 8 O. N. P. 557, 11 O. D. (N.P.) 725.

Where an answer in a proceeding to partition the realty of a decedent alleges that there is not sufficient personal property to pay the debts, the court will permit the action to go to decree after the lapse of the statutory period from the death of the decedent, and upon distribution will order that a sufficient amount of the proceeds from the sale be turned over to the administrator to

pay the indebtedness of the estate as certified by the probate court: *Wilson v. Irwin*, 11 O. N. P. (N.S.) 175.

Where, in an action by the heirs for the partition of real estate, the administrator is made a defendant, and he files an answer and cross-petition asking for the sale of such property to pay debts, the administrator is entitled to such order of sale, and statutes of limitation have no application in favor of such heirs: *Lafferty v. Shinn*, 38 O. S. 46, III Longsdorf's Notes, 953.

An action by an administrator to sell real estate to pay debts, brought within one year after the death of the decedent, supplants a partition case brought by the heirs: *Stout v. Stout*, 82 O. S. 358.

The right of the administrator to subject land to payment of debts is superior to the right of the heirs to have partition. As soon as the administrator finds that the personal estate will be insufficient to pay debts, it is his duty to apply to the probate or common pleas court for authority to sell the land, and the heirs can prevent a sale and have partition of the lands only by giving bond for the payment of debts, etc.: *Stout v. Stout*, 82 O. S. 358.

When the sale of lands is necessary to pay debts, the filing of a suit in partition does not prevent the administrator from selling the lands. On filing his certificate from the probate court in the court where the partition suit is pending, he is entitled to an immediate order of sale; and, without filing such certificate, he may appear in the partition suit and, on cross-petition, obtain an order of sale without waiting a year after the ancestor's death: *Myers v. Myers*, 9 O. C. C. (N.S.) 449, 19 O. C. D. 396.

The administrator, the debts being otherwise unprovided for, may come into a partition proceeding and have an order of court requiring a sufficient amount to be paid to him to discharge the debts: *Corey v. Hayes*, 13 O. C. C. 185, 7 O. C. D. 272.

A journal entry, under which a certificate of indebtedness is issued by the probate court for the purpose of filing the same in a partition suit in the common pleas and obtaining money to pay debts, as authorized by G. C., § 10818, will be set aside where the statement of the executor does not show all the assets and indebtedness of his estate, and especially where it does not show that the personal property is insufficient to pay the debts thereof: *In re De Serisy*, 8 O. N. P. 694, 11 O. D. (N.P.) 666.

A proceeding under G. C., §§ 10818 and 10819, to procure a certificate of indebtedness to file in a suit in partition is one to sell lands to pay debts, and where the claims for the payment of which the sale of the land is

required include one due the executor, the heirs should have notice and be allowed to defend against it if such claim is denied: *In re De Serisy*, 8 O. N. P. 694, 11 O. D. (N.P.) 666.

M. PAYMENT OF DEBTS.

1. What is Payment.

Payment by an Ohio debtor to an administrator appointed in some other state than Ohio prior to the appointment of an administrator in Ohio, is a satisfaction of the debt: *Crawford v. Missionary Society*, 10 O. N. P. (N.S.) 676.

Where a creditor was appointed administrator of his debtor's estate, and died without receiving any assets, it is not to be assumed that the debt was paid; nor would it, under such circumstances, be extinguished. But if the administrator had assets, out of which he might lawfully have retained his claim, it will be presumed that the debt was paid: *Hall v. Pratt*, 5 O. 72, I Longsdorf's Notes, 248.

Where a legatee is appointed executor and files no inventory or account, but an account is filed by an administrator *de bonis non* showing debts paid but making no mention of the legacy, every presumption favors the theory that the legacy was paid by the administratrix to herself, and in the absence of proof of fraud, active or constructive, the motion for an order for payment of the legacy after a lapse of many years should be overruled: *Holzlin v. Schleeweis*, 7 O. L. R. 434.

2. Funds From Which Payable.

The personal estate is primarily liable for the debts of decedent, unless by a will he has exonerated it from the payment of the same and imposed that burden upon the real estate: *Skinner v. Blackburn*, 4 O. C. C. 325, 2 O. C. D. 574.

An executor as such has no power before final settlement to turn over, without an order of the probate court, notes held by the estate to a creditor of the estate, and one holding notes so turned over does not have a valid title to them upon which to sue the maker: *Surety Co. v. Haughton*, 13 O. C. C. (N.S.) 523, 22 O. C. D. 138.

Where a testator provides that his real estate shall be sold and divided into equal parts, one of which is undivided, the undivided share is first applicable to the payment of his debts: *Gilson v. Gilson*, 11 O. C. C. (N.S.) 49, 20 O. C. D. 322.

Where property, subject to the lien of a chattel mortgage, is taken possession of by the administrator and sold by him, the mort-

gagage is not authorized to maintain an action to foreclose his mortgage. He must assert his lien against the fund arising from the sale by the administrator: *Whitely v. Weber*, 2 O. C. C. 336, 1 O. C. D. 517.

A contract to pay a certain debt out of the promisor's personal estate after death, does not confine it to that fund; accordingly, its collection can not be defeated by specific devises of all the real estate, the personality being inadequate: *Judy v. Louderman*, 48 O. S. 562, IV Longsdorf's Notes, 430 [reversing *Louderman v. Judy*, 2 O. C. C. 351, 1 O. C. D. 526].

Personalty is the primary fund for settling all personal obligations of the decedent: *Case v. Hall*, 52 O. S. 24, IV Longsdorf's Notes, 562.

Though intestate personality is primarily liable for debts, yet if the testator clearly designates a particular fund for the purpose, the latter must be first exhausted: *Bane v. Wick*, 14 O. S. 505, II Longsdorf's Notes, 681.

That no unnecessary delay may arise, legatees may provide for payment of debts by leaving sufficient in the hands of the executors and may distribute in kind the remainder of the estate: *In re Isherwood*, 7 O. N. P. 332, 5 O. D. (N.P.) 143.

Where it appears from the will that the testator did not intend to burden the trust property with any debt contracted by him, or with any claim chargeable against the property by operation of a law before the estate vested, a clause of the will relating to the deduction of taxes, etc., from the income devised must be held to include only taxes, etc., becoming a lien after the vesting of the estate: *Loomis v. Von Phul*, 2 O. N. P. (N. S.) 423, 15 O. D. (N.P.) 37.

Where the mortgagor of goods dies, and his administrator proceeds to administer same, the mortgagee can not maintain an action of replevin against the administrator for the possession of the mortgaged property, even though condition broken before the mortgagor's death. The mortgagee's interest in the property is transferred to the fund arising from the sale by the administrator: *Linghler v. Kraft*, 3 O. N. P. (N.S.) 653, 16 O. D. (N.P.) 474.

Funds derived by an administrator from the sale of mortgaged premises and deposited by him in bank, preparatory to payment to the mortgagees, should be listed by the administrator for taxation, notwithstanding the entire amount will be required to satisfy the liens which have been established and ordered paid: *Gregg v. Hammond*, 4 O. N. P. (N.S.) 214, 16 O. D. (N.P.) 549.

Though debts are a lien, the administrator has no power over such lien. He can only

obtain the proceeds of the land by an authorized sale: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

Where the administrator, instead of selling the real estate, collected the rents and applied them to the satisfaction of the ancestor's debts, his action was upheld: *White v. Turpin*, 16 O. S. 270, II Longsdorf's Notes, 773.

3. Notice of Appointment.

G. C., § 10760, treats the filing of proof of notice as a method of perpetuating evidence; that is, it forms no part of the notice itself: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

An administrator may pay after the year from the time notice was given, without being personally liable to a creditor who had not presented his claim, or of which he had no notice; but he must pay the debts after eighteen months: *In re Wakefield*, 7 O. N. P. 562, 5 O. D. (N.P.) 395.

In this state a general legacy bears interest, at the legal rate, from the end of the first year from the date of notice of appointment of executor, unless testator intended otherwise: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

4. Presentation of Claim.

(a) Necessity.

A devise of an annuity is not a "claim" within the meaning of G. C., 10717, and such devisee need not file his claim with the executor for allowance or disallowance: *Hunt v. Hayes*, 19 O. C. C. 151, 10 O. C. D. 388.

It is not a condition precedent to the enforcement of stockholders' liability against the estate of a decedent that the claim be presented to the executor: *Roebbling v. Coal & Iron Co.*, 4 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 8; *Hull v. Coal & Iron Co.*, 7 O. N. P. 157, 7 O. D. (N.P.) 527.

Stockholder's liability is not a claim requiring presentation for allowance, for it is impossible to ascertain the amount; nor would failure to sue within six months of rejection prejudice other creditors, for whose benefit, also, the suit is brought, and the plaintiff has no power to adjust and release the claim; hence, their relation is not that of debtor and creditor, under G. C., § 10740: *Wanz v. Hotel Co.*, 1 O. C. C. 105, 1 O. C. D. 63.

Funeral expenses and expenses of last sickness are made preferred claims against estates of decedents under G. C., § 10714, and as such should be presented to the executor or administrator for his allowance or rejection.

tion, as provided by G. C., § 10717: *In re Miller*, 12 O. D. (N.P.) 562.

If the same person is administrator both of creditor and debtor no formal presentation for allowance by himself is necessary, but the claim is extinguished as soon as funds applicable to it come into his hands: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

An executor or administrator can not apply the assets of the estate to the payment of his claim against the decedent until after the same has been presented to and allowed by the probate court: *Liggett v. Liggett*, 3 O. N. P. (N.S.) 518, 51 Bull. 59.

A demand for a legacy need not be presented for allowance before suing, nor is an order necessary to ascertain the amount: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

A judgment lien on decedent's real estate need not be presented for allowance to entitle the creditor to share in the proceeds of a sale of the real estate to pay debts, for G. C., § 10809, requires it to be paid: *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

A judgment against the administrator need not be again presented for allowance: *Williams v. Bradley*, 5 O. C. C. 114, 3 O. C. D. 58.

Whether a claim against the estate of a deceased surety on a replevin bond need be presented before action, was questioned in *Daykin v. Emery*, 10 O. C. C. 652, 5 O. C. D. 121.

If an administrator have actual notice of a debt by proceedings against them to enforce a defective mortgage, they are not justified in distributing all the assets among other creditors merely because no demand is made: *Bank v. Carpenter*, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

Presentation of claim is not necessary when executor has knowledge of its existence; so held in action to quiet title to property conveyed by devisee of life estate with power to convey, to satisfy claim for services rendered testator and wife: *Gogreve v. Day*, 10 O. C. C. (N.S.) 69, 20 O. C. D. 609 [affirmed, without opinion, *Day v. Gogreve*, 80 O. S. 736].

Where a claim against an estate has been duly presented to and allowed by the administrator, no further allowance by a succeeding administrator *de bonis non* is required by statute: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

A claim allowed by an administrator before the estate is declared insolvent should be reported to the court as a valid claim without a second presentation and allowance, unless the holder of the claim is duly notified

by the administrator that he disputes or rejects it: *Haley v. Krug*, 1 O. C. C. 44, 1 O. C. D. 27.

If a guardian has rendered services to an imbecile ward, allowance for services and compensation is by G. C., § 10953, to be determined by the court settling the guardian's account, and, it not being a personal claim against the ward, it need not in case of his decease be presented to his personal representatives: *Scattergood v. Ingram*, 86 O. S. 76.

A claim of a third person for money paid for taxes at the request of an executor for the benefit of the estate is of such a nature that it is not necessary to its validity that it should be formally presented within the prescribed term: *Stillman v. Holmes*, 9 O. N. P. (N.S.) 193, 20 O. D. (N.P.) 84.

Additions to tax returns made by the auditor and certified to the treasurer, need not be presented for allowance before suit by the latter: *Gager v. Prout*, 48 O. S. 89, IV Longsdorf's Notes, 404.

If the executor as residuary legatee give bond under G. C., § 10608, conditioned to pay all the debts and legacies, presentation of a claim for allowance is not necessary before suing on the bond: *Stevens v. Hartley*, 13 O. S. 525, II Longsdorf's Notes, 623.

Presentation of a claim is not necessary in order to sustain a proceeding to revive an action: *Musser v. Chase*, 29 O. S. 577, III Longsdorf's Notes, 500.

An action having been commenced in the lifetime of a party defendant, upon reviving in the name of his personal representative no presentation of the claim to such representative is required: *State v. Kilgour*, 8 O. N. P. (N.S.) 617, 19 O. D. (N.P.) 670.

No presentation or rejection is necessary of a claim against an administrator where the claim was in suit at the time of the death of the defendant and the petition stated facts sufficient to constitute a cause of action. Such a cause may proceed to judgment: *Glass v. Buzzard*, 14 O. C. C. (N.S.) 427, 23 O. C. D. 144 [affirmed, without opinion, *Buzzard v. Glass*, 85 O. S. 461].

In an action on an account against an administrator, alleged to be due from his intestate, it is essential to prove presentation and its rejection, or what is equivalent thereto, or to show some other reason why the administrator is liable to be sued, notwithstanding the provisions of G. C., § 10746: *Yager v. Greiss*, 1 O. C. C. 531, 1 O. C. D. 296.

A suit can not be maintained within eighteen months after letters issued, unless first presented to the executor or administrator for his allowance: *Keenan v. Saxton*, 13 O. 41, I Longsdorf's Notes, 622.

Payment by an administrator from individual funds does not preclude the filing of a requisition for the disallowance of such claims: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102.

Where a will gave the testator's wife power to sell land to pay debts, and she sold it, and then died, and fifty years elapsed, it will be conclusively presumed as to *bona fide* purchasers that the debts were presented to the administrator and allowed, or that they were not due within two years, or that they were sued for and put in judgment: *Smith v. McIntyre*, 83 Fed. 456, 12 O. F. D. 688.

The proceedings of the court to sell the lands of a decedent to pay debts are presumed to have been regular: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130.

(b) Waiver.

Presentation of the claim may be waived as where the administrator goes to trial on the merits without objecting, and he can not then revoke the waiver and amend: *Pepper v. Sidwell*, 36 O. S. 454, III Longsdorf's Notes, 869; *Daykin v. Emery*, 10 O. C. C. 652, 5 O. C. D. 121.

Waiver of a formal presentation is shown if the administrator, having some months before examined the claim, now refuses to allow it. It need not be shown him again: *Kyle v. Kyle*, 15 O. S. 15, II Longsdorf's Notes, 697.

After appearance and trial the administrator can not object that the claim had not been presented before suit: *Musser v. Chase*, 29 O. S. 577, III Longsdorf's Notes, 500.

Setting aside the will on contest five years after its probate and thus annulling the letters to the executor, is no excuse for not presenting a claim while he was acting, and an administrator being appointed to whom plaintiff presented his claim for the first time, plaintiff's action is barred: *Delaplane v. Smith*, 38 O. S. 413, III Longsdorf's Notes, 979.

5. Allowance or Rejection.

(a) What Constitutes.

Part payment of a claim without disputing the balance is a sufficient allowance of the whole: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

Merely receiving a claim, examining it, and comparing it with the decedent's books, is neither an allowance nor rejection: *Keenan v. Saxton*, 13 O. 41, I Longsdorf's Notes, 622.

Where the holder of a note executed by a deceased person, upon inquiry by the administrator if he has a claim, presents the

note to such administrator and requires a partial payment upon it, then or shortly, saying also that the administrator need not hurry, such presentation sufficiently "exhibits" the claim as defined in G. C., § 10722. It is not necessary to such exhibiting of the claim that the claimant shall formally present it with a demand that the administrator indorse his allowance thereon: *Miller v. Ewing*, 68 O. S. 176, IV Longsdorf's Notes, 941.

Acknowledging "notice of the existence" of notes, is not allowing nor rejecting them: *Fisher v. Mossman*, 11 O. S. 42, II Longsdorf's Notes, 477.

While payment by an administrator of separate interest notes may not be an allowance of the principal note as a claim against the estate, a continuance by the administrator to pay the interest on the principal note for some years after it became due does amount to an allowance of the note as a just claim against the estate: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

Not disputing or rejecting a claim is a sufficient allowance of it. Formal indorsement of allowance is not indispensable: *Smock v. Bouse*, 12 O. C. C. 46, 5 O. C. D. 293.

Where the administrator verbally allows a claim, but refuses to indorse the allowance in writing, but in his petition to sell land to pay debts recites the claim as a debt, this is better record evidence of an allowance than indorsement would be, and no suit to compel an allowance will lie, although G. C., § 10740, provides that a refusal to indorse is deemed a rejection; for a person can not sue to protect a right when he has a better or as good a protection as the suit would bring: *Smock v. Bouse*, 12 O. C. C. 46, 5 O. C. D. 293.

A promise to pay a foreclosure decree by the executors out of the proceeds of sale which the creditor agrees he can make under a power in the will, is an allowance of the claim: *Bank v. McIntire*, 40 O. S. 528, IV Longsdorf's Notes, 41.

Rejection of a claim may be made by an attorney for the estate thereunto duly authorized, acting ostensibly and in fact for the administrator: *Miller v. Ewing*, 68 O. S. 176, IV Longsdorf's Notes, 941.

If, within a reasonable time after such exhibition of the note, the administrator informs the claimant, unequivocally, that the claim is rejected and that all that he will get on it will be at the end of a law suit, the six months' statute of limitations will then begin to run, and if suit be not brought within six months no action can be main-

tained upon the note: *Miller v. Ewing*, 68 O. S. 176, IV Longsdorf's Notes, 941.

A distinct refusal to allow a claim by an executor, and telling the creditor to consider it rejected, is a rejection: *Harter v. Taggart*, 14 O. S. 122, II Longsdorf's Notes, 640.

A demand for an indorsement by the administrator of a rejection need not be averred or proved. An unequivocal rejection of the claim to authorize action, although not indorsed, is sufficient: *Stambaugh v. Smith*, 23 O. S. 584, III Longsdorf's Notes, 147; *Treasurer v. Walker*, 10 Dec. Rep. 558, 22 Bull. 106; *Harter v. Taggart*, 14 O. S. 122, II Longsdorf's Notes, 640.

Rejection must be shown in an action on a claim (G. C., § 10740), but formal presentation by vouchers and affidavit is not necessary, if not required by the administrator. An informality in the affidavit is waived if not objected to, and the rejection is on the merits: *Morgan v. Bartlette*, 3 O. C. C. 431, 2 O. C. D. 244.

Notice not to allow a claim given by the widow is not proof of fraud in the administrator in afterwards allowing it: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

(b) When Claim Should Be Rejected.

Where a frugal man, simple in his tastes and habits of living, and accustomed to hard work, takes his own life, leaving an estate of \$800, an expenditure of \$150 for a casket is extravagant and unreasonable, and should be disallowed, notwithstanding the sole legatee may have acquiesced therein at the time: *In re Kaercher*, 6 O. N. P. (N.S.) 459, 52 Bull. 107.

An application under G. C., § 10728, for the allowance of a claim by the mother for support of a deceased minor child is sufficient where it shows her divorce for the aggression of the husband; that she has had sole care and expense of supporting such minor, amounting to over \$150 per year; and that her own means are very small: *Spink v. Spink*, 7 O. C. C. (N.S.) 89, 18 O. C. D. 94 [affirmed, without opinion, *Spink v. Spink*, 78 O. S. 390].

Allowance may be made to a mother out of the estate of a deceased minor child for past maintenance and support, where having furnished such support she had little or no estate, or an estate trifling in comparison with that of the minor, and the support was furnished to the minor for his benefit under conditions which were coercive upon the mother and compelled her to assume a burden which was not naturally and legally hers alone: *Spink v. Spink*, 7 O. C. C. (N.

S.) 89, 18 O. C. D. 94 [affirmed, without opinion, *Spink v. Spink*, 78 O. S. 390].

(c) Time.

The administrator is entitled to a reasonable time to examine a claim before allowing or rejecting it: *Keenan v. Sawton*, 13 O. 41, I Longsdorf's Notes, 622.

The allowance of a claim consisting of principal and interest notes resulting from the payment of said interest notes, and the interest on the principal note after it becomes due will be treated as of the date of the payment of the first interest note, and until the validity of the claim is denied by the administrator no suit is necessary to prevent the bar of the statute for nonclaim: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

(d) Effect.

The allowance of a claim by an executor or administrator is *prima facie* evidence of the liability of the estate for the debt; and although his acts are not conclusive, creditors are not bound to go behind them unless fraud or mistake is shown: *Mattoon v. Cole*, 8 O. 248, I Longsdorf's Notes, 431.

Where an original note was presented with an affidavit that the note was a just claim, that all the payments made thereon were indorsed thereon, and, by clerical error, the amount was understated, but the whole claim was rejected, the claimant may sue for the full amount due on the note: *Morgan v. Bartlette*, 3 O. C. C. 431, 2 O. C. D. 244.

The fact that the executor had mentioned the services of an attorney and a note in his account, but no averment appears of any finding of the probate court allowing it, does not authorize an action. Moreover, the action here is on the note and not on the record: *Mellen v. West*, 5 O. C. C. 89, 3 O. C. D. 46.

If a former administrator allows a claim it need not be presented to the administrator *de bonis non* for reallowance: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

A claim once allowed may be subsequently rejected by the same or another administrator: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

The allowance of a claim, when exhibited or presented to an administrator for allowance, is not conclusive against the estate as to its validity: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

Since G. C., § 10809, requires a judgment lien to be paid, it need not be presented for allowance to entitle the creditor to share in

the proceeds of a sale of real estate to pay debts: *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

Suit can not be maintained within eighteen months after letters issued, unless such claim was first presented to the executor or administrator for settlement, with a request that he should indorse his allowance thereon: *Keenan v. Saxton*, 13 O. 41, I Longsdorf's Notes, 622.

By the allowance of a claim by the administrator, the statute of limitations ceases to run against it: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

In an action against an administrator of an estate it is essential to prove a presentation of such claim to the administrator, and its rejection, or what is equivalent thereto by him; or to show some other reason why the administrator is liable to be sued, notwithstanding the provisions of G. C., § 10746: *Yager v. Griess*, 1 O. C. C. 531, 1 O. C. D. 296.

If a claim is allowed and the estate is afterwards declared insolvent, but no commissioners in insolvency are appointed, the claim should be reported valid without a new allowance unless the administrator notifies the claimant that he retracts: *Haley v. Krug*, 1 O. C. C. 44, 1 O. C. D. 27.

No suit by holders of claims which have been allowed is necessary to preserve their right to participate in the assets of the estate, and G. C., § 10746, is not applicable to a claim which has been allowed until it has been reconsidered and disallowed: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *sub nomine*, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821].

Where the affidavit accompanying the note was informal, but no objection was taken to the informalities, and the claim was rejected on its merits by indorsement on the back, the technical objection to the affidavit was waived: *Morgan v. Bartlette*, 3 O. C. C. 431, 2 O. C. D. 244.

A suit brought in the common pleas court against an assignee for the benefit of creditors, to require him to allow a claim of the plaintiff in settlement of his trust, may be appealed to the circuit court: *Kennedy v. Thompson*, 3 O. C. C. 446, 2 O. C. D. 254.

The purpose of G. C., § 10746, is to fix the status of the estate and property of decedents so that persons may buy it and deal with it freely and safely, and afterclaims are barred under this statute, it should not be possible to revive them so as to sweep away property of others acquired from the heirs or estate: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

After a claim has been barred under G. C., § 10746, a subsequent allowance or dis-

allowance of it by an administrator *de bonis non* will not revive it so as to take it out of the operation of the statute: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

Where a claim presented by a creditor to the executor or administrator of an estate, is accepted and allowed by such executor or administrator as a valid claim against the estate which he represents, but is subsequently disallowed and rejected by the successor of the executor or administrator who allowed it, the four years statute of limitation provided by G. C., § 10746, begins to run in such case only from the time of the rejection of said claim: *Bray v. Darby*, 82 O. S. 47 [reversing *Bray v. Darby*, 20 O. C. D. 683].

(e) *Rejection on Demand of Heir or Creditor.*

The word "heir or creditor" in G. C., § 10724, may be construed to mean devisees and legatees or any person whomsoever, whose property is or may be affected by the recovery of the judgment, and as such they have the right to file in the probate court a written requisition on the executor to disallow and reject any claim presented for allowance; and such devisees and legatees are proper parties in any action brought upon a claim rejected under such requisition and have the right to defend: *Todd v. Todd*, 6 O. C. C. (N.S.) 105, 17 O. C. D. 224.

Where the administrator pays claims out of his own funds, a requisition for disallowance of such claims may nevertheless be filed. If disallowed, the administrator then becomes subrogated to the rights of those creditors: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *sub nomine*, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821].

A legacy is not such a claim as may be disallowed by the executor at the requisition of an heir. And a devisee, who has been paid in full, is not an "heir" under G. C., § 10724: *Hunt v. Hayes*, 19 O. C. C. 151, 10 O. C. D. 388.

Verbal notice to the administrator by the widow not to allow a certain claim is not sufficient proof of fraud on the part of the administrator for afterwards making such allowance: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

A surviving husband, who is entitled to curtesy in his wife's real estate, is not thereby an heir or creditor within the meaning of G. C., § 10724. He has no right to contest claims accepted by the administrator as his interests are not affected thereby: *Pirmann v. Gerhold*, 7 O. N. P. 664, 5 O. D. (N.P.) 414.

Parties requiring a claim to be rejected and giving bond for expenses of resisting it, under G. C., § 10724, should be made parties to the action on it, for they must make the defense. The administrator, by making the contest himself, indicates an intention not to rely on the statute, and should make them parties if the claimant does not do so. Becoming parties on their own motion and being dismissed on the claimant's motion is not sufficient to hold them for costs, for it gives them no opportunity to make the defense. The administrator should see that the judgment awards cost against them: *Fullerton v. Davis*, 1 O. C. C. 572, 1 O. C. D. 320.

In a suit by an administrator to recover upon a bond given under G. C., § 10724, he must show that the requirements of the bond have been strictly complied with: *Fullerton v. Davis*, 1 O. C. C. 572, 1 O. C. D. 320.

G. C., § 10724 and succeeding sections, gives to the heirs the right to prosecute error to any judgment, although not parties thereto: *Spaulding v. Allen*, 19 O. C. C. 609, 10 O. C. D. 259.

6. Character in which Payment is Made.

In the absence of notice or knowledge to the contrary it is the right of the holder of a note against a decedent to consider interest payments thereon as coming from the administrator in his official and not in his individual capacity: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

The executor obtains no title to real estate, although he may convey for the purpose of realizing money to pay debts: *Helmig v. Meyer*, 8 O. N. P. 31, 10 O. D. (N.P.) 308.

7. What Are Debts.

(a) In General.

G. C., § 10779, does not contemplate that the probate court should determine what are debts: *Pirmann v. Gerhold*, 7 O. N. P. 664, 5 O. D. (N.P.) 414, 1 Goebel, 142.

(b) Amount.

Where an administrator ordered by court to pay a certain sum to a creditor, being the amount of his lien on real estate sold, and the administrator refuses, and carries the case through all the courts, but it is affirmed, the creditor is entitled to interest in preference to other creditors: *In re Robb*, 5 O. N. P. 52, 5 O. D. (N.P.) 227.

A secured creditor of an insolvent estate is entitled to a dividend on the entire

amount, and not merely on the surplus after exhausting the security: *Cromieell v. Herron*, 11 O. C. C. 448, 5 O. C. D. 196.

(c) Attorney's Fees.

Attorney fees of the executor in a contested will case, which is compromised on a different basis of settlement from that provided in the will, are not a proper subject of charge against the estate: *In re Seeger*, 7 O. N. P. 207, 1 O. D. (N.P.) 113.

Although an executor is an attorney he may be allowed fees for attorneys employed by him where no allowance for legal services of his own is made. And that such attorneys also represent the widow in the same case (a sale case) is not an inconsistent employment: *King v. Alt*, 11 O. N. P. (N.S.) 433, 22 O. D. (N.P.) 183.

(d) Taxes.

Taxes due on real estate at the time of decedent's death are debts of the estate for which the administrator may ask sale of real estate if he has no personalty: *Welsh v. Perkins*, 8 O. 52, 1 Longsdorf's Notes, 413.

When taxes become a lien upon real property prior to and are unpaid at the time of the death of the owner, the executor is liable therefor, and not a testamentary trustee who came into possession of the property at the owner's death: *Loomis v. Von Phul*, 2 O. N. P. (N.S.) 423, 15 O. D. (N.P.) 37.

The assessment of taxes is so far complete by the second Monday of July that the name of the person assessed for the year can not be changed, hence having died testate on July 12, the taxes are properly chargeable against his estate: *Morrison v. Bruce*, 1 O. D. (N.P.) 190.

Taxes must be paid on the funds of an insolvent estate in the hands of an administrator unlike an assignee (G. C., § 5370): *In re Robb*, 5 O. N. P. 52, 5 O. D. (N.P.) 227.

Where the owner of real estate died testate the day on which the taxes for the ensuing year became a lien, but which were not ascertained or levied at the time, having appointed an executor and also a trustee of a portion of the real estate, the trustee thereupon became the owner of such real estate for the purpose of the trust and is liable, and not the executor, for the payment of taxes for the ensuing year: *In re O'Brien*, 2 O. N. P. (N.S.) 421.

The act of 1859, § 38, for summary collection of taxes assessed against an executor or administrator, does not apply to those assessed to the decedent in his lifetime, but

only to the executor: *Wolfe v. Geffroy*, 16 O. S. 219, II Longsdorf's Notes, 771.

Where decedent died in May, the June taxes on his real and personal property are a personal debt, to be paid by the administrator: *In re Lones*, 57 Bull. 122.

Taxes on real estate of a decedent who died in May, although a lien from the second Monday of April, are not due and payable until October 1st, when the auditor delivers his duplicate to the treasurer, and the administrator is not entitled to pay them for the next ensuing year unless he needs the land to sell to pay debts: *In re Lones*, 57 Bull. 122.

Pending proceedings to sell real estate to pay debts, the administrator may pay accruing taxes out of the assets. But if he holds the real estate merely by sufferance of the heirs and collects the rents, he should pay taxes out of the rentals, for he collects only as trustee of the heirs, and not for the estate: *In re Lones*, 57 Bull. 122.

Bonds in hands of a resident executor of a nonresident testator are taxable in this state: *Tafel v. Lewis*, 75 O. S. 182, IV Longsdorf's Notes, 1015.

Where executors hold distinct property on distinct trusts, with separate beneficiaries, there should be separate returns for each, and one should not be visited with penalty for false returns of the other: *Phipps v. Ratterman*, 10 O. C. C. 205, 6 O. C. D. 488.

A legacy to an executor by releasing debts due from him to testator in consideration of and in lieu of compensation for settling the estate is not taxable on the excess over the statutory allowance if the debts released do not appear to be more than a reasonable allowance: *Hooper's Will*, 4 O. N. P. 186, 6 O. D. (N.P.) 560. See also TAXATION.

(e) Support and Services.

In order to entitle a brother to recover for board and care of his sister, who lived with him as a member of his family, several years prior to his death, though ill, needing care and unable to be of much assistance about the house a great part of the time, the burden is upon the brother to show either an express contract between them or such circumstances as will authorize the jury to find that he expected to charge for her board and that she expected to pay for it: *Jurling v. Garner*, 8 O. N. P. 277, 11 O. D. (N.P.) 439 [citing *Harrison v. Gottlieb*, 3 O. C. C. 191, 2 O. C. D. 109].

A son-in-law, who with his wife lives with his father-in-law, without making an express agreement for compensation for service, can not recover on an implied promise: *Lovet v. Price*, W. 89, I Longsdorf's Notes, 7.

A son who lives with his father after attaining majority, can not recover for services rendered without showing an express promise to pay: *Willis v. Dun*, W. 133, I Longsdorf's Notes, 12.

A married stepdaughter, residing with her stepfather, can not recover for services rendered without showing an express promise or facts and circumstances from which a promise may be fairly inferred: *Hawthorne v. McClure*, 4 O. C. C. 11, 2 O. C. D. 390.

No implied obligation arises against a father to compensate the services rendered him by his unmarried daughter while resident in and a member of his family; and without proof of some understanding, agreement or promise on his part to compensate them, no right or cause of action accrues to her thereon: *Pollock v. Pollock*, 2 O. C. C. 143, 1 O. C. D. 410.

As a general rule, the estate of a minor is not liable for past support by the parents, but an exception to the rule occurs where a mother, who has furnished such support, had little or no estate in comparison with the minor, and the support was furnished under conditions which were coercive upon the mother and compelled her to assume a burden not hers alone. And when such claim is presented to the probate court, under G. C., § 10728, there is drawn to the court the chancery jurisdiction necessary to a complete exercise of the jurisdiction specially conferred by the statute: *Spink v. Spink*, 7 O. C. C. (N.S.) 89, 18 O. C. D. 94 [affirmed, without opinion, *Spink v. Spink*, 78 O. S. 390].

Where long and faithful service by the plaintiff was acknowledged by the decedent, who exacted a promise that these services should be continued to his wife after his death, with the direction that the wife make suitable provision for the services rendered and to be rendered, a binding contract is made and a debt created against the estate for services performed after as well as before the death of the decedent: *Gogreve v. Day*, 10 O. C. C. (N.S.) 69, 20 O. C. D. 609 [affirmed, without opinion, *Day v. Gogreve*, 80 O. S. 736].

While it is not presumed that services of a child in taking care and nursing a parent are to be compensated unless an understanding to that effect exists, yet compensation will be allowed for such service in the absence of an express understanding to that effect, where the circumstances are such that the child was justified in assuming that she would be compensated for such services: *In re Skelton*, 20 O. C. C. 704, 10 O. C. D. 372. See also CONTRACTS.

Relationship to a family is established without formal adoption by one who becomes

a member of the family in childhood and so continued for many years after reaching maturity, and an action for services will not lie where brought by such a member of the family against the estate of the mother of the family where no agreement was made either by parol or in writing that the services should be paid for: *Evers v. Gardner*, 1 O. C. C. A. 216.

(f) *Funeral Expenses and Monument.*

Where a testator left his personalty to two daughters and, after the death of the last survivor of them, her husband erected a single monument for them and testator, and seeks reimbursement, it was held that the probate court has no right under G. C., § 10832, to allow the cost as a debt of the testator's estate: *Catlin v. Huestis*, 11 O. C. C. 120, 5 O. C. D. 23.

A married woman's funeral and last sickness expenses are debts of her estate under G. C., § 10714, although her surviving husband has property, and the executor may properly allow and pay them: *McOlellan v. Filson*, 44 O. S. 184, IV Longsdorf's Notes, 203; *Helmkamp v. Kater*, 8 Dec. Rep. 667, 9 Bull. 160.

The probate court is without jurisdiction, in advance of the settlement of the estate to entertain an application by the administrator to fix a sum as a maximum to be expended by such administrator for the purpose of a tombstone or monument and order the administrator, in the event that such monument is not procured by the widow or next of kin, to erect such monument and charge the expense to the estate: *In re Ferguson*, 81 O. S. 58.

The propriety of erecting a monument is, by G. C., § 10832, in the exclusive discretion of the administrator, and only with reference to the deceased, although there is no room left for his widow's grave, but the court may determine the reasonableness of the cost. A reasonable expenditure may also be made for cornerstones of the cemetery lot and lettering thereon: *In re Lones*, 57 Bull. 122.

It is the duty of the probate judge, upon the hearing of an administrator's or executor's account, whether exceptions have been filed thereto or not, to scan closely the amounts claimed to have been paid for funeral expenses, and in the absence of statutory or testamentary provisions the allowance for such expenses must be reasonable, having regard to the amount of the estate, the station in life of the deceased, and the customs of the people in the same station, and if unreasonable and extravagant, should be disallowed even as against legatees and

next of kin: *Kroll v. Close*, 82 O. S. 190, IV Longsdorf's Notes, 1059.

An expressed desire by a decedent as to the amount which should be expended on his funeral is without force or effect unless such desire has found expression in his will: *In re Kaercher*, 6 O. N. P. (N.S.) 459, 52 Bull. 107.

(g) *Gifts.*

A gift to a person, such as a note, check, etc., of the decedent, is not collectible after his death: *Simons v. Savings Society*, 31 O. S. 457, III Longsdorf's Notes, 597; *Starr v. Starr*, 9 O. S. 74, II Longsdorf's Notes, 376; *Hamor v. Moore*, 8 O. S. 239, II Longsdorf's Notes, 337; *Prior v. Reynolds*, 1 Dec. Rep. 366, 8 W. L. J. 326.

(h) *Mortgage.*

In a proceeding brought by the personal representatives of the husband to sell land on which a mortgage had been executed to secure a note on which the wife had advanced money as part payment, the widow can not be subrogated to the lien and security of the mortgage indebtedness in so far as the money so advanced by her may have been used in paying said mortgage, in the absence of evidence that the widow gave or loaned the money to her husband, intending or expecting it to be paid on the mortgage debt: *Hickey v. Conine*, 6 O. C. C. 321, 17 O. C. D. 369.

(i) *Homestead.*

When one dies intestate, leaving a widow, who, having separated from him, is permanently residing elsewhere, and the property on which he resided is brought to sale for the payment of a mortgage lien thereon and for the payment of his debts, she is not entitled to an allowance out of the proceeds in lieu of a homestead, the widow's right in that regard being fixed by G. C., § 11732, which confines the right to "a widow composing a part of the decedent's family at the time of his death": *Nichols v. French*, 83 O. S. 162 [approving and following *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159].

(j) *Street and Insurance Assessments.*

A street assessment is a lien on the real estate without personal liability, and accordingly is not a debt to be paid by the executor out of personalty: *Wilson v. Hall*, 6 O. C. C. 570, 3 O. C. D. 589.

Mutual fire insurance being effected by a decedent, the estate is liable for assessments made prior to his death (G. C., § 9538), and jointly liable with the heirs for assessments

made during the rest of the term of the policy: *In re Lones*, 57 Bull. 122.

(k) *Expense Incurred in Defense of Will.*

Whether an executor can be allowed credit in his account for expenses incurred in the successful defense of the will depends upon the circumstances of each particular case: *Weir v. Weir*, 7 O. C. C. (N.S.) 289, 18 O. C. D. 199.

8. *Payment Out of Funds Not Primarily Applicable.*

(a) *Money Advanced by Third Person.*

A person paying debts of a decedent can set off the same against the administrator's claim against him: *Caraway v. Robinson*, 85 O. S. 485.

Money which has been borrowed after the death of the owner of realty and applied to the discharge of a valid ditch assessment against such property is a lien upon such property in favor of the person advancing such money: *Sears v. Walker*, 85 O. S. 490.

A person loaning money to the heir of the decedent land owner was assured that the money would be used to pay a mortgage and also that the debts had all been paid, which was untrue. An administrator was appointed, and he filed a petition to have land sold to pay the debts. It was held that the person loaning the money was entitled to be subrogated to the mortgage which his money has satisfied: *Straman v. Rechline*, 58 O. S. 443, IV Longsdorf's Notes, 744.

A buyer of land from the heir, applying the price to discharge liens thereon and preferred claims, will be subrogated to the rights of the holders thereof against the estate, if his land is sold by the administrator: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

The heir's sale of land and application of the price to pay preferred claims is no bar to the administrator's petition to sell. Creditors are entitled to a sale in due course of law: *Sidener v. Hawes*, 37 O. S. 532, III Longsdorf's Notes, 935.

If there are existing debts the executor is entitled to an order for the sale of the property which was set off as a homestead, and the person whose money was applied for the payment of debts of the creditors may be subrogated to the creditors rights, and may be entitled to demand that the property shall be sold to reimburse him: *Wehrle v. Wehrle*, 39 O. S. 365, III Longsdorf's Notes, 1036.

A mortgage by the heirs and the administratrix to borrow money to pay off a lien on the property is void as against creditors. But the mortgagee will be subrogated to

priorities of the lien so paid: *Cate v. Peck*, 11 Dec. Rep. 813, 30 Bull. 5.

The rule of immunity of estates against indebtedness incurred by the personal representatives does not apply where the estate and the minor heirs derived a benefit from the use by a third person of his own money at the request of the executrix, in paying taxes and thus saving the property from sacrifice; and this is true, notwithstanding the maladministration of the executrix: *Stillman v. Holmes*, 9 O. N. P. (N.S.) 193, 20 O. D. (N.P.) 84.

A finding of the unpaid deficit on sale in a foreclosure against the mortgagors, administrator and heirs being on service by publication only, was therefore void, but on execution under it other lands of the decedent were levied on and bought by B. B's title being a partition case by the widow and heirs of the mortgagor found worthless, because there was no valid judgment, he is entitled under G. C., § 11704, to be subrogated to the administrator's rights to the extent that his money was used to pay the debt of the estate, and for taxes paid since, and to have a lien therefor and order of sale subject to dower: *Doyle v. Breneman*, 2 O. N. P. 415, 4 O. D. (N.P.) 22.

A lender of money to an executor to pay debts lends on the executor's personal responsibility, and though he may have an equity, yet after confirmation of the executor's final account in which to balance the estate, the executor shows that he has donated a large amount to the estate, it was questioned whether such lender can have the account opened: *Smith v. Hayward*, 5 O. N. P. 501, 5 O. D. (N.P.) 462.

An heir having sold property without administration, taking notes and a mortgage to secure the price, and sold them to a *bona fide* holder, who now seeks foreclosure, the buyer of the property is entitled to have credited on the note and mortgage the amount of a judgment against the estate for which his land may be sold: *Heller v. Meiss*, 13 Dec. Rep. 670, 1 C. S. C. R. 477.

An heir or other person who pays taxes on real estate may have a lien on the rents and profits of the particular property, but is not a creditor of the estate: *Piatt v. St. Clair*, W. 526, I Longsdorf's Notes, 42.

A person lending money to the administrator to pay debts gets no lien thereby on the heir's land: *Lieby v. Parks*, 4 O. 469, I Longsdorf's Notes, 236.

The estate was held liable for money loaned to the executor of which it got the benefit: *Behrens v. Leucht*, 13 Dec. Rep. 864, 2 C. S. C. R. 217.

But the supreme court, in reversing, held that this point did not arise, the debt being

a personal liability of the executor: *Lucht v. Behrens*, 28 O. S. 231, III Longsdorf's Notes, 400.

A lender of money to an administratrix to pay debts which she then transferred to him as security, can hold the estate liable for the loan: *Veldeman v. Lindeman*, 7 Dec. Rep. 676, 4 Bull. 911.

Where an administrator's sale to pay debts is void, the court having no jurisdiction, a person to whom the buyer had conveyed with warranty can not be subrogated to the buyer's claim against the estate for the money that had gone into it. There is no privity between the buyer's creditors and the creditors of the estate: *Salmond v. Price*, 13 O. 368, I Longsdorf's Notes, 643.

On a void administrator's sale to pay debts (being under a decree of another state) the purchase money is no lien on the land, and the buyer can not compel the heirs to reimburse him, although his money has gone to pay debts: *Nowler v. Coit*, 1 O. 519, I Longsdorf's Notes, 99; *Lieby v. Parks*, 4 O. 469, I Longsdorf's Notes, 236; *Salmond v. Price*, 13 O. 368, I Longsdorf's Notes, 643.

Equity can not grant a person ejected at law from land reimbursement for taxes and improvements against the rightful owners who ejected him: *Winthrop v. Huntington*, 3 O. 327, I Longsdorf's Notes, 174.

The occupying claimant law applies to a person ejected from land by the rightful owners: *Henry v. Doctor*, 9 O. 49, I Longsdorf's Notes, 461.

Equity may, however, impose on the heirs repayment of taxes paid as a condition on quieting the title against the buyer at the void sale, they being a charge on the land: *Nowler v. Coit*, 1 O. 519, I Longsdorf's Notes, 99.

In a proceeding by an executor to secure payment of a note held by him, payments on an insurance policy made by decedent after the death of the payee of the note (decedent's wife), to whom he had assigned the policy, and which policy inured to the benefit of the decedent's estate, can not be set off against the note: *Claypool v. Claypool*, 4 O. C. C. (N.S.) 577, 15 O. C. D. 327. [affirmed, without opinion, *Claypool v. Claypool*, 75 O. S. 578].

An administrator has no power to sell or transfer notes secured by mortgage which belonged to the deceased at the time of his death and such notes taken up by a third party will be regarded and held as paid, as between the administrator and such third party; but as between such third party and a subsequent mortgagee with notice of the prior mortgage, such third party may be subrogated to the lien of the prior mortgage, when no additional burdens will thereby be

imposed upon such subsequent mortgagee and such third party did not pay the notes to the administrator as a mere volunteer: *Miller v. Stark*, 61 O. S. 413, IV Longsdorf's Notes, 812.

(b) By Executor.

The payment by an administrator of claims against the estate from his own funds is not such a payment as precludes the filing of a requisition for the disallowance of such claims; and while in the event of disallowance the administrator becomes subrogated to the rights of the creditors so paid, he acquires no greater rights than the original creditors would have had as the holders of claims which had been allowed: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821; affirmed, without opinion, *Glenn v. Eicher*, 81 O. S. 553].

If rents of real estate are collected by the administrator and used to pay debts, the person entitled to the rents can recover from the estate therefor: *Conger v. Atwood*, 28 O. S. 134, III Longsdorf's Notes, 393.

If testator's widow is the administratrix of his estate and pays debts of the estate out of her individual funds she is subrogated to the rights of the creditors thus paid and such payment is an allowance of the claims which prevents the statute of limitations from applying: *In re Patterson*, 58 Bull. 305.

9. Priority of Payment.

(a) In General.

A preferred creditor remains such until his securities are exhausted; then he is a general creditor: *In re Spense*, 7 O. N. P. 624, 7 O. D. (N.P.) 386.

A preferred creditor can not participate in a dividend among general creditors until the security for his claim has been exhausted: *Spence v. Kiefer*, 4 O. N. P. 439, 7 O. D. (N.P.) 386.

Where the contract of employment of an agent factor requires him to keep all proceeds of sales of the principal's goods as a special deposit for the principal, and he uses them to pay for goods for his own store and in paying its bills, and then dies insolvent, a trust may be declared in the stock of goods and the claim ordered paid as a preferred debt: *Harvester Co. v. Keifer*, 20 O. C. C. 311, 11 O. C. D. 270.

A recognizance for the appearance of an individual is not such special claim on the estate of the recognizor as to be entitled to a preference over ordinary creditors upon distribution of that estate: *Dewit v. Osburn*, 5 O. 480, I Longsdorf's Notes, 306.

The individual creditors of a deceased member of a firm can not claim a preference in the decedent's individual estate as against the creditor's of the firm: *Grosvenor v. Austin*, 6 O. 103, I Longsdorf's Notes, 326.

A reformed mortgage has not priority over the debts of the general creditors: *Straman v. Rechtime*, 58 O. S. 443, IV Longsdorf's Notes, 744.

A premium due a surety company on the administrator's bond can not be allowed as prior to claim of mortgages upon distribution in an action to sell real estate to pay debts: *Sherman v. Millard*, 6 O. C. C. (N. S.) 338, 17 O. C. D. 175.

Lands upon which the widow gave a mortgage after her husband's death, having been sold to pay debts, the distribution of the fund arising therefrom must be as to the widow in accordance with the provisions of G. C., § 10714, and not under the provisions of G. C., § 10809, providing how a fund from the sale of land shall be applied: *Neely v. Neely*, 1 O. N. P. (N.S.) 97 [reversed, *Neely v. Neely*, 49 Bull. 85].

No superior right can be acquired by superior diligence, but the estate stands for the payment of all general creditors alike: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

Before the court can determine what distribution is required, it must be settled whether any part of the effects shall be used for the payment of a particular debt: *Brown v. Trottnor*, 11 O. C. C. 498, 5 O. C. D. 222.

The right of an administrator to subject the lands of his intestate to the payment of the debts of the estate is superior to the right of the heirs at law to have partition of such lands, and when the administrator finds the personal estate to be insufficient for the payment of debts it is his duty to apply to the probate or common pleas court forthwith for authority to sell real estate: *Stout v. Stout*, 82 O. S. 358.

The debts of an estate must be paid before distribution; and distribution made upon advice of counsel and the probate judge is made at the peril of the administrator. If the estate proves solvent he should be credited with such distribution, but if insolvent, he should not receive such credit: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

The chapters (G. C., §§ 10884-10914) entitled "Proceedings when the estate of a deceased person is insolvent," deals wholly with creditors. In none of them is there any mention of the heirs, for the reason, that heirs have no beneficial interest in such an estate. The administrator primarily represents the creditors, secondarily the heirs and especially is this true under G. C., §§ 10884 and 10885: *Insurance Co. v. Bank*, 173 Fed. 390.

The equity powers of the probate court which would enable it to find that trust funds were mixed with the estate and to declare them a preferred debt, not having been put exclusively in that court, leaves the common pleas jurisdiction over such questions as concurrent: *Harvester Co. v. Keifer*, 20 O. C. C. 311, 11 O. C. D. 270.

Commissioners appointed under G. C., § 10884 to examine claims when the estate is insolvent, act in a quasi judicial capacity: *Cromwell v. Herron*, 11 O. C. D. 448, 5 O. C. D. 196, 1 O. D. (N.P.) 196.

A creditor is entitled to an allowance of his claim as it stood at the date of the assignment of the debtor, and to receive dividends on the whole claim: *Jelke v. Stallo*, 1 O. N. P. 29, 1 O. D. (N.P.) 43.

A secured claim is entitled to a dividend on the full amount and not merely on the deficiency left after realizing on the security: *Cromwell v. Herron*, 11 O. C. C. 448, 5 O. C. D. 196, 1 O. D. (N.P.) 196.

(b) Funeral Expenses.

Funeral expenses and expenses of the last sickness are made preferred claims under G. C., § 10714, and as such should be presented to the executor or administrator for his allowance or rejection, as provided by G. C., § 10717: *In re Miller*, 12 O. D. (N.P.) 562.

G. C., § 10714, which directs payment of funeral expenses and those of the last sickness, may apply to the estate of a deceased married woman, though such deceased left surviving her a husband having property: *McClellan v. Filson*, 44 O. S. 184, IV Longsdorf's Notes, 203.

Funeral expenses may include a reasonable amount for a tombstone or monument: *Kilbourne v. Fay*, 29 O. S. 264, III Longsdorf's Notes, 465.

(c) Attorney's Fees.

Necessary attorney's fees in collecting assets or resisting unjust claims when paid by the administrator are expenses entitled to precedence as such: *Thomas v. Moore*, 52 O. S. 200, IV Longsdorf's Notes, 569.

(d) Taxes.

Taxes under G. C., § 10662, are preferred over liens securing claims of general creditors: *Trust Co. v. Stich*, 71 O. S. 459, IV Longsdorf's Notes, 985.

Tax-inquisitors are not entitled to a commission on omitted property which has been placed on the duplicate under G. C., § 10662, from information derived from inventories in the probate court: *State v. Lewis*, 12 O. D. (N.P.) 46.

A tax inquisitor's compensation for discovery of omitted property of decedent will be limited to a percentage on taxes collected on property which should have been returned in the lifetime of the decedent: *State v. Gilfillan*, 3 O. N. P. (N.S.) 153, 15 O. D. (N.P.) 756 [affirmed, *State v. Gilfillan*, 3 O. L. R. 476, 19 O. C. D. 709; modified, *Gilfillan v. State*, 76 O. S. 341].

A county auditor is not required to make search for property not placed on tax duplicate in accordance with G. C., §§ 10661 and 10662: *State v. Lewis*, 4 O. N. P. (N.S.) 454, 17 O. D. (N.P.) 370.

When administration of an estate is committed to two or more persons residing in different counties, "the moneys, credits and investments" belonging to the estate must be listed for taxation under G. C., § 5371, in the county where the administrator having actual possession and control of the property to be listed resides at the time of listing: *Brown v. Noble*, 42 O. S. 405, IV Longsdorf's Notes, 120.

(e) Year's Allowance.

The year's allowance to a widow and minor children is a debt of the estate, and has preference over all others, except funeral expenses, those of the last sickness, and expenses of administration: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

10. Over-payment.

Overpayment to one creditor at the expense of another is at the administrator's peril if the estate is insolvent, and he is liable to the unpaid creditor for his share just as if he had assets: *Abbott v. Cole*, 5 O. 86, I Longsdorf's Notes, 249.

Overpayment to a creditor by mistake may be recovered back; there is an implied promise to refund. The administrator may sue in his individual character, for he is personally liable for the amount and has a corresponding right to collect it: *Rogers v. Weaver*, 5 O. 536, I Longsdorf's Notes, 311, W. 174, I Longsdorf's Notes, 16.

11. Action on Claim.

(a) Nature of Action.

Where partners are indebted for services rendered to them, the indebtedness is joint, and under the former practice, on the death of one, the only remedy of the creditor at law was a suit against the surviving partner; but by the statute the debt becomes a joint and several obligation, and the creditor has his

election to sue the surviving partner, or the administrator of the deceased partner, or both the surviving partner and the administrator: *Weil v. Guerin*, 42 O. S. 299, IV Longsdorf's Notes, 113; *Williams v. Bradley*, 5 O. C. C. 114, 3 O. C. D. 58; *Williams v. Bradley*, 7 O. C. C. 227, 4 O. C. D. 570.

At common law, the death of one of the joint makers of an obligation extinguished all remedy at law against his estate, but G. C., § 10733 abrogates the common law rule, and the estate is made liable in the same manner as if the "contract had been joint and several"; and the survivor and the personal representative of the deceased obligor can be joined in the same action, whether the contract or obligation is in terms joint or several, or both, or, is made so by G. C., § 10733; and it authorizes a several judgment to be rendered against each of them: *Burgoyne v. Insurance Co.*, 5 O. S. 586, II Longsdorf's Notes, 206.

G. C., § 10733 abrogates the common law rule: *Burgoyne v. Life Insurance Co.*, 5 O. S. 586, II Longsdorf's Notes, 206; *Bank v. Yoe*, 4 O. 125, I Longsdorf's Notes, 209; *Buell v. Cross*, 4 O. 327, I Longsdorf's Notes, 223.

When a claim for an allowance for the support of a deceased minor child by either father or mother is presented to the probate court under G. C., § 10728, there is drawn to that court the chancery jurisdiction necessary to a complete exercise of the jurisdiction specially conferred by the statute: *Spink v. Spink*, 7 O. C. C. (N.S.) 89, 18 O. C. D. 94 [affirmed, without opinion, *Spink v. Spink*, 78 O. S. 390].

Judgment on exceptions to an executor's account disallowing a claim made by him to the proceeds of a certain farm by virtue of an agreement with the testator, does not bar a proceeding under G. C., § 10728, for compensation for working the farm, under a claim of an agreement therefor. The two claims are different and inconsistent: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

An action to sell realty is a civil action, and in either court in which the suit may be brought, or on appeal, the rights of the several parties in the subject matter may be determined. But the probate court having exclusive jurisdiction to settle the accounts of executors and administrators, it is incompetent, where such suit is brought in the common pleas court, for that court to attempt to fix the costs and expenses of administration: *Tidd v. Bloch*, 4 O. C. C. (N. S.) 216, 16 O. C. D. 113.

A claim rejected by an administrator is a jury case and is not appealable to the circuit court: *Stuber v. Carpenter*, 1 O. L. R. 85.

(b) *Time of Bringing Action.*(aa) *Earliest Time.*(aaa) *When Time Begins to Run.*

Where notice of appointment was given by publication within three months after giving bond, the two years limitation begins to run from the date of giving bond, although proof of such publication is not filed until a year thereafter: *Ardrey v. Shall*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

Although the giving of the notice within three months is necessary, in order to start the running of the four years, whenever the notice is so made, the four years is to be computed as beginning at "the time of the giving of the bond": *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

The statute of limitations does not begin to run against a debt based upon a contract not in writing which becomes due by reason of the decease of the debtor, until the appointment of an administrator or executor on the estate of such debtor, and due notice thereof: *Hoiles v. Riddle*, 74 O. S. 173, IV Longsdorf's Notes, 1008.

Where the executor has not been required to give bond the limitation provided by G. C., § 10746 begins to run from the time of his appointment as such executor: *Delaplane v. Smith*, 38 O. S. 413, III Longsdorf's Notes, 979.

Where the will dispensed with an executor's bond, the limitation provided for by G. C., § 10746, began to run from the date of the executor's qualification as such: *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

The two years' statute of limitations begins to run against an account against an estate, paid by the executrix, from the date of allowance and confirmation, and not from notice of appointment: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

A judgment lien on a debtor's lands at the time of his death remains after his death, and execution need not issue to preserve the lien. Pleading the lien by the judgment creditor in an action brought by the personal representative to sell the land for the payment of debts, is not the commencement of an action within the purview of G. C., § 10746, and need not be filed within the time therein provided: *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

When a debt becomes due at the debtor's death, if the next of kin do not take out administration, the creditor must do so within a reasonable time. G. C., § 10746 begins to run from the time the creditor should have had the administrator appointed: *Hoiles v.*

Riddle, 4 O. C. C. (N.S.) 449, 16 O. C. D. 363.

The statute of limitations against claims for expenses of last sickness begins to run from the date of account, but against funeral expenses not until after the appointment of an administrator, there being no person to sue or be sued during the interval between the death of the deceased and the appointment of his personal representative: *In re Miller*, 12 O. D. (N.P.) 562.

Where, under decrees of foreclosure, an executor sold lands for more than was due, paid nothing on the decrees, but paid out and distributed the entire estate to others, such act was a fraud upon the holder of the decrees, and the statute of limitations could begin to run in his favor until the creditor had notice of the act: *Bank v. McIntire*, 40 O. S. 528, IV Longsdorf's Notes, 41.

In the case of a claim for unpaid stock subscriptions against the estate of a decedent, the statute begins to run from the appointment of a receiver or other act of insolvency on the part of the corporation: *Roebbing Sons Co. v. Coal & Iron Co.*, 4 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 9.

An administrator's part payment or acknowledgment, if the claim is not already barred, will take the residue out of the statute as to personal assets, so that time will run only from them: *Niemcewicz v. Bartlett*, 13 O. 271, I Longsdorf's Notes, 641.

An administrator has no power to revive a debt once extinct by limitation: *Drouillard v. Wilson*, 1 Dec. Rep. 555, 10 W. L. J. 385. See also LIMITATION.

(bbb) *Claim Allowed.*

A petition against an administrator must show the lapse of eighteen months, or that the case is within one of the exceptions of G. C., § 10740, else it is demurrable: *Hammerle v. Kramer*, 12 O. S. 252, II Longsdorf's Notes, 560; *Levi v. Buchanan*, 13 Dec. Rep. 819, 2 C. S. C. R. 144; *Rhodes v. Doggett*, 2 Dec. Rep. 451, 3 W. L. M. 134; *Green v. Ulyatt*, 2 Dec. Rep. 427, 3 W. L. M. 44; *Pepper v. Sidwell*, 36 O. S. 454, III Longsdorf's Notes, 869.

A foreclosure of a mortgage shows itself to be within the exception that the insolvency of the estate would not affect it, and so far is well brought, but heirs and devisees are necessary parties: *Green v. Ulyatt*, 2 Dec. Rep. 427, 3 W. L. M. 44.

A creditor of the estate of a deceased person, whose claim has been duly allowed by the administrator, may prosecute an action thereon against the estate after the expiration of eighteen months from the date of the administrator's bond, and such further time

as may be granted by the court for the collection of the assets of the estate: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

If the petition does not show the lapse of time necessary to the maintenance of the action, it is defective, and may be demurred to by the administratrix, as not stating facts sufficient to constitute a cause of action against her: *Hammerle v. Kramer*, 12 O. S. 252, II Longsdorf's Notes, 560; *Levi v. Buchanan & Co.*, 13 Dec. Rep. 819, 2 C. S. C. R. 144; *Pepper v. Sidwell*, 36 O. S. 454, III Longsdorf's Notes, 869.

The bringing of suit in aid of execution against an administrator before the expiration of eighteen months, which suit was dismissed as premature, is not a bar against an adjudication of the same issues between the same parties, subsequent to the expiration of the eighteen months, no further time having been allowed by court for the collection of the assets: *Lauer v. Smith*, 1 O. C. C. (N. S.) 121, 14 O. C. D. 47 [affirmed, without opinion, *Smith v. Lauer*, 65 O. S. 563].

If the claim has been allowed, no suit to compel its allowance lies, nor any suit until expiration of the time fixed by G. C., § 10740: *Smock v. Bouse*, 12 O. C. C. 46, 5 O. C. D. 293.

G. C., § 10737, was cited as recognizing that an executor should have at least one year in which to collect assets and to ascertain the condition of the estate: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

The word "suit" as used in G. C., § 10740, is synonymous with the word "action": *Kennedy v. Thompson*, 3 O. C. C. 446, 2 O. C. D. 254.

An administrator can not be sued within eighteen months after his appointment unless there was presentation of the claim to him for allowance: *Keenan v. Saxton*, 13 O. 41, I Longsdorf's Notes, 622.

Setting up a judgment lien by cross petition in a proceeding to sell real estate to pay debts is not commencing an action within G. C., § 10746, which requires actions against executors to be begun within two years: *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

Claims against an estate are not withdrawn from the operation of G. C., § 10746, by the allowance of further time to the executor or administrator: *Gilbert v. Little*, 2 O. S. 156, I Longsdorf's Notes, 1036.

Money arising from the sale of land possessed by the decedent at the time of his death and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the deceased, under an arrangement made to save their lands from sale, are not new assets within

the meaning of G. C., § 10747, and will not extend the limitation within which creditors are required to sue: *Favorite v. Booher*, 17 O. S. 548, II Longsdorf's Notes, 849.

G. C., § 10747, does not apply to a case where the evidence as to the existence of debts is unsatisfactory, and leaves a doubt as to whether or not there were any, and the purchaser has been in possession for fifty years, so that his title will be held good as against the heirs and those claiming under him: *Smith v. McIntyre*, 95 Fed. 585, 37 C. C. A. 177, 13 O. F. D. 14.

Where the debt of a creditor has been allowed, and the executor or administrator has funds in his hands applicable to its payment, if the estate is solvent the creditor is entitled to its payment within the eighteen months from the date of the administration bond. After that time, he may sue on the bond, and recover even though further time is given to collect the remaining assets: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

G. C., § 10753, as well as § 10746, are subject not only to the exceptions contained in G. C., § 10753, but also to such as must necessarily be implied in order to give effect to other sections of the administration statutes: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821; affirmed, without opinion, *Glenn v. Eicher*, 81 O. S. 553].

(ooo) Claim Rejected.

Claims allowed by the administrator but later disallowed by the administrator *de bonis non*, may be sued on, under G. C., § 10725, within six months after their rejection: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102.

The provision of G. C., § 10746, to the effect that an administrator who has given due notice of his appointment can not be held to answer the suit of a creditor unless it be commenced within two years from the time of his giving bond, applies to a case where the claim, if owing, was due at the death of the decedent, and has not been allowed by the administrator, but has been rejected; and a suit upon such claim will be defeated by a plea of the two years' statute of limitations if not commenced within two years from the giving of such bond although it may have been commenced within six months after the rejection of such claim, and although the claim was presented to the administrator within the period of two years from the time of his giving bond: *Harris v. O'Connell*, 85 O. S. 136 [distinguishing *Speidel v. Phillips*, 78 O. S. 194, IV Longsdorf's Notes, 1039].

Suit on a claim duly allowed and later rejected at instance of creditor, may be brought within six months after notice of such rejection, notwithstanding that, deducting the time intervening between such allowance and such rejection, more than six years have elapsed after the accruing of the cause of action: *Speidel v. Phillips*, 78 O. S. 194, IV Longsdorf's Notes, 1039 [distinguishing *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011].

Rejection of the claim, or some reason for suing on it, is necessary before any action will lie on it, notwithstanding G. C., § 10746: *Yager v. Greiss*, 1 O. C. C. 531, 1 O. C. D. 296.

Where a claim is rejected by an administrator or executor, suit must be brought within six months to recover a judgment upon the claim, which is to be satisfied out of the assets of the deceased in the hands of the personal representative: *Louderman v. Judy*, 2 O. C. C. 351, 1 O. C. D. 526 [reversed, *Judy v. Louderman*, 48 O. S. 562, IV Longsdorf's Notes, 430].

It is error to render judgment against the estate upon a claim due and disallowed more than six months prior to the commencement of the action; the failure of the executor to plead the statute in bar does not give a right to such judgment: *Pollock v. Pollock*, 2 O. C. C. 140, 1 O. C. D. 408.

Where no action was commenced for nine months and ten days after disallowance of a claim by an administrator *de bonis non*, the claim was barred: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

Where suit is brought against an administrator within eighteen months of his appointment, it must appear that the claim has been disputed or rejected: *Morgan v. Bartlette*, 3 O. C. C. 431, 2 O. C. D. 234.

Where by a clerical error the amount of a note, which had the payments endorsed on it, was understated, and the whole claim was rejected, the claimant was allowed to sue for the full amount due on the note: *Morgan v. Bartlette*, 3 O. C. C. 431, 2 O. C. D. 234.

If one administrator allows a claim and his successor disallows it, the period of limitation runs only from the rejection: *Stewart v. McLaughlin*, 47 O. S. 555, IV Longsdorf's Notes, 394; *Bray v. Darby*, 82 O. S. 47.

G. C., § 10725 must be construed with G. C., § 10722, so as to contain the words "or be forever barred from maintaining an action thereon": *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

Where facts and dates relative to presentation and rejection are fully set out in the petition or answer, an answer averring that "the right of recovery has long since been barred" is sufficient; the statute need not be

pleaded specifically: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

Where no bond has been required, the limitation of eighteen months begins to run from the date of executor's appointment as such: *Delaplane v. Smith*, 38 O. S. 413, III Longsdorf's Notes, 979.

(bb) Latest Time.

(aaa) When Time Begins to Run.

A claim once allowed but subsequently rejected, the four years' limitation (G. C., § 10746) runs only from the rejection: *Stewart v. McLaughlin*, 47 O. S. 555, IV Longsdorf's Notes, 394.

Where no bond has been required of the executor the eighteen months provided by G. C., § 10740, begin to run from the date of the executor's qualification: *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

Under an act limiting suits to four years from the time of giving bond, an executor, who is not required to give bond, can be sued only within four years of his appointment if he published the statutory notice thereof: *Delaplane v. Smith*, 38 O. S. 413, III Longsdorf's Notes, 979; *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

Where a creditor exhibits an authenticated claim to the personal representative of an estate, with the avowed purpose of having it allowed as a valid claim against the estate of such deceased person, and the personal representative thereupon distinctly refuses to allow it, and tells the creditor to consider the claim rejected, such claim is actually rejected, and the six months limitation begins to run from such rejection: *Harter v. Taggart*, 14 O. S. 122, II Longsdorf's Notes, 640.

Time begins to run on giving bond and publishing notice, except when assets subsequently come to the executor's hands, or the cause of action accrues afterwards: *Gilbert v. Little*, 2 O. S. 156, I Longsdorf's Notes, 1036.

Where a claim presented by a creditor to the executor or administrator of an estate is accepted and allowed by such executor or administrator as a valid claim against the estate which he represents, but is subsequently disallowed and rejected by the successor of the executor or administrator who allowed it, the four years' statute of limitation provided by G. C., § 10746, begins to run only from the time of the rejection of said claim: *Bray v. Darby*, 82 O. S. 47 [approving and following *Stewart v. McLaughlin*, 47 O. S. 555, IV Longsdorf's Notes, 394].

Where notice of appointment as administrator is duly given by publication within

three months after the giving of bond, although proof of such publication is not filed in the probate court until after the expiration of a year from the giving of the bond, the two years' limitation within which actions may be brought will begin to run from the date of the giving of the bond: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

The statute of limitations (G. C., §§ 11226, 11222), does not begin to run against a debt based upon a contract not in writing which becomes due by reason of the decease of the debtor, until the appointment of an administrator or executor on the estate of such debtor, and due notice thereof: *Hoiles v. Riddle*, 74 O. S. 173, IV Longsdorf's Notes, 1008.

G. C., § 10746, the four years' statute of limitation applicable to executors and administrators, begins to run from the time of the qualification of such officers, not from the rejection or disallowance of the claim upon requisition under G. C., § 10724. The former section is not applicable to cases where the claims are rejected; in such case the latter section is applicable: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254 [distinguishing *Stewart v. McLaughlin*, 47 O. S. 555, IV Longsdorf's Notes, 394].

A proceeding for the allowance of a claim of a son against his mother's estate, he being the executor of the estate, brought under G. C., § 10728, is barred unless brought within six years from his appointment and qualification as such executor: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

Such proceeding although brought by the executor of the estate for the allowance of a claim of his own against the estate, is governed by G. C., § 10746, which provides as to the time of bringing action after notice of appointment has been made: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

In such case such statute will apply although the executor has failed to give the notice of his appointment as provided by statute. The purpose of the provision is to notify outside creditors and the world in general of such facts, and not for the benefit of the executor: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

The two years' statute of limitations begins to run against an account against an estate, paid by the executrix, from the date of allowance and confirmation and not from notice of appointment: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

By G. C., § 10722, a creditor must commence suit within six months after his claim is rejected, or it will be barred. This is not a special proceeding but a civil action: *Ken-*

nedy v. Thompson, 3 O. C. C. 446, 2 O. C. D. 254.

When a debt becomes due at the death of a debtor, upon failure of next of kin to have administration taken out upon the estate, it is the duty of the creditor, in order to save his claim from the bar of the statute, to have letters issued in a reasonable time from the decedent's death, as the statute begins to run from the time the creditor should have had the administrator appointed, and not from the time he did have letters issued. What is a reasonable time depends upon the circumstances of each particular case: *Hoiles v. Riddle*, 4 O. C. C. (N.S.) 449, 16 O. C. D. 363.

A claim which accrued against a decedent in his lifetime is barred within the statutory period after his death (see G. C., § 10746); and such bar applies even if notice of the appointment of the administrator is not given if the creditors have actual notice of such appointment: *Bray v. Darby*, 20 O. C. D. 683 [reversed, with opinion, *Bray v. Darby*, 82 O. S. 47].

The statute of limitations against claims for expenses of last sickness begins to run from the date of account, but against funeral expenses not until after the appointment of an administrator, there being no person to sue or to be sued during the interval between the death of the deceased and the appointment of his personal representative: *In re Miller*, 12 O. D. (N.P.) 562.

The right to a citation against an administrator is not barred until ten years from the hearing of his last account, and not from its filing, because no citation can issue between the filing and hearing: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

(bbb) Claim Allowed.

Allowance of the claim by the administrator stops the running of the statute of limitations against the claim, as between the creditor and the estate: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499; *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

Allowance of the claim will not prevent action after the eighteen months, or such further time as may be granted to collect assets, have expired. The remedy on the bond under G. C., § 10869 is not exclusive: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

A claim on a promissory note against an estate of a deceased person is not barred by G. C., § 11221, providing a limitation of fifteen years upon written contracts, where it has been allowed by an administrator *de bonis non*, before the fifteen years had ex-

pired: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

(ccc) Claim Rejected.

The provision of G. C., § 10746, to the effect that an administrator who has given due notice of his appointment can not be held to answer the suit of a creditor unless it be commenced within two years from the time of his giving bond, applies to a case where the claim, if owing, was due at the death of the decedent, and has not been allowed by the administrator but has been rejected; and a suit upon such claim will be defeated by a plea of the two years statute of limitations if not commenced within two years from the giving of such bond although it may have been commenced within six months after the rejection of such claim, and although the claim was presented to the administrator within the period of two years from the time of his giving bond: *Harris v. O'Connell*, 85 O. S. 136 [*Speidel v. Phillips*, 78 O. S. 194, IV Longsdorf's Notes, 1039, distinguished].

Suit upon a claim founded upon a contract not in writing, against the estate of a deceased person, which claim has been duly presented for allowance to the administrator, and duly allowed by him, and subsequently, at the instance of an heir or creditor, disallowed and rejected, may, by force of G. C., § 10725, be brought within six months after notice of such rejection, notwithstanding that, deducting the time intervening between such allowance and rejection, more than six years have elapsed after the accruing of the cause of action: *Speidel v. Phillips*, 78 O. S. 194, IV Longsdorf's Notes, 1039 [distinguishing *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011].

The statute limiting the right of action to six months after the claim is rejected, does not apply to a case where the claim is allowed upon presentation, and afterwards disputed, but only to cases where it is disputed or rejected upon presentation for allowance: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011 [distinguished, *Speidel v. Phillips*, 78 O. S. 194, IV Longsdorf's Notes, 1039]; *Bray v. Darby*, 82 O. S. 47.

The act (now G. C., § 10746) that no cause of action against an executor shall be barred until a year after its accrual having been passed as an amendment to the act (now G. C., § 10722) requiring actions on rejected claims to be brought within six months, modified it, and the creditor had the full year on a rejected claim from the time it was due: *McKent v. Kent*, 2 Dec. Rep. 370, 2 W. L. M. 540.

A judgment against the administrator can be sued on more than six months after its

rejection, for the presentation of it for allowance was not necessary: *Williams v. Bradley*, 5 O. C. C. 114, 3 O. C. D. 58.

The requirement to sue on a rejected claim within six months (G. C., § 10722) is controlled by G. C., § 11233, allowing a new action within a year if an action fail otherwise than on the merits. If the first suit is in the U. S. courts for a partnership accounting, and is dismissed because the remedy at law is adequate, and the second suit in the common pleas is for a balance due after closing up the firm's accounts, the suits are substantially the same, and the second one brought within a year of the dismissal of the first is in time: *Burgoyne v. Moore*, 12 O. C. C. 31, 5 O. C. D. 522 [affirmed, without opinion, *Burgoyne v. Moore*, 51 O. S. 626].

An unequivocal rejection is sufficient to bar the claim unless sued on within six months: *Harter v. Taggart*, 14 O. S. 122, II Longsdorf's Notes, 640.

(ddd) Disallowance of Claim Once Allowed.

Where claims against the estate of a decedent were allowed in due course by the administrator, but were subsequently disallowed by the administrator *de bonis non*, a suit for the allowance of such claims can be maintained if brought under G. C., § 10724 within six months after their rejection: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821; affirmed, without opinion, *Glenn v. Eicher*, 81 O. S. 553].

No suit by holders of claims which have been allowed is necessary to preserve their right to participate in the assets of the estate, and G. C., § 10746 is not applicable to a claim which has been allowed, until it has been reconsidered and disallowed: *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102 [affirmed, *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821].

Where a claim against an estate is allowed by the administrator after it had been barred by G. C., § 10746, and afterwards disallowed by the administrator, such allowance is a nullity, and the four years' limitation provided by said section having already run can not be revived to run again from the time of such disallowance: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

Where after a claim against an estate has been disallowed by the administrator *de bonis non*, no action was commenced thereon for nine months and ten days after such disallowance, the claim is barred by G. C., § 10724: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

(eee) Extension of Time.

Money arising from the sale of land possessed by the decedent at the time of his death, and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the intestate, under an arrangement made to save their lands from sale, are not new assets within the meaning of § 104 of the administration law, and will not extend the four years limitation within which creditors are required to sue: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

G. C., § 10746, bars actions against an executor of solvent estates on claims due within two years in which judgments are to be levied on assets of the estate coming into his hands during the two years. It does not bar actions against him, judgments in which are to be levied on new assets coming into his hands after the expiration of two years: *Smith v. McIntyre*, 13 O. F. D. 14, 37 C. C. A. 177, 97 Fed. 585.

The proceeds of decedent's land sold to pay debts and rents in the administrator's hands received from a guardian of the heirs to save their land from sale, are not new assets which will extend the four years' limitation for suing administrators: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

Allowing further time to settle the estate does not prolong the four years' limitation for suits: *Gilbert v. Little*, 2 O. S. 156, I Longsdorf's Notes, 1036.

Where the appointment of an administrator is revoked by the probate court, but on appeal the administrator is restored to his office and duties, the period during which he was suspended from his office is to be deducted in fixing the two years' limitation for the bringing of an action against him as such administrator: *Badger v. Orr*, 1 O. C. C. A. 49.

(fff) Form and Construction of Statute.

Our statute forbidding suit by a creditor against an administrator after four years from the time of giving bond is a transcript of the Massachusetts section: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

Creditor here is a generic term, including all who have rights of action against the decedent: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

G. C., § 10724 and the preceding § 10722, providing as to suits on claims rejected by an administrator being in *pari materia* should be read together and receive the same construction; and § 10724 should be construed as if it contained the words "or be forever barred

from maintaining an action thereon": *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

The purpose of G. C., § 10746, providing that suits against executors or administrators shall be barred, unless commenced within four (now two) years from the time of their qualifications as such and of statutes of this character is to fix the status of the estate and property of decedents so that persons may buy it and deal with it freely and safely, and after claims are barred under such statutes, it should not be possible to review or revive them so as to sweep away property of others acquired from the heirs or estate: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

An action was commenced against D in 1879. October, 1895, D died, and, within a few days an executor was duly appointed and qualified. Without reviving the action or making the executor a party, judgment was rendered against D in May, 1899. In 1900 suit was brought thereon against said executor to recover the amount of such judgment. At the time the action was commenced against D, and until April 8, 1898, the time within which an action could be brought against an executor (with certain exceptions) was limited by G. C., § 10746, to four years. April 8, 1898, said section was amended by limiting the time for commencing such action to two years. It was held that the action against the executor is governed by the limitation in said section as it existed prior to the amendment: *Bevitt v. Diehl*, 12 O. D. (N.P.) 315; *Bevitt v. Diehl*, 12 O. D. (N.P.) 383.

The provisions in the G. C., § 10878, requiring suit to be commenced against the heirs, widow and next of kin of a decedent within one year after the time when the right of action shall first accrue, is not merely a statute of limitation relating to the remedy, but is a necessary qualification of the right to maintain such an action: *Roth v. Hummel*, 1 O. C. C. A. 28.

(ggg) Claim not Filed.

The fact that the treasurer and some of his bondsmen are deceased, and no claim on account of interest earned by public funds coming into his hands was made to their administrators within eighteen months, is not a bar to recovery on the treasurer's bond: *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320.

A surviving husband's distributive share in his deceased wife's personal estate, not asserted until nineteen years after said estate has been accounted for and distributed, is barred by the statute of limitations: *Lamkin*

v. *Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13.

Where, under the doctrine of subrogation, an indebtedness exists in favor of a wife against the estate of her husband, the limitation under G. C., § 10746, of actions by creditors does not operate as a bar against recovery by her administrator of the amount so due: *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821 [affirming, *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102].

The years support allowed a widow under G. C., § 10656, being a preferred claim, is within G. C., § 10746, barring actions against estates not brought within two years of notice of appointment of the personal representative thereof. Accordingly the failure to include a claim for her year's allowance in the inventory of the estate of a deceased widow as a charge against her deceased husband's estate is not ground for an exception against such inventory, more than two years having elapsed since her appointment as executrix thereof: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

It was questioned whether the four years' limitation for suing executors would not apply to an action against the administrator of a surety on a guardian's bond, though no proper demand was made for want of another guardian, since the minor could have had another guardian appointed and a demand made: *Favorite v. Booher*, 17 O. S. 548, II Longsdorf's Notes, 849.

No suit is necessary to prevent the bar of the statute for nonclaim until the validity of the claim is denied: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

Where an executor is also devisee, charged with payment of a legacy, the limitation of actions against executors and administrators does not apply to the legatee's action against him: *Fuller v. McEwen*, 17 O. S. 288, II Longsdorf's Notes, 834.

Where the same person is administrator of the creditor as well as of the debtor estate, no formal presentation or allowance of the claim within four years from the date of the bond of the administrator of the debtor estate is necessary: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

G. C., § 10746 has no application to the case where the executor is also a devisee, and accepts a devise charged by the will with payment of testator's debts. There the law imposes a personal obligation on the devisee to pay such debts, not subject to the above limitation as to time within which an action may be commenced: *Fuller v. McEwen*, 17 O. S. 288, II Longsdorf's Notes, 834.

A trust is terminated by the death of the trustee, and the relation of debtor and credi-

tor thereupon arises, and where the beneficiaries under the trust neglect to demand an accounting by the representative of the trustee, or to file their claims with him, the statute of limitations runs against them and all the restrictions which apply to the filing of claims against the estate of a decedent also obtained against them: *Robson v. Evans*, 13 O. N. P. (N.S.) 326.

(cc) Waiver.

If, within reasonable time thereafter, the administrator informs the claimant that the claim is rejected, the six months' statute will then begin to run. Such rejection may be made by an attorney for the estate acting for the administrator. After the expiration of six months, the administrator can not, by estoppel or in any other manner, waive the statute and thus bind the estate: *Miller v. Ewing*, 68 O. S. 176, IV Longsdorf's Notes, 941.

The general statutes of limitations may be waived by an executor or an administrator, but statutes of limitations with respect to actions against executors or administrators can not be waived: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

An administrator may waive the bar of the statute requiring actions against him to be brought within four years (for present statute see, G. C., § 10746). It goes to the remedy and not to the right: *Joyce v. Hart*, 11 Dec. Rep. 487, 27 Bull. 144.

(dd) Disability.

The two years' limitation within which actions may be brought against an executor or administrator under G. C., § 10746, runs against a creditor, notwithstanding infancy: *Ardrey v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032.

G. C., § 10746, applies to a proceeding for the allowance of a claim of a son against his mother's estate where he himself is executor. And this is true even though the executor has failed to give the statutory notice of his appointment: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

(c) Parties.

In a proceeding for the allowance of a claim of an executor against the estate, a co-executor is not a necessary party: *Downing v. Downing*, 3 O. C. C. (N.S.) 623, 13 O. C. D. 389.

The proceeding provided for by G. C., § 10728 is an action or suit in behalf of the executor, and so far as this proceeding is concerned, he is not the executor of the es-

tate: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

Parties requiring a claim to be rejected and giving bond for expenses of resisting in, under G. C., § 10724, should be made parties to the action on it, for they must make the defense: *Fullerton v. Davis*, 1 O. C. C. 572, 1 O. C. D. 320.

The word "heir" in G. C., § 10724, may be construed to mean devisees and legatees, and as such have the right to file in the probate court a written requisition on the executor to disallow and reject any claim presented for allowance; and such devisees and legatees are proper parties in an action brought upon a claim rejected under such requisition, and have the right to defend against such claim: *Todd v. Todd*, 6 O. C. C. (N.S.) 105, 17 O. C. D. 224.

G. C., § 10775, must be strictly construed. And a judgment creditor of an heir or devisee is not a necessary party to a suit to pay debts of the deceased ancestor or devisor: *Kummer v. Lake*, 1 O. N. P. (N.S.) 209, 13 O. D. (N.P.) 491.

In this state an heir is not a party to a suit to compel the allowance of a claim unless the claim was disallowed upon his requisition: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

A creditor of an estate can sue the administrator to be admitted to share its distribution without first getting judgment on his claim: *Grosvenor v. Austin*, 6 O. 103, I Longsdorf's Notes, 326.

Foreclosure in the common pleas without making the mortgagor's administrator a party will not prevent him from filing a proceeding in the probate court to sell to pay debts: *Bateman v. Morris*, 4 O. N. P. 397, 7 O. D. (N.P.) 387. See also CONFLICT OF JURISDICTION.

For the general discussion of the subject of parties, see PARTIES.

(d) Pleading.

Presentation and disallowance must be averred even though the claim is against a trust fund, supposed to be held separately, and not mingled if the petition fails to show affirmatively that it was so separately held and not mingled: *Milkins v. Charch*, 1 Dayton Term Rep. (Iddings) 82.

In an action against an administrator of an estate on an account alleged to be due from his intestate, it is essential to prove a presentation of such claim to the administrator, and its rejection, or what is equivalent thereto, by him, or to show some other reason why the administrator is liable to be sued, notwithstanding the provisions of G. C.,

§ 10746: *Yager v. Greiss*, 1 O. C. C. 531, 1 O. C. D. 296.

The statute of limitations may be pleaded against a set off of the executor: *Irwin v. Garretson*, 13 Dec. Rep. 704, 1 C. S. C. R. 533.

Where a claimant begins suit within six months after the rejection of the claim, and after the expiration of that period is non-suited, limitations may be pleaded: *Haymaker v. Haymaker*, 4 O. S. 272, II Longsdorf's Notes, 92.

The party claiming the remedy must allege and prove his right to a sum determinate and certain, liquidated by allowance, judgment or award: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015.

But this condition does not apply to an executor who has given bond as residuary legatee: *Stevens v. Hartley*, 13 O. S. 525, II Longsdorf's Notes, 623.

In an action against the estate of a deceased person, it is not necessary to aver or prove that, at the time the claim on which suit is brought was rejected by the executor or administrator, a specific demand was made for the indorsement of his allowance thereon: *Stambaugh v. Smith*, 23 O. S. 584, III Longsdorf's Notes, 147.

A debt due to the administrator himself requires no pleadings for its allowance (G. C., § 10729), but the same rules of evidence and burden of proof as in an action at law apply: *In re Gerke*, Goebel, 289.

An answer sufficiently sets up the bar of G. C., § 10725, providing that after a claim has been rejected upon requisition of an heir or a creditor, the claimant shall be required to bring an action within six months from the time of such rejection, which alleges facts bringing the case within such section, and then alleges that if there was ever anything due from defendant, the right of recovery has long been barred as against defendant: *Crouse v. Frybarger*, 22 O. C. C. 315, 12 O. C. D. 254.

If a note is sued on after fifteen years from maturity, averring its allowance before fifteen years, an answer merely of the statute of limitations is demurrable: *Thomas v. Chamberlain* 39 O. S. 112, III Longsdorf's Notes, 1011.

An answer of failure to sue within six months after rejection and a separate defense that suit was not brought "within the time allowed by law, and was therefore barred," with a statement of facts, showing the lapse of four years before suit, and there is evidence tending to support the four years' bar, it is error to confine the answer to the bars of six months and six years: *Jones v. Jones*, 41 O. S. 417, IV Longsdorf's Notes, 70.

For the general discussion of the subject of pleading, see PLEADINGS.

(e) *Evidence.*

Admissions made by an administrator, respecting a claim against the estate, when not in the act of accepting or rejecting the same, are not admissible in evidence in a suit which is brought after the person making the admission, had been divested of his functions; and the fact that the administrator is one of the heirs does not alter the character of the testimony: *Hueston v. Hueston*, 2 O. S. 488, I Longsdorf's Notes, 1076.

Where the evidence of plaintiff tended to show a presentation of the claim and its return, with no indorsement and no verbal message, but accompanied with a letter which a witness for plaintiff stated was a rejection of the claim, and defendant was not allowed to cross examine such witness as to such letter, or to introduce it in evidence on his cross examination, or afterwards in chief, such action of the court was erroneous: *Yager v. Greiss*, 1 O. C. C. 531, 1 O. C. D. 296.

The plaintiff can not testify to transactions with the testator: *Stevens v. Hartley*, 13 O. S. 525, II Longsdorf's Notes, 623. See also WITNESSES.

An action for recovery of compensation for services rendered by an attorney for the benefit of a decedent during her lifetime and in the settlement of her estate after her death, negative testimony given by persons having a pecuniary interest in the estate, to the effect that they had no knowledge of the rendering of such services, can not be accepted as overbalancing direct and convincing testimony as to the extent and nature of the services, given by the attorney himself and corroborated in large measure by testimony by the executor of the estate: *In re Campbell*, 1 O. C. C. A. 187.

For the general discussion of the subject of evidence, see EVIDENCE.

(f) *Costs.*

Costs can not be included in a judgment on a claim not presented within a year (G. C., § 10737), but each party must pay his own costs: *Roe v. Hunter*, 8 O. N. P. 21, 8 O. D. (N.P.) 423.

In an action against an administrator on a claim for services rendered to deceased in his last sickness, which was not filed with the administrator, and demanded within a year after he qualified, no costs can be recovered: *Roe v. Hunter*, 8 O. N. P. 21, 8 O. D. (N.P.) 423.

Under an old law, where defendant died after suit brought, and the action survived, plaintiff could not recover costs against an executor or administrator: *Farrier v. Cairns*, 5 O. 45, I Longsdorf's Notes, 246.

(g) *Review.*

G. C., § 10724, authorizing heirs to require the administrator to reject a claim and to make a defense thereto, carries the right to prosecute error to any judgment, although they are not parties thereto: *Spaulding v. Allen*, 19 O. C. C. 609, 10 O. C. D. 259.

An heir has no right to prosecute error proceedings to a judgment in an action to compel the allowance of a claim unless the claim was disallowed upon his requisition: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

Where an executor, who is also a devisee, desires to appeal from the finding of the court allowing a claim of his co-executor the filing of a written notice of his intention to appeal is not sufficient, but he must execute an undertaking: *Downing v. Downing*, 3 O. C. C. (N.S.) 623, 13 O. C. D. 389.

Where the commissioners of an insolvent estate (G. C., § 10884) allow to a secured creditor dividends only on such part of his claim as may be left after exhausting his security, this allowance becomes final if the creditor does not appeal to the probate court within ten days (G. C., § 10890), and a refusal by the probate court of a motion made a year afterwards to compel the administrator to pay a dividend on the full claim is not appealable to the common pleas: *Cromwell v. Herron*, 11 O. C. C. 448, 5 O. C. D. 196.

A debt due to the administrator from the estate is not barred by a finding on appeal to the common pleas of a balance due from him and order to pay it to his successor, for by G. C., § 10727, he can not retain any part of the assets to pay his own debt. Hence, he may sue his successor on a claim due from the decedent: *Sharp v. Pontius*, 2 O. C. C. 7, 1 O. C. D. 331.

Where proceedings have been appealed from the commissioner of insolvency to the court of common pleas, the supreme court can not take jurisdiction as an appellate tribunal; such appeal is not a proceeding in chancery: *McCurdy v. Terry*, 14 O. 391, I Longsdorf's Notes, 677.

Where an administrator is ordered by the court to pay a certain sum to a creditor, said sum being the amount of his lien on real estate sold and the administrator, instead of paying, carries the case through the upper courts, but loses, the creditor is entitled to interest on his claim accruing during the litigation: *In re Robb*, 5 O. N. P. 52, 5 O. D. (N.P.) 227.

12. *Arbitration.*

An administrator has a common law power to submit a claim to arbitration, and G. C., § 10718, authorizing submission to referees,

approved by a justice, etc., does not exclude it, but is cumulative: *Childs v. Updyke*, 9 O. S. 333, II Longsdorf's Notes, 378.

The power of the probate judge ceases with his approval of the referees (G. C., § 10718). He is not authorized to receive and act on their report. The reference is to be perfected with the court of common pleas (G. C., § 10721: *Anderson v. Baker*, 15 O. S. 173, II Longsdorf's Notes, 717.

Judgment may be entered summarily on the award under G. C., § 10718, providing for arbitration by executors, etc. Action on it is not necessary: *Bradstreet v. Pross*, 9 Dec. Rep. 154, 11 Bull. 117 [affirming *Pross v. Bradstreet*, 8 Dec. Rep. 731, 9 Bull. 244].

The word "court," in G. C., § 10721, refers to the common pleas, and the report and proceedings are to be disposed of in that court: *Anderson v. Baker*, 15 O. S. 173, II Longsdorf's Notes, 717.

An executor's rejection of a claim does not estop him to submit it to arbitration under G. C., § 10718: *Bradstreet v. Pross*, 9 Dec. Rep. 154, 11 Bull. 117 [affirming *Pross v. Bradstreet*, 8 Dec. Rep. 731, 9 Bull. 244].

An executor's submission of a claim against the decedent's real estate is unauthorized, and the award constitutes no cause of action: *Hart v. Corlett*, 4 Dec. Rep. 181, 1 Clev. L. Rep. 92.

Where the justice of a claim exceeding one hundred dollars is doubted by an executor or administrator, and he enters into an agreement to refer the matter to three disinterested persons, the referees shall be approved by the probate judge; but this does not authorize the probate judge or the probate court to receive the report of the referees, or to act upon it; for when the probate judge approves of the referees, his duty and authority in the matter end, and the reference must be perfected in, and the report of the referees made to the court of common pleas, and there disposed of: *Anderson v. Baker*, 15 O. S. 173, II Longsdorf's Notes, 717.

In a proceeding by an administrator to sell real estate to pay judgments entered upon awards of arbitrators, it is competent for the heir, upon a cross petition in the same proceeding, to attack said judgments for fraud: *Conway v. Duncan*, 28 O. S. 102, III Longsdorf's Notes, 392.

N. POWER TO SETTLE.

When a contract is executory, and the legal title to the property has not passed, the administrator of the deceased party possesses the power to compromise and rescind the contract, where it may reasonably be considered for the interest of the estate to make such settlement; and equity will up-

hold such settlement and will not disturb the contract of rescission: *Ludlow v. Cooper*, 4 O. S. 1, II Longsdorf's Notes, 67.

Where decedent, in his lifetime having a life estate in certain real estate, leased the same for a period of years, which had not expired at the time of his decease, his administrator might lawfully settle with the tenant for the damages resulting to him through being dispossessed of the premises, or pay the remainderman a reasonable sum for the confirmation of the lease for the unexpired term of such lease, and money so expended is properly chargeable to and may be collected from the estate, when it appears that it was manifestly beneficial and entered into in good faith: *Jackson v. O'Brannin*, 14 O. S. 177, II Longsdorf's Notes, 644.

While the personal representative of an estate may, at his discretion, perform or rescind the contract of his intestate, imposing an obligation or duty, as may be for the best interests of the estate, his acts are, as a rule, subject to the approval of the court: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 358.

And the rule is the same whether the agent or attorney acts for such administrator, officially or personally, and whether he acts, in making such settlement, as the attorney of the administrator solely, or for him and others, with a view to their joint profit; for what he may not do singly, the policy of the law will not permit him to participate in doing; and, in either case, the benefits received must inure to the benefit of the estate: *Cow v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

An administrator can not be allowed, directly or through his attorney to compromise, adjust, and settle claims against the estate for which he is acting for less than their face, and put the difference in his own pocket: *Cow v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

XVIII. YEAR'S ALLOWANCE.

A. NATURE.

The allowance for a year's support confers a vested right of property, and is not divested by the widow's death, or any other contingency occurring after the amount has been fixed by the proper tribunal; and the death of the widow, within the year and before the whole amount has been expended in her support, does not bar the right of her executor or administrator to recover the balance unpaid from the representative of her husband's estate: *Dorah v. Dorah*, 4 O. S. 292, II Longsdorf's Notes, 93.

The year's allowance is a debt of the estate, which, on payment by an executrix, is a proper credit in her account: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

The year's allowance is a debt, and is not barred by the widow's election to take under a will which leaves her about half the realty absolutely, and the other half with the undisposed of personalty in trust to be used for the good of the children and to divide when the youngest comes of age: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

The year's allowance is not a debt of the decedent, though it is a debt of the estate: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884 [explained in *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693].

G. C., § 10714, is an express declaration that the year's allowance to a widow is a debt of the estate, and that she is a creditor thereof: *Whitely v. Weber*, 2 O. C. C. 338, 1 O. C. D. 517.

The widow of a bankrupt is entitled to certain articles, or their equivalent in money, and allowance for a year's support for herself and children: *In re Parschen*, 119 Fed. 976, 13 O. F. D. 443.

The law making it the duty of appraisers of the estate of a decedent to make provisional allowance for his widow, owes its existence to a humane consideration for the distress and helplessness of widows newly bereaved, and has the same foundation as the homestead and exemption law, and this allowance is to be allowed under all circumstances, and should be treated as a debt of the estate: *Neely v. Neely*, 1 O. N. P. (N.S.) 97, 48 Bull. 929.

Lands descend subject to year's allowance if the personalty is insufficient to pay debts, see *Carr v. Hull*, 65 O. S. 394, IV Longsdorf's Notes, 888.

A mortgage executed by a widow upon the real estate of her husband, after his death, while a lien upon her dower interest, does not become a lien upon her first year's allowance; nor can the widow, by any act of her own, prevent the appraisers from setting off to her provisional support, or the administrator from paying it as a preferred debt out of the funds in his hands: *Neely v. Neely*, 1 O. N. P. (N.S.) 97, 48 Bull. 929.

The doctrine of estoppel does not apply to a widow as against funds in the hands of the administrator: *Neely v. Neely*, 1 O. N. P. (N.S.) 97, 48 Bull. 929.

On executor's sale to pay debts, the year's allowance, being a debt, must be postponed to judgment liens, by reason of G. C., § 10809; although in all other cases it is by G. C., § 10714, a preferred debt: *Jones v. Allen*, 6 O. N. P. 518, 8 O. D. (N.P.) 338.

The mortgagee of a defective title is not entitled to subrogation against the first year's allowance of the widow: *Dienst v. Loan and Banking Co.*, 10 O. C. C. (N.S.) 46, 20 O. C. D. 537.

The statutory provision for the setting off of a year's support for widow and minor children is mandatory: *Evans v. Evans*, 9 O. N. P. (N.S.) 589, 20 O. D. (N.P.) 676 [affirmed on other points *Evans v. Evans*, 13 O. C. C. (N.S.) 62, 21 O. C. D. 635].

B. RIGHT TO YEAR'S ALLOWANCE.

1. Postnuptial Contract.

A post-nuptial agreement by which a wife agrees to support herself and make no claim on the estate does not bar the year's support: *Garretson v. Garretson*, 4 O. C. C. 336, 2 O. C. D. 581 [affirmed, without opinion, *Garretson v. Garretson*, 29 Bull. 220].

A contract releasing the right to a year's allowance may be made by a woman with her husband while living provided he leaves no minor children: *In re Roth*, 6 O. N. P. 498, 9 O. D. (N.P.) 429.

Where a husband during coverture makes a provision for his wife, in full of all her claims as widow against his estate, including her right to dower, which she accepts, and he dies intestate, she is not thereby barred of her right to the year's support provided by law, out of his estate: *Spangler v. Dukes*, 39 O. S. 642, III Longsdorf's Notes, 1056.

2. Antenuptial Contract.

Whether an ante-nuptial contract, making provision for the wife in case of her survivorship and expressed to be in satisfaction of her share of the personal estate of her husband, will operate as a bar in equity to her year's support, was questioned in *Lowe v. Phillips*, 14 O. S. 308, II Longsdorf's Notes, 660.

The year's allowance may be barred by ante-nuptial agreement to that effect in consideration of marriage where each party has sufficient property for support and desires to keep it separate and each agrees to make no claim of curtesy, dower, year's allowance, etc., and there are no children of the marriage, and neither had minor children living at the time of the husband's death: *Broadstone v. Baldwin*, 5 O. N. P. 39, 8 O. D. (N.P.) 236. See also HUSBAND AND WIFE.

3. Gift by Will.

An election to take under a will which requests that no appraisement be made, whereby no year's allowance was set off, does not waive the right to demand the year's allowance, but the appraisement may be obtained

at any time while the estate remains unsettled: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

A clear intention in a will that a provision shall be in lieu of year's support will, under G. C., § 10572, exclude the allowance if the widow elects to take under the will: *In re Witner*, 7 O. N. P. 143, 10 O. D. (N.P.) 30.

A provision in a will in lieu of dower and all other claims does not bar the right of a year's support: *Collier v. Collier*, 3 O. S. 369, II Longsdorf's Notes, 35.

A widow inherited a large personal estate from her husband, there being no children. The debts of the estate were comparatively inconsiderable. She was made his administratrix, but made no claim for administering the estate nor for an allowance as widow. She died intestate with respect to property which had come from her husband, much larger in amount than the compensation and allowance combined. It was held that under the circumstances, she must be considered as having waived the allowance and the compensation: *In re McDermott*, 13 O. D. (N.P.) 390.

4. Jointure.

A jointure made and accepted during coverture, in full of all claims as widow including dower, does not bar the year's allowance: *Spangler v. Dukes*, 39 O. S. 642, III Longsdorf's Notes, 1056.

5. Payment of Distributive Share.

That a child has received its distributive share of the estate does not bar a subsequent claim for an allowance for year's support: *Banase v. Muhme*, 13 O. C. C. 501, 7 O. C. D. 224.

6. Separation and Divorce.

Immorality and separation on the part of the wife does not forfeit her right to the year's allowance. Divorce alone terminates the right: *In re Diller*, 5 O. N. P. 255, 6 O. D. (N.P.) 182.

Separation of the couple so that the wife is not actually of the husband's family disentitles her to the allowance, unless she can show that it was not her fault nor her wish. In such case another woman living with decedent and believing herself to be his lawful wife, can receive the allowance, though there had been no dissolution of the first marriage: *In re Roth*, 6 O. N. P. 498, 9 O. D. (N.P.) 429.

The fact that a husband and wife separate, and live apart for a number of years, does not destroy the wife's right of allowance from the estate as widow, unless divorced, the wife at his death is entitled to a year's

support and the articles of personal property mentioned in the statute: *In re McMillen*, 8 O. C. C. (N.S.) 294, 18 O. C. D. 645.

Under the laws of Ohio a widow is entitled to have an allowance for a year's support made by appraisers, notwithstanding a fair agreement of separation between the husband and wife: *Knese v. Hake*, 16 O. D. (N.P.) 466, 3 O. L. R. 610.

7. Death of Widow.

Where the appraisers neglect to set off to the widow her allowance for a year's support, and she, after the expiration of the year, dies without having waived or relinquished her right to such allowance, the right to the same survives to and may be recovered by her personal representative: *Bane v. Wick*, 14 O. S. 505, II Longsdorf's Notes, 681.

In a suit by the distributees of the husband's intestate personalty against his executors, who are the wife's residuary legatees, and her executors are also made defendants, the executors can retain an amount for the year's allowance, to be ascertained by the master in taking the account: *Bane v. Wick*, 14 O. S. 505, II Longsdorf's Notes, 681.

Death of the widow after her year's allowance is fixed does not bar her administrator's right to recover any balance of it unpaid. The allowance once fixed is a vested right except so far as the court may have power to alter it: *Dorah v. Dorah*, 4 O. S. 292, II Longsdorf's Notes, 93.

A widow dying intestate having inherited from her husband, there being no children, a failure to claim during her lifetime was held to be waiver of her year's allowance: *In re McDermott*, 13 O. D. (N.P.) 390.

8. Set-off.

A debt due from the widow for the purchase of assets should be deducted from the year's allowance: *White v. Moe*, 19 O. S. 37, II Longsdorf's Notes, 924.

When a widow has consumed property of the estate greater in value than the year's allowance made for the benefit of her estate, after her death, the allowance will be held to have been paid: *In re McDermott*, 13 O. D. (N.P.) 390.

9. Lapse of Time.

A year's support allowed a widow under G. C., § 10656, being a preferred claim, is within G. C., § 10746, barring actions against estates not brought within two years of notice of appointment of the personal repre-

sentative thereof. Accordingly the failure to include a claim for her year's allowance in the inventory of the estate of a deceased widow as a charge against her deceased husband's estate is not ground for an exception against such inventory, more than two years having elapsed since her appointment as executrix thereof: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

Lapse of time (seven years) alone does not waive the right to demand the year's allowance: *Rierdon's Estate*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

Demand not necessary to secure the year's allowance, and mere lapse of time is no waiver of the right to same. If the allowance has never been set off, because of no appraisalment made, on the widow's application an appraisalment will be ordered any time while the estate remains unsettled. And the appraisers, in making this allowance, will take into consideration any part of the estate which the widow has used for her support: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

The settlement made by an administrator will not be opened up forty years after the estate was closed in order to let in the claim of the widow for her first year's support, where no such claim was asserted at the time the estate was being settled: *Evans v. Evans*, 13 O. C. C. (N.S.) 62, 21 O. C. D. 635 [affirming *Evans v. Evans*, 9 O. N. P. (N.S.) 589, 20 O. D. (N.P.) 676, and affirmed, without opinion, *Evans v. Evans*, 83 O. S. 482].

If a year's allowance is set off to the widow and minor children by appraisers such year's allowance becomes a debt of the estate and it is not barred by G. C., § 10746, which requires actions by creditors to be commenced within eighteen months from the time of giving bond: *In re Patterson*, 58 Bull. 305.

10. Waiver.

If testator's widow is administratrix of his estate and with knowledge of the facts makes distribution without paying to herself her year's allowance such conduct is a waiver of her right to her year's allowance: *In re Patterson*, 58 Bull. 305.

C. RIGHT OF CHILDREN TO ALLOWANCE.

Apportionment of the year's allowance where a minor child does not live with the widow, but with his guardian, may be made by the appraisers, and if they fail the court has power under G. C., § 10656, to do so: *In re Pollard*, Goebel, 216.

Children under fifteen are entitled to have set off and allowed to them, out of the estate

of their deceased mother, provision for twelve months' support, in like manner as out of the estate of their deceased father: *In re Hinton*, 64 O. S. 485, IV Longsdorf's Notes, 876 [reversing *Hance v. Chappell*, 20 O. C. C. 214, 11 O. C. D. 139; *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397].

A child under fifteen which has never been a resident of Ohio is entitled to a year's support out of its father's estate, and this besides its distributive share out of the estate: *Banse v. Muhme*, 13 O. C. C. 501, 7 O. C. D. 224.

That a child is foreign born and a foreign resident does not disentitle it to a year's support, that being merely a continuance of the parent's general duty to support: *Banse v. Muhme*, 13 O. C. C. 501, 7 O. C. D. 224.

If a husband conveys his property to his children without any intent to defeat his divorced wife's year's allowance except as it may be implied from the transaction, and being out of debt, the gift can not be set aside by his administrator for the purpose of paying a year's allowance: *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693.

If the widow and children do not live together and the appraisers have not apportioned the year's allowance between the widow and the minor children the court will apportion the same as seems fair and equitable: *In re Patterson*, 58 Bull. 305.

If the widow does not support the minor children during the first year after her husband's death the amount to be apportioned to such children as their allowance for a year's support does not vest in the widow but in the children: *In re Patterson*, 58 Bull. 305.

D. PROCEDURE.

The probate court has original and exclusive jurisdiction over an application for a year's allowance to a widow: *Moore v. Idler*, 6 O. C. C. (N.S.) 19, 16 O. C. D. 502.

An administratrix who is the widow of the deceased and who appears in court to resist a claim of a creditor to reduce the amount of her one year's allowance, can not object to the creditor testifying to facts which occurred previous to the death of her husband on the grounds that she is the administratrix and that G. C., § 11495, forbids an adverse party testifying against an administratrix as to such facts: *In re Rahe*, 12 O. D. (N.P.) 500.

The question whether the person claiming to be the widow of a decedent is in fact his widow, and therefore entitled to an allowance from his estate for her first year's support, should be raised by exception to the inventory, and the finding of the probate court with reference thereto is appealable to

the court of common pleas: *In re Scott*, 8 O. N. P. (N.S.) 279, 19 O. D. (N.P.) 577.

E. AMOUNT.

A year's allowance in money set off to the widow and children to support them for twelve months from the death of the husband and father, under G. C., § 10657, is excessive when it is more than twice as much as the family have lived on previously, particularly when the result of so large an allowance is to prevent the payment of the decedent's debts in full. If previous to the death of the decedent, the family were supported by him in a reasonable manner according to his income, the allowance should not be more than the amount of the previous annual expenses: *In re Rahe*, 12 O. D. (N.P.) 590.

Insolvency of the husband, while it does not have a controlling effect on the amount of the widow's allowance, yet must be considered as one of the elements, and the allowance should not have been more liberal by reason thereof: *In re Mullen*, 5 O. N. P. 392, 6 O. D. (N.P.) 134.

Though twenty years have elapsed the amount of the allowance is to be governed by the circumstances of the parties at the husband's death: *In re Howland*, 7 O. N. P. 665, 5 O. D. (N.P.) 582.

If any part of the estate has been used by the widow for her support, the appraisers must take this into consideration in making the year's allowance (G. C., § 10656): *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

Opinion evidence as to probable expense of maintaining the house is incompetent: *In re Rahe*, 12 O. D. (N.P.) 590.

F. FUND FROM WHICH PAYABLE.

If there are creditors defrauded by a fraudulent conveyance, and the grantor's administrator recovers the property, it is to be treated as intestate property, and inures to all the distributees, and thus the year's allowance to widow and children can be paid out of it: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884 [explained in *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693].

The allowance for the support of the widow for one year is such a debt of her husband's estate, that resort may be had, for payment of same, against land conveyed away by deceased for the purpose of defrauding his creditors: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884.

The year's allowance to the widow, under G. C., § 10656, can only be made out of the estate of a deceased resident of Ohio, and not in an ancillary administration out of

the property in this state of a deceased non-resident: *McCalla v. McCalla*, 46 Bull. 280.

Fifteen years after the husband's disappearance, the probate court appointed an administrator, who collected a claim of \$174.21 due the husband. Later the husband reappeared and demanded this sum of the person from whom it had been collected. It was held that the presumption was that the money was paid to the wife, who was entitled to a year's support on the supposition that her husband was dead: *Brent v. First*, 41 O. S. 436, IV Longsdorf's Notes, 70.

G. REVIEW.

A paper styled a motion that sets forth sufficient facts to justify a probate judge in reviewing the allowance made to the widow and children, is a sufficient compliance with G. C., § 10659, which provides that a petition shall be filed for that purpose; for the court is only asked to make an order in the premises, and a motion is all that is necessary to obtain an order from a court. When such a motion is overruled by the probate court the party who filed it can not be deprived of his appeal to the common pleas court on the ground that he did not file a petition as required by G. C., § 10659, for the paper was all that section requires: *In re Rahe*, 12 O. D. (N.P.) 590.

The allowance provided for by G. C., § 10656, may be reviewed and increased for the benefit of the estate of the widow by the probate court, under G. C., § 10659, on petition of a "person interested": *Sherman v. Sherman*, 21 O. S. 631, III Longsdorf's Notes, 48.

Overruling the widow's application to review the year's support, under G. C., § 10659, as allowed by the appraisers, is *res judicata* as to all persons interested, and bars a further application: *Moore v. Moore*, 46 O. S. 89, IV Longsdorf's Notes, 314.

The review of the year's allowance on petition of a person interested may be asked, after the year and the widow have both expired: *Sherman v. Sherman*, 21 O. S. 631, III Longsdorf's Notes, 48.

A person with whom the widow lived during the twelve months, and until her death, and who supported and took care of her, and incurred expense for her in sickness, and who has a valid claim therefor against her estate, is a "person interested," within the meaning of G. C., § 10659: *Sherman v. Sherman*, 21 O. S. 631, III Longsdorf's Notes, 48.

As the law was before the amendment of G. C., § 11206, by the act of April 15, 1882, if the probate court neither increased nor diminished the allowance set off by the ap-

praisers for the year's support of the widow and minor children, but confirmed it, there is no right of appeal from said order to the court of common pleas: *Reidermann v. Tafel*, 9 Dec. Rep. 393, 12 Bull. 284.

The probate court refused to set aside a year's allowance to a widow as barred by an ante-nuptial contract, holding that it had no jurisdiction to determine the validity and effect of such contract, and it was also urged that such allowance is a debt which can not be barred by prior contract, either as to herself or children. The ruling was affirmed: *Baldwin v. Broadstone*, 35 Bull. 161.

The court may increase or decrease the allowance, but it has not original jurisdiction to fix same: *In re Roth*, 6 O. N. P. 498, 9 O. D. (N.P.) 429.

The proper method to have the allowance reviewed is by petition, and not by exception to the inventory under G. C., § 10639: *In re Rierdon*, 5 O. N. P. 516, 5 O. D. (N.P.) 606.

XIX. MANSION HOUSE.

The widow's right to remain in the mansion house is not restricted to personal occupancy. If the administrator denies her right and rents it, she is entitled to the rent. If he has collected the rents and paid debts with them, she may charge him personally or as administrator and that he may be personally held is no defense to an action against him as representing the estate: *Conger v. Atwood*, 28 O. S. 134, III Longsdorf's Notes, 393.

XX. DISTRIBUTION.

A. INTEREST OF DISTRIBUTE.

The distributee's right vests at the death, subject to administration. Upon his death, before distribution the right passes to his personal representative: *Armstrong v. Grandin*, 39 O. S. 368, III Longsdorf's Notes, 1037.

The widow's share of personalty vests immediately on the husband's death intestate, though the statute of descents provides what she shall get on distribution, accordingly her administrator takes if she dies before order of distribution: *Conger v. Barker*, 11 O. S. 1, II Longsdorf's Notes, 475.

Children of a deceased heir take their share in personalty subject to the burdens that would have been valid against the heir: *Martin v. Martin*, 56 O. S. 333, IV Longsdorf's Notes, 691.

A widow or widower is not entitled to interest on the distributive share in personalty, because the distributive share can not be known until the amount of personal prop-

erty subject to distribution has been ascertained and the distributive share computed therefrom: *Hutchings v. Davis*, 68 O. S. 160, IV Longsdorf's Notes, 941 [distinguishing *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821].

A legacy bears interest from one year after notice of executor's appointment: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821 [affirming *Case School v. Gray*, 15 O. C. C. 488, 8 O. C. D. 241].

That part of the funds in the hands of an executor which represents the value of the widow's dower is entitled to share the interest earned, *pro rata* with the rest of decedent's estate: *In re Arnold*, 10 O. N. P. (N.S.) 167, 47 Bull. 616, 48 Bull. 929.

A testator gave to his wife all that part and interest in his estate, real, personal and mixed, which is secured to her, as his widow, by the laws of distribution of estates of the state of Ohio, in the cases where wives survive husbands who die intestate, and gave, absolutely, the remainder of his property, real, personal and mixed, to his brother. It was held that, under this will, the widow took her dower interest in the real estate of the testator, situated in Ohio, one-half of the first four hundred dollars and one-third of the remainder of the personal property subject to distribution, the use of the mansion house, under the provisions of G. C., § 8607, and the year's allowance provided for in G. C., § 10656, and that the remainder of the estate, real, personal and mixed, went to the brother: *Foster v. Clifford*, 87 O. S. 294 [reversing *Clifford v. Foster*, 14 O. C. C. (N.S.) 391, 23 O. C. D. 429].

B. INTEREST OF EXECUTOR.

Where a testator vests in his widow a life estate in his lands, with the provision that within a reasonable time after the death of his widow certain land shall be sold by the executors named in the will and the proceeds divided equally between his five children, or if any of his children should die before distribution the share of such child or children should go to his or their heirs, "so that the proceeds of said lot may vest in my children and their heirs forever," the power given to the executors with respect to conferring title is a power coupled with an interest and vests the fee in the executors: *Knisely v. Young*, 15 O. C. C. (N.S.) 49, 23 O. C. D. 439.

C. TIME.

The debts of an estate must be paid before distribution to heirs; and distribution made to heirs upon the advice of counsel and probate judge, is made at the peril of

the administrator. If the estate proves solvent, he should be credited with such distribution, but if insolvent, he should not receive such credit: *James v. West*, 67 O. S. 208, IV Longsdorf's Notes, 923.

An order of distribution to an executor made in less than thirty days after filing his account (G. C., § 10848) is without jurisdiction and a motion to vacate lies: *In re Cloud*, 7 O. C. C. 67, 3 O. C. D. 666.

There is no rule as to distribution kindred to that relating to legacies. The distribution is to be made when the court orders it done, and not before. The amount to be distributed can not be fixed until the court passes upon the accounts of the executor and determines how much is to be charged to him and for what amounts he is to be credited: *In re Hutchins*, 21 O. C. C. 720, 12 O. C. D. 29 [reversing, on other grounds, *Hutchins v. Davis*, 68 O. S. 160, IV Longsdorf's Notes, 941].

The probate court may pass on and order payment of a legacy before final distribution and before the four years in which a claim can be sued on have elapsed, the legatee giving indemnity: *Disney v. Haives*, 9 Dec. Rep. 406, 12 Bull. 322; *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

Distribution of an estate will not be delayed by reason of a contingent claim arising from decedent's having signed a title bond to protect a defective title to land sold. The remedy at law is adequate in case the title proves defective: *In re Bates*, 7 O. N. P. 625, 5 O. D. (N.P.) 545.

Legatees are entitled to demand payment of their legacies within the time limited for the presentation of the claims of creditors, upon a satisfactory showing to the probate court, and the giving of an undertaking to the executor, if any be required by the court: *In re Isherwood*, 7 O. N. P. 332, 5 O. D. (N.P.) 143.

D. ORDER OF COURT.

1. Form and Effect of Order.

An order to an executor with reference to the distribution of the fund in his hands should merely direct him to pay it out in accordance with law and the provisions of the will, any further directions as to whom the fund is to be paid is inoperative and void: *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370 [modifying and affirming *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803].

There is no authority to designate by name or otherwise the person entitled to receive the funds to be distributed, and such designation, if made, is void and of no effect: *Arm-*

strong v. Grandin, 39 O. S. 368, III Longsdorf's Notes, 1037; *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

The probate court under G. C., § 10848, can make a general order for distribution, but it can not make specific distribution to heirs or creditors by name: *In re Miller*, 12 O. D. (N.P.) 562.

An order of court to distribute a remaining fund "to the next of kin and representative according to the statute," which statute gave the whole fund to the widow, can not be construed to bar her right, although the same order describes the heirs and representatives as "next of kin and distributees": *Armstrong v. Grandin*, 39 O. S. 368, III Longsdorf's Notes, 1037.

An executor or administrator is protected by the order of court compelling him to make payment to certain distributees, and such record may be used as evidence in a subsequent suit for the same money, by one who was not a party to the original suit: *Jackman v. Wasignary*, 56 Bull. 1.

A mortgagee is entitled to be recognized in the order of distribution, but can not have an order of sale on his mortgage, the court's powers being only what the statute confers in special proceedings: *Harlan v. Roberts*, 2 Dec. Rep. 473, 3 W. L. M. 202.

In an action brought under G. C., § 10870, a general finding of a balance in the hands of the executor or administrator and an order to distribute the same according to law, is not a sufficient foundation for the action; but the specific amount, if any, due to the plaintiff must have been first fixed by a court of competent jurisdiction as provided by law: *Henry v. Doyle*, 82 O. S. 113.

2. Power to Order Distribution.

Formerly, one executor could compel distribution as against another executor, or as against the representative of a deceased executor, by a bill in chancery: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

Formerly any creditor could compel distribution by a bill in chancery. So a surviving partner could compel distribution by the administrator of a deceased partner: *Grosvenor v. Austin*, 6 O. 103, I Longsdorf's Notes, 326.

An order to an executor with reference to the distribution of the fund in his hands should merely direct him to pay it out in accordance with law and the provisions of the will, any further directions as to whom the fund is to be paid is inoperative and void: *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370 [modifying and affirming *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803].

An affidavit filed by the widow of the testator to whom a life estate has been given with a contingent remainder over "to be distributed in accordance with the laws of the state" in lieu of a final account, and published as notice of a final account, was not notice to anybody of a proceeding for a construction of the will or determination of the rights of the devisees under the will; and the action of the court in confirming the account was not intended to and did not have the effect of determining who were the distributees under the will or under the law: *Carnes v. McAfee*, 11 O. N. P. (N.S.) 517.

Claims which no creditor is asserting are not to be provided for by the probate court on final settlement: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

Where there are no other outstanding claims, a provision for the payment of an annuity does not stand in the way of final distribution, when it appears that the annuitant has for a valuable consideration transferred to the parties entitled to the corpus of the estate his entire right, title and interest therein: *Deposit Co. v. Kirby*, 17 O. D. (N. P.) 194, 4 O. L. R. 304.

The account of an executor must be filed thirty days before an order of distribution can be made by the probate court, and all parties interested can be brought before it for the purpose of determining who shall share in such distribution: *In re Cloud*, 7 O. C. C. 67, 3 O. C. D. 666.

3. Power to Determine Distribution.

The probate court has no jurisdiction under G. C., § 10492, to determine who are the distributees of the estate and the amount due each. Its power is exhausted by making a general order to distribute: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

The probate court is without jurisdiction to determine to whom the estate of a decedent shall be distributed, but is limited to questions of amount each heir is to receive: *Skardon v. Robinson*, 8 O. L. R. 412, 55 Bull. 373.

The court has power on final settlement only "to order the distribution." This gives it no power to designate the distributees or determine the amount due each: *Swearingen v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671; *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649; *Armstrong v. Grandin*, 39 O. S. 368, III Longsdorf's Notes, 1037.

Today, the settlement of estates is with the probate court, and a creditor can not, at his option, transfer such settlement to another court: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

An act (of 1853) giving the probate court exclusive jurisdiction to enforce distribution of decedent's estates is constitutional. While this authorizes the court to determine every disputed question of fact by itself or a jury, and to enforce its order by execution, yet it does not give the court jurisdiction of an original petition to compel the administrator to pay the amount due under its order of distribution. It is only enforceable by an execution in that court—to enforce it as a debt of record must be by other proceedings: *McLaughlin v. McLaughlin*, 4 O. S. 508, II Longsdorf's Notes, 126.

The probate court has jurisdiction of a legatee's petition to compel executors to pay over a balance of the legacy before the time for final distribution, and in a proper case even before the time for debts to be proven has elapsed, as where there are probably no debts and abundant assets and a great necessity: *In re Isherwood*, 7 O. N. P. 332, 5 O. D. (N.P.) 143.

The probate court, under G. C., § 10848, conferring power to make distribution, can make a general order therefor; it can not make specific distribution to heirs or creditors by name: *In re Miller*, 12 O. D. (N.P.) 562.

The probate court has jurisdiction of the person of the administrator until his accounts are settled. And that jurisdiction is not ousted by the fact that the court orders his removal and appoints a successor: *In re Morrison*, 68 O. S. 252, IV Longsdorf's Notes, 943.

The probate court can not determine the state of accounts between the administrator and distributees and determine the validity of offsets due the administrator. This can be inquired into when a distributee seeks to enforce the order of distribution: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

The equity powers of the probate court which would enable it to find that trust funds were mixed with the estate and to declare them a preferred debt not having been put exclusively in that court leaves the common pleas jurisdiction over such question as concurrent or cumulative: *Harvester Co. v. Keifer*, 20 O. C. C. 311, 11 O. C. D. 270.

In an action under G. C., § 10848, to compel distribution the probate court must determine, as a matter of evidence, who are the rightful distributees of the estate, and is not limited to fixing the amount due to each: *Jackman v. Wasignary*, 56 Bull. 1.

The probate court has power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate. Legatees are entitled to payment of legacies before expiration of four (4) years within which creditors' claims may be pre-

sented: *Disney v. Hawes*, 9 Dec. Rep. 406, 12 Bull. 322.

G. C., § 10855, provides that the court of common pleas shall have concurrent original jurisdiction with the probate court in all cases provided for in G. C., §§ 10848 to 10853. There is no appeal: *In re Correy*, 4 O. C. C. 220, 2 O. C. D. 510.

G. C., §§ 10848 to 10858, were designed to confer on the probate and common pleas courts the power of enforcing an order of distribution. It does not exclude the remedy provided for a legatee by G. C., §§ 10762 and 10870. It is merely cumulative to the latter sections: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

The common pleas can adjudge as between a creditor and an assignee of a distributee, claiming adversely to each other on interpleader: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

An attempt on the part of the circuit court to specifically distribute funds in the hands of an administratrix is *ultra vires* and void. The probate court has no jurisdiction in the matter, and hence the higher court can not obtain such authority by appeal: *In re Maholm*, 51 Bull. 209 [affirmed, without opinion, *In re Estate Maholm*, 72 O. S. 679].

The superior court, by virtue of its chancery powers, has jurisdiction of an action on behalf of one or more heirs, to compel an administrator to render an account of his administration and distribution of an estate: *Cadwallader v. Longley*, 12 Dec. Rep. 756, 1 D. 497.

Personalty has no situs and its distribution, except to pay debts, is governed by the *lex domicilii* of the owner: *Swearingen v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671.

The settlement of a final account showing payment of money to a person not entitled thereto (as to the child of a deceased legatee instead of the legatee's administrator) is no bar to a subsequent action against him for the recovery of the money by one who is legally entitled to the same: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

4. Necessity.

An executor as such has no power before final settlement to turn over, without an order of the probate court, notes held by the estate to a creditor of the estate, and one holding notes so turned over does not have a valid title to them upon which to sue the maker: *Surety Co. v. Haughton*, 13 O. C. C. (N.S.) 523, 22 O. C. D. 138.

So long as an estate remains unsettled, or at least until order of distribution is made, the property held by an executor or an ad-

ministrator is in the custody of the law, and does not vest in or become the property of the heir or legatee: *Orlopp v. Schueller*, 72 O. S. 41 [reversing *Orlopp v. Schueller*, 4 O. C. C. (N.S.) 611, 16 O. C. D. 127].

5. Method of Enforcement.

(a) In General.

G. C., §§ 10848 to 10860, were designed to confer on the probate and common pleas courts the power of enforcing an order of distribution made by the probate court on the settlement of an account, by an executor, administrator or guardian. It does not exclude the remedy provided for a legatee by G. C., §§ 10762 and 10870. G. C., §§ 10848 to 10858 are merely cumulative to G. C., §§ 10762 and 10870: *Gray v. School*, 62 O. S. 1, IV Longsdorf's Notes, 821.

G. C., § 10848, does not repeal G. C., §§ 10869, 10870 and 10871, which authorize suits on the bond of executor or administrator, but provides a cumulative and more summary remedy for the enforcement of demands against executors and administrators: *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

G. C., §§ 10848 to 10856, furnish a complete and adequate remedy to the next of kin to recover their distributive shares of the estate, where it can be shown that, in respect to any portion of his estate, he died intestate: *Bowen v. Bowen*, 38 O. S. 426, III Longsdorf's Notes, 980.

The proceedings authorized by G. C., §§ 10853, 10854 and 10855, do not exclude an action by the executor, asking a construction of the will, G. C., §§ 10857 and 10858, involving the determination of the rights of legatees: *Davis v. Hutchings*, 15 O. C. C. 174, 8 O. C. D. 52 [reversed, without reference to G. C., § 10855, *Davis v. Davis*, 62 O. S. 411, IV Longsdorf's Notes, 837].

A creditor may maintain a bill in chancery for distribution of decedent's assets against an executor or administrator, before obtaining judgment: *Grosvenor v. Austin*, 6 O. 103, I Longsdorf's Notes, 326.

A creditor's bill will lie to reach an heir's interest in the hands of an executor: *Boswell v. Hall*, 6 O. N. P. 497, 8 O. D. (N.P.) 590.

In a suit brought under G. C., § 10870, by a legatee or other distributee against an executor or administrator, it is necessary to allege and prove a demand upon, and neglect or refusal by, the defendant before the commencement of the action: *Henry v. Doyle*, 82 O. S. 113.

In an action under G. C., § 10870, by a legatee or other distributee against an executor or administrator, a general finding of a

balance in the hands of the executor or administrator and an order to distribute the same according to law, is not a sufficient foundation for the action, but the specific amount, if any, due to the plaintiff must have been first fixed by a court of competent jurisdiction as provided by law: *Henry v. Doyle*, 82 O. S. 113.

An order of distribution by the court has so far the force and effect of a judgment that it may be enforced by execution: *McLaughlin v. McLaughlin*, 4 O. S. 508, II Longsdorf's Notes, 126.

The probate court, having acquired jurisdiction, its findings and judgment are conclusive until reversed or modified or otherwise adjudged erroneous: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

Suit may be brought against an administrator by a distributee, individually, as for money had and received, without naming him as administrator: *Waldsmith v. Waldsmith*, 2 O. 156, I Longsdorf's Notes, 114.

When one of two executors has in his hands the balance remaining for distribution, an action may be maintained against him, without joining his co-executor or administrator: *Negley v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

An order refusing to remove an administrator is not included in the "orders, judgments and decrees," authorized by the act of April 17, 1857: *Ebersole v. Schiller*, 50 O. S. 701, IV Longsdorf's Notes, 523.

Service upon a foreign administratrix can be had by publication or by her voluntary appearance; and the court has full jurisdiction to hear and determine the amount due from the former guardian of the ward, and order the amount paid by such administratrix. The jurisdiction having once attached can not be ousted by removal from state, or by removal of trust property: *Neeting v. Strickland*, 18 O. C. C. 136, 9 O. C. D. 841.

Where the record shows affirmatively that the law in regard to service by publication under G. C., § 10850, has not been complied with, all the proceedings under the same are void and may be set aside on motion of an interested party: *In re Cloud*, 7 O. C. C. 87, 3 O. C. D. 666.

(b) Limitation.

Where the residuum is left to children and their issue, and the executors had published all statutory notices and a grandson by a deceased daughter was, without their fault, unknown to them, but he knew his relationship before decedent died and that he might inherit and could readily have ascertained the fact of death, but did not inform the executors of his existence or make any claim until

eleven years after final settlement, and brought suit for his share eighteen years after final settlement, it was held that his action against the executors is barred: *Stewart v. Welsh*, 41 O. S. 483, IV Longsdorf's Notes, 74.

If a distributee is not known to exist, and the executors close up the estate in good faith, limitations begin to run in their favor against all who knew of the termination of the trust, and a beneficiary without actual knowledge by reason of his own laches, will be treated as having notice: *Stewart v. Welsh*, 41 O. S. 483, IV Longsdorf's Notes, 74.

An action to recover a general legacy is not on a continuing trust and is barred by the statute of limitations: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

An action under G. C., §§ 10848-10854, to recover an unpaid balance in the hands of an administrator is barred by the statute of limitations within six years after the expiration of thirty days from the date of order of distribution: *Lease v. Downey*, 5 O. C. C. 480, 3 O. C. D. 235.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

(c) Review.

G. C., § 10859, is broad enough to allow the court to entertain any appeal from the judgment of the probate court. But the circuit court has decided that G. C., § 10859, refers only to cases in which it is sought to make the executor or administrator pay upon proceedings in settlement of estates: *Kislingbery v. Donovan*, 8 O. N. P. 476, 11 O. D. (N.P.) 535.

G. C., § 10859, only relates to proceedings brought in the probate court, against an executor or administrator, under G. C., §§ 10848, *et seq.*: *Barr v. Closterman*, 2 O. C. C. 387, 2 O. C. D. 251 [affirmed, without opinion, *Closterman v. Barr*, 27 Bull. 392].

Where a case pending in the probate court is reversed and sent to the common pleas court, no appeal will lie from the final judgment to the circuit court: *In re Correy*, 4 O. C. C. 220, 2 O. C. D. 510.

E. PAYMENT.

1. Method of Payment.

A distributee having for her own purposes accepted the individual check of one of two joint executors for her distributive share and gives a receipt in full to the executors, who thereupon paid her share with her assent to such executor, whereby it was lost to the estate, can not on dishonor of the check

sue the executors and their sureties, the act of the executor in giving his individual check not being among the duties in the trust: *Riggin v. Creath*, 60 O. S. 114, IV Longsdorf's Notes, 779.

Where, after final settlement, an executor or administrator distributes the balance in his hands to a part only of the distributees, such distribution will not avail him against the claims of such distributees as have not received their share: *Negley v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

Stock bequeathed to a wife for life and then to be distributed according to law, thus giving a contingent remainder to the children vesting at her death, having been exchanged by her for new stock in a reorganized company, it to be taken and distributed after her death by the deviser's administrator *de bonis non* with the will annexed, and not by her administrator: *Carnes v. McAfee*, 11 O. N. P. (N.S.) 517.

The act of April 17, 1857 (S. & C. 619, G. C., §§ 10848 to 10856), furnishes a complete and adequate remedy to the next of kin to recover their distributive shares of the estate, where it can be shown that, in respect to any portion of his estate, the testator died intestate: *Bowen v. Bowen*, 38 O. S. 426, III Longsdorf's Notes, 980.

An executor or administrator can not be compelled to distribute the funds in his hands until the claimant has established his right under the forms of the statutes; he may if he thinks it proper to do so, voluntarily pay out the distributive fund, trusting to be exonerated on the final distributive account: *Henry v. Doyle*, 82 O. S. 113.

Where it appears that the requirement of a bond to protect the executor is provided for in G. C., § 10841, would be a great hardship to the legatee, payment of the legacy without bond may be ordered: *In re Isherwood*, 7 O. N. P. 332, 5 O. D. (N.P.) 143.

The court will not enjoin distribution of an estate because of a contingent claim arising from decedent's having signed a title bond to protect a defective title to land sold. There is an adequate remedy at law: *In re Bates*, 7 O. N. P. 625, 5 O. D. (N.P.) 545.

The power of protecting the administrator in the mode provided by G. C., § 10762, was first conferred on courts of law in this state by the act of March 23, 1840, Swan's Stat. (1841) 360: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

Where there are no debts, G. C., § 10762, does not apply: *Lapham v. Martin*, 33 O. S. 99, III Longsdorf's Notes, 659.

2. Set-off.

The administrator or executor of a decedent's estate has the right and it is his duty

to retain out of the distributive share of an heir or legatee or out of the sum due a creditor, an amount equal to the debt owing to the estate by such heir, legatee or creditor, and this is true whether such indebtedness was to the deceased before his death or to the estate thereafter: *Lambright v. Lambright*, 74 O. S. 198, IV Longsdorf's Notes, 1009.

Children of a deceased heir (in this case children of a deceased brother) take their shares in personalty subject to the burdens that would have been valid against such heir. Accordingly, if he was indebted to the intestate his children's shares are subject to the debt: *Martin v. Martin*, 56 O. S. 333, IV Longsdorf's Notes, 691.

An heir's share of the land is subject to his debts due to the decedent: *Keever v. Hunter*, 62 O. S. 616, IV Longsdorf's Notes, 843.

A distributee's interest is extinguished by his debt to the estate for the amount, and he can not defeat this by assignment of his interest: *Skinner v. Lehman*, 6 O. 430, I Longsdorf's Notes, 348.

A debt due from an heir or legatee is an asset, and where his distributive share will be sufficient to pay it, the administrator must charge himself therewith in full, and so, though the claim is due decedent, as surety for the heir, not reduced to judgment until after decedent's death and not yet paid. The administrator is not required to distribute in full to his heir's estate and present his claim for the debt to the heir's administrator for allowance and dividend: *In re Ellis*, 5 O. N. P. 207, 5 O. D. (N.P.) 330.

While an executor may set off a debt due from a legatee to a decedent and secured by a mortgage upon certain realty belonging to the legatee, a judgment creditor of such legatee whose judgment is a lien subsequent to that of the mortgage can not compel the executor so to apply such legacy; especially if the legatee has in good faith and for value assigned his interest in such legacy to a third person: *Chapman v. Viall*, 19 O. D. (N.P.) 788.

An heir or legatee who owes a debt to the estate can not compel the administrator or executor to pay him his entire distributive share, but the administrator may deduct therefrom the amount of the debt: *In re Ellis*, 5 O. N. P. 207, 5 O. D. (N.P.) 330.

A claim by the executor of the widow for a balance due him on account of costs and debts paid may be asserted against the equitable interest of the widow in the land, but not against the interest of the adopted daughter: *Oglesby v. Rose*, 11 O. N. P. (N.S.) 188, 21 O. D. (N.P.) 291.

A debt owed to the estate by the devisee of specific realty can not be charged thereon

by the executor without judgment and levy like any other creditor: *Woodruff v. Snowden*, 7 O. N. P. 520, 10 O. D. (N.P.) 123.

But a share out of a residuum composed of realty and personalty mixed, which such debt would increase, and is therefore part thereof, is subject to deduction for such debt: *Woodruff v. Snowden*, 7 O. N. P. 520, 10 O. D. (N.P.) 123.

The lien of a magistrate's judgment may be set up in a proceeding in the probate court to sell the property of a decedent to pay debts, where the party against whom the lien was obtained has an interest in the property as an heir: *In re Seitz*, 11 O. C. C. (N.S.) 204, 21 O. C. D. 32.

Set-off of a debt due from a distributee, but barred by limitations in the decedent's life time, can not be had in the distributee's action for his share. Limitations apply to equitable as well as legal claims: *Harrod v. Carter*, 3 O. C. C. 479, 2 O. C. D. 274.

Where under the doctrine of subrogation an indebtedness exists in favor of a wife against the estate of her husband the limitation provided by G. C., § 10746, does not operate as a bar against recovery by her administrator of the amount so due: *Glenn v. Eichor*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821.

A debt due an estate by a son of a testator is superior to a mortgage given by him on his interest in certain lands of his father, to secure another debt, and will be deducted from his legacy upon distribution unless his interest in the lands mortgaged comes by way of a specific devise of such real estate: *Woodruff v. Woodruff*, 3 O. C. C. (N.S.) 616, 13 O. C. D. 408.

In a proceeding brought by an executor under G. C., § 10728, for the allowance and payment of a promissory note held by him, there can not be set-off against said note payments on a policy of insurance made by decedent subsequent to the death of the payee of the note (decedent's wife), to whom he had assigned said policy, said insurance by the death of said payee and by virtue of the statute of descent and distribution (G. C., § 8592) inuring to the benefit of decedent's estate, especially when decedent by codicil gave to payee's children all interest he had in said insurance without abatement on account of such payment: *Claypool v. Claypool*, 4 O. C. C. (N.S.) 577, 15 O. C. D. 327.

A debtor heir, who makes claim on distribution, is required to account to the estate for the debt he owes and the amount he is to receive will depend upon the result of the accounting; if his debt is evidenced by promissory notes, they may in a suit for par-

tition be regarded as advancements, and interest upon them can only be computed up to the date of the death of the ancestor: *Tobias v. Richardson*, 5 O. C. C. (N.S.) 74, 16 O. C. D. 81 [affirmed, without opinion, *Tobias v. Richardson*, 72 O. S. 626].

Where a father, after executing a will containing provision for all his children, furnishes to a son a sum of money, "to be taken out of his estate," the amount thus furnished is properly chargeable against the devise to the son: *Goodson v. Goodson*, 12 O. C. C. (N.S.) 158, 21 O. C. D. 627 [affirmed, without opinion, *Goodson v. Goodson*, 87 O. S. 502].

3. To Whom Made.

Determination as to who shall participate in the estate of a decedent must be made by the executor or administrator on his own responsibility and without the protection of an order of court: *Skardon v. Robinson*, 8 O. L. R. 412, 55 Bull. 373.

Where a devisee of a share in real estate dies before distribution is made, the proceeds from a sale of the property go to his heirs as personalty, and should be paid to his administrator: *Avery v. Howard*, 7 O. N. P. (N.S.) 97, 19 O. D. (N.P.) 71.

The surplus of the proceeds of a sale of real estate by an administrator remaining in his hands on the final settlement of his account, under the statute, is to be considered and disposed of as real estate, and the widow of intestate is not entitled to any part thereof, in her capacity as one of the distributees of the personal estate of deceased: *Griswold v. Frink*, 22 O. S. 79, III Longsdorf's Notes, 59.

The jury must determine from the evidence who the beneficiaries of decedent are, and the pecuniary loss sustained by each: *Traction Co. v. Moeller*, 17 O. D. (N.P.) 22.

Where a resident of this state meets death by wrongful act in New York, and the claim is settled without suit, the proceeds of such settlement are to be distributed under G. C., § 10773, and the father of deceased would not be entitled to share with the wife as a distributee of the fund: *Miller v. Miller*, 9 O. C. C. (N.S.) 315, 19 O. C. D. 353.

In an action in Ohio for wrongful death of a husband, resident of Ohio, occurring in New York, where such husband left no issue, the damages as recovered are payable to his widow, notwithstanding the general rule that such damages are to be distributed in accordance with the statutes of the state in which the wrongful act was committed: *Miller v. Miller*, 9 O. C. C. (N.S.) 315, 19 O. C. D. 353.

Property or money held by the executor or administrator of an estate in his representative capacity, can not be reached by attachment or garnishee process in an action against the heir or legatee before an order of distribution has been made: *Orlopp v. Schueller*, 72 O. S. 41, IV Longsdorf's Notes, 987 [reversing *Orlopp v. Schueller*, 4 O. C. C. (N.S.) 611, 16 O. C. D. 127].

4. Payment by Mistake.

Payment by mistake of the executor to one not entitled may be recovered by him in his official capacity. The fact that he could have sued personally does not exclude the additional remedy: *Phillips v. McConica*, 59 O. S. 1, IV Longsdorf's Notes, 757.

Where an administrator made a wrong distribution of an estate, upon a finding that there were no such children as those designated in the will, and notice of the petition in the probate court was advertised but five weeks, when it should have been advertised for six weeks, the order is void for want of jurisdiction and the administrator and sureties on his bond are liable to the rightful distributees: *Sater v. Pease*, 10 O. D. (N.P.) 722 [following *Sater v. Kocher*, 8 O. C. C. 390, 6 O. C. D. 276].

Payment to a person not entitled to the distributive share is not protected by confirmation of the executor's final account and is not a bar to an action to recover the amount back: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

A testator bequeathed ten thousand dollars to a trustee to give to his daughter at majority. By a codicil he left one thousand dollars to the daughter, but not mentioning the trustee. The executor paid ten thousand dollars to the trustee, and, believing the trustee should receive the one thousand dollar legacy, also paid to him a one thousand dollar bond, believing it to be part of the estate, whereas it had been given to the daughter by the testator in his lifetime. The trustee having paid the daughter at her majority, it was held that the account can be adjusted by considering the legacy given in trust as fully paid, and by now paying the one thousand dollars given by the codicil, with interest after one year from date of the letters testamentary: *Rote v. Warner*, 17 O. C. C. 350, 9 O. C. D. 540.

5. Presumption.

Where a legatee is appointed executor and files no inventory or account, but an account is filed by an administrator *de bonis non* showing debts paid but making no mention of the legacy, every presumption favors the theory that the legacy was paid by the ad-

ministratrix to herself, and in the absence of proof of fraud, active or constructive, the motion for an order for payment of the legacy after a lapse of many years should be overruled: *Holzlin v. Schleeuwies*, 7 O. L. R. 434.

F. SUBSEQUENT DISCOVERY OF WILL.

An administrator having distributed all the assets under a decree of court finding who were entitled thereto, and a will being afterwards admitted to probate, the executor seeks to compel the administrator to pay over again, and to compel purchasers of assets from former distributees to surrender them, it was held that neither relief can be granted. The former decree is evidence for the administrator, though the complainant was not a party to it. The only remedy is to make the legatees parties and compel the former distributees to pay back, and this can be done by amendment: *Barkaloo v. Emmerick*, 18 O. 268, I Longsdorf's Notes, 847.

Real estate purchased with proceeds of insurance will be distributed in accordance with husband's will where the wife, to whom the insurance was payable, treated the proceeds as belonging to his estate: *Buehler v. Buehler*, 2 O. N. P. (N.S.) 430, 14 O. D. (N.P.) 693.

G. RECEIPT BY DISTRIBUTE.

Where a receipt is given by a distributee to an administrator upon distribution, and the account of the administrator is properly published and confirmed by the probate court, the evidence thus perpetuated is complete and binding upon the parties in so far as the giving of the receipt is concerned, but it is not conclusive as to whether the distributee actually received the money or the distribution was made according to law: *In re Koehnken*, 1 O. C. C. (N.S.) 126, 15 O. C. D. 245 [modifying and affirming *In re Koehnken*, 8 O. N. P. 657, 11 O. D. (N.P.) 799].

A distributee, having for her own purposes accepted the individual check of one of two joint executors for her distributive share and given a receipt in full to the executors, who thereupon paid her share with her assent to such executor, whereby it was lost to the estate, can not on dishonor of the check sue the executors and their sureties, the act of the executor in giving his individual check being apart from his duties in the trust: *Riggin v. Creath*, 60 O. S. 114, IV Longsdorf's Notes, 779.

A distributee may sue the administrator to cancel receipts obtained by deceit on the principle of *qui timet*, but can not have a recovery of the distributive share if there is not an averment of settlement of the estate

and a balance for distribution: *Duhme v. Mehner*, 18 O. C. C. 706, 6 O. C. D. 78.

The only effect of filing the vouchers received on distribution, with the approval of the court, is to place on record the receipts in the hands of the executor and make them final, as to those who have signed them, as to so much of their distributive share as the vouchers may represent; and although the receipts may cover the entire property, those who are entitled to a distributive share, and have not received it, are not precluded from enforcing their claim: *Negley v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

XXI. ACCOUNTS.

A. POWER OF COURT TO COMPEL.

Executors and administrators may be compelled to account in equity: *Cram v. Green*, 6 O. 429, I Longsdorf's Notes, 348.

The appointment of an administrator by the probate court and his acceptance of the trust and qualification as such, gives that court jurisdiction not only of the estate but also the person of the administrator until his accounts as such administrator are settled. Such jurisdiction is not ousted by the fact that, on motion of parties interested and after due notice to the administrator, the court makes an order requiring him to make settlement and at the same time and by the same entry orders his removal and appoints a successor: *In re Morrison*, 68 O. S. 252, IV Longsdorf's Notes, 943.

Formerly the executor had a discretion as to whether or not he should file such accounts as are provided for by G. C., § 10842: *Negley v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

Removal of the guardian to another state, thereby terminating the guardianship (G. C., § 10936), does not oust the jurisdiction of the probate court to compel him or his executor to account. Such foreign administrator may be served by summons or may enter appearance, and thereupon the court may determine the amount due and order it paid, and the sureties are bound thereby: *Netting v. Strickland*, 18 O. C. C. 136, 9 O. C. D. 841. See also GUARDIAN AND WARD.

It is the duty of the probate court (G. C., § 11202), to examine accounts filed in that court, and *sua sponte* or on request of an interested party, make such orders as are proper and necessary to secure a faithful and correct administration of the trust: *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

Where a testator in his will provided for the erection of a family vault and that a specific sum should be used for that purpose, and further provided "that the sum of \$500

shall be set aside and invested in good farm mortgages, etc., and the income held as a perpetual fund for the care of such vault after the same is erected"—it was held that the executor can not, even by consent of all persons having an interest in the estate of the decedent, use said sum in the erection of the vault, and if it is so used the executor is chargeable therewith and must account therefor as provided in said will: *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

Although not specifically declared by statute, it is at least the legislative intent, as may be gathered from G. C., § 10822, that an administrator, who has been removed for cause, can be required to account to the probate court for past transactions: *In re Morrison*, 68 O. S. 252, IV Longsdorf's Notes, 943.

The court has no authority to compel an administrator removed to file an account: *In re Miller*, 8 O. N. P. 385, 11 O. D. (N.P.) 624.

An administratrix who lends herself to a scheme to divert the bulk of the estate into the hands of a favorite child by procuring surrenders from other children, who were young and inexperienced, and without disinterested advice on statements that their father so wished in his lifetime, will be compelled to account, and the petition is properly against her in her representative capacity: *Duhme v. Mehner*, 10 O. C. C. 107, 6 O. C. D. 126.

The power of proceeding against an executor or administrator by citation or attachment is a necessary incident to the proper exercise of the jurisdiction of the probate court but such proceeding is barred by such lapse of time as would be a bar to an action on the administration bond: *Phillips v. State*, 5 O. S. 122, II Longsdorf's Notes, 165.

The administrator of a deceased guardian must file the account of the deceased guardian immediately after his appointment: *In re Bruckmann*, 1 O. N. P. (N.S.) 7, 48 Bull. 637.

The right to a citation against the administrator under G. C., § 10825, is not barred until ten years from the hearing of his last account. The time does not run from its filing because no citation can issue between the filing and hearing. But an account is not final if assets remain unaccounted for: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

An administrator cited for not filing his account within 18 months is bound to pay only the ordinary costs of citation and not the fees of an array of witnesses summoned against him: *In re Klumperink*, 3 Dec. Rep. 344, Law and Bank Bull. 344.

B. CONTENTS.

1. *In General.*

An executor or administrator is accountable for everything he receives in which the decedent had an interest, notwithstanding any contrivance by which an attempt may be made to become receiver in a different character: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

Services rendered an administrator by an attorney in settlement of the estate are necessary expenses and may be allowed under G. C., § 10830, but no action at law will lie against the administrator as such upon an account for such services: *McBride v. Brucker*, 5 O. C. C. 12, 3 O. C. D. 7.

The account of an administrator must include the ancillary accounts required by him in another state. He can do this by obtaining a certified copy, stating its confirmation, and that the original and vouchers are on file: *In re Phelps*, 3 Dec. Rep. 13, 2 Gaz. 120.

An executor or administrator with the will annexed, who has power under the will to sell land without order of court, must, in his account, set out with reasonable fullness the date of sale, the location of the land, the amount sold, and the name of the purchaser. The price and name of the purchaser is not sufficient, the account being the only record by which to advise those interested: *In re Williamson*, 4 O. N. P. 282, 7 O. D. (N.P.) 24.

Books of a business which has to be operated continuously as a going concern may be received in lieu of vouchers: *In re Reynolds*, 3 O. N. P. 292, 2 O. D. (N.P.) 11.

Personal estate was devised to a wife for life and then so much "as was unconsumed" was to be divided among certain heirs, with no requirement that the executor should collect and distribute that which was unconsumed at the death of the widow. It was held that the widow had a right to consume and dispose of the whole estate, and it was the duty of the executor to deliver possession thereof to her, and he is not responsible for the disposition of it by the widow, nor is he required to account therefor: *Posegate v. South*, 46 O. S. 391, IV Longsdorf's Notes, 333.

The allowance to an administrator for extraordinary services is part of the statement of his account: *McMahon v. Ambach*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

Where an executor has collected the rents from a business block and paid taxes, insurance, and repairs thereon, his account must show each item of such receipt and expenditures, and where he merely charges himself with a certain amount as the net income

therefrom, he will be required to file an itemized supplemental account: *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803 [modified *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370].

2. *Debits.*(a) *In General.*

Materials left by an intestate for building may be regarded as personal, and not as real assets: *Gray v. Hawkins*, 8 O. S. 449, II Longsdorf's Notes, 358.

Once being assets, no act of the parties can change them back into a debt: *Hall v. Pratt*, 5 O. 72, I Longsdorf's Notes, 248.

By a former statute (2 Chase, 1309, § 8), the administrator was required to charge himself with the amount of the estate, according to the inventory of sale, including all debts due the estate and moneys on hand at death: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

(b) *Rents.*

Rents collected by the administrator and used to pay debts, the heirs not excepting to the items, may be treated by the court as assets and a correct accounting of them compelled: *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

Rents accruing up to the time of the administrator's sale to pay debts belong not to the administrator but to the heir, for the title descends on him: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

Although a will gives all the property to the testator's daughters, who are also executrices, requiring them to pay: 1. Debts and expenses. 2. Distribute the income to themselves and coheirs. This does not create a trust for creditors and their distribution of the rents of the real estate, without holding it back for creditors is proper, for the rents are not assets: *In re Gallagher*, 5 O. N. P. 518, 7 O. D. (N.P.) 548.

On a lease by a life tenant rents upon his death are not apportionable between his administrator and the remainderman where there is no privity of estate, and the latter's estate becomes an estate in possession at once and terminates the lease: *Noble v. Tyler*, 61 O. S. 432, IV Longsdorf's Notes, 813.

If an administrator instead of selling lands of the infant heir to pay debts, collects his rents by the advice of the family and pays with them, and thus saves the infant's land, this will be sanctioned by court, though on the infant's death his estate thus descends as realty instead of personalty, accordingly, his administrator can not recover of the ancestor's administrator. If the infant would

have been bound, parties and privies will also be bound: *Turpin v. Turpin*, 16 O. S. 270, II Longsdorf's Notes, 773.

(c) *Proceeds of Sale.*

Where a lessee exercises an option to purchase after a lessor's death, the fund is liable for debts, and accordingly, the executor is entitled to it, and if paid to him or his successor, by order of court, it is assets, for which his bond is liable: *Buckwalter v. Klein*, 5 Dec. Rep. 55, 2 Am. L. Rec. 347.

Under a power in a will to sell land to pay debts, the value of the land if resorted to, becomes assets, the same as if sold by order of the court, and the bond is therefore liable for a collusive sacrifice of the property: *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 15 [affirmed *Brown v. Reed*, 56 O. S. 264, IV Longsdorf's Notes. 689].

The proceeds of real estate sold under an order of the court to pay debts are assets and covered by the general bond: *Wade v. Graham*, 4 O. 126, I Longsdorf's Notes, 209.

Where the administrator, with the consent of the heirs, sells the decedent's interest in land held in another's name as security, and has a balance of the purchase money left, he holds it as assets: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

Proceeds of a partition sale coming to the administrator's hands are assets and are covered by the general bond: *Campbell v. English*, W. 119, I Longsdorf's Notes, 10.

(d) *Partnership Funds.*

The executor or administrator of a surviving partner, who dies with partnership assets in his possession, and while he is engaged in settling the partnership business is entitled to the possession of such assets, and is charged with the duty of completing such settlement: *Dayton v. Bartlett*, 38 O. S. 357, III Longsdorf's Notes, 974.

(e) *Official Money.*

When an officer dies, official money not mixed with his own, but kept separate or identifiable, is not assets but a trust for his successor in office: *State v. Corey*, 2 Dec. Rep. 669, 4 W. L. M. 563 [affirmed on other grounds, *State v. Corey*, 16 O. S. 17, II Longsdorf's Notes, 755].

(f) *Proceeds of Business Carried on by Executor.*

Where testator left a business in the hands of his executors to be carried on seven years, and at the end of that time, to deliver its "proceeds" to residuary legatees, the moneys

and profits arising from the business were assets in the hands of the executors: *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728.

(g) *Desperate Claims.*

A claim against an executor being transmuted into money in his hands, can not be classed as an uncollectible or desperate claim, by reason of the insolvency of the executor: *Cheney v. Powell*, 20 O. C. C. 398, 11 O. C. D. 279.

G. C., § 10701, confers no jurisdiction on the probate court to order the sale of such an asset as a desperate claim. And a sale thus made carries to the purchaser no liability that subsisted between the estate and the executor and the sureties on the executor's bonds: *Cheney v. Powell*, 20 O. C. C. 398, II O. C. D. 279.

Predicated upon the title passing to the purchaser by a sale so made, no action will lie against such executor and sureties on his bond: *Cheney v. Powell*, 20 O. C. C. 398, 11 O. C. D. 279.

(h) *After-acquired Assets.*

Administrator must account for after-acquired assets. But rents of real estate accruing between intestate's death and sale of his lands by administrator are not such assets: *Overturf v. Dugan*, 29 O. S. 230, III Longsdorf's Notes, 462.

(i) *Life Insurance.*

Proceeds of life insurance on a policy payable to the administrator, and received by him are assets, and covered by the bond: *Webb v. Roettinger*, 12 O. C. C. 730, 4 O. C. D. 270 [affirmed, without opinion, *Webb v. Roettinger*, 55 O. S. 686].

Insurance on the life of the husband, becomes assets of the wife's estate when she is named as beneficiary in the policy of insurance and there are no children: *Plaut v. Insurance Co.*, 4 O. C. C. (N.S.) 94, 16 O. C. D. 499 [affirmed, without opinion, *Plaut v. Insurance Co.*, 65 O. S. 586].

(j) *Bonds.*

Where a person holding bonds in trust for others without personal interest, and not in any default, dies, and his executor with the consent of the beneficiaries collects them, they do not come to his hands as assets, and neither his co-executor nor his bond are liable for his misappropriation: *Quinby v. Walker*, 14 O. S. 193, II Longsdorf's Notes, 645.

If heirs furnish money to pay the debts instead of a bond, under G. C., § 10785, to save the real estate, the court can compel the

administrator to give a correct account of it as assets: *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

(k) *Funds Recovered for Wrongful Death.*

Money recovered for wrongful death is not an asset: *Steel v. Kurtz*, 28 O. S. 191, III Longsdorf's Notes, 398. See also DEATH BY WRONGFUL ACT.

(l) *Funds on which Sub-contractor had Lien.*

Funds, on which sub-contractors have a mechanics' lien, should not be turned over to the administrator: *Vernon v. Harper*, 79 O. S. 181, IV Longsdorf's Notes, 1045.

(m) *Securities of Debtor held by His Administrator.*

If a debtor delivers securities to the administrator of his surety to indemnify his estate they are not assets, and the administrator holds as trustee for the debtor, and if he converts them to his own use, the loss must fall on the debtor and not on the estate: *Arbuckle v. Tracy*, 15 O. 432, I Longsdorf's Notes, 719.

(n) *Property Subject to Void Chattel Mortgage.*

Where a chattel mortgage is declared void by statute, "as against creditors of the mortgagor," and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the administrator or executor: *Kilbourne v. Fay*, 29 O. S. 264, III Longsdorf's Notes, 465.

(o) *Note.*

A testator who at his death holds a note against his son, and in his will directs in case that said note is not paid before his death, such son "shall be charged with and there shall be taken out of his share" the amount thereof, said note is an asset in the hands of his executor, and should be appraised and inventoried: *Bullock v. Bullock*, 3 O. N. P. (N.S.) 190, 15 O. D. (N.P.) 783; [reversing *In re Bullock*, 50 Bull. 160; and judgment of reversal affirmed, without opinion, *Bullock v. Bullock*, 75 O. S. 574].

Notes owned by a decedent at the time of his death are personal property and assets of his estate, the title to which is in the administrator and not the heirs; the latter have no right to enforce their payment. But notes treated as evidence of advancements form no part of the estate: *Tobias v. Richardson*, 5 O. C. C. (N.S.) 74, 16 O.

C. D. 81 [affirmed, without opinion, *Tobias v. Richardson*, 72 O. S. 626].

(p) *Remainders.*

Where a fund is left to a daughter, and at her death the unexpended part is to go to certain grandchildren, the daughter having died without consuming it, her administratrix is not entitled to administer upon it: *Catlin v. Huestis*, 11 O. C. C. 120, 5 O. C. D. 23.

(q) *Gift with Promise to Surrender.*

A gift with a promise to surrender to the donor at any time before her death if it was needed, remains the property of the donor and passes to her estate: *In re Galbraith*, 4 O. L. R. 186, 51 Bull. 326.

(r) *Interest.*

Dower to the widow of a decedent, partakes in interest earned by funds belonging to the estate while in the hands of the executor: *In re Arnold*, 1 O. N. P. (N.S.) 167, 47 Bull. 616, 48 Bull. 929.

Assets in the hands of an administrator, which have not been ordered by the court to be paid out or distributed, or which are tied up by litigation in good faith, or upon which no profit has been received, do not bear interest, and the administrator should not be charged with such interest as assets in his hands: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

An administrator investing funds of the estate so as to bear interest, is chargeable with the amount earned by the interest bearing fund: *In re Craig*, 10 O. D. (N.P.) 733.

Before the last amendment it was held that interest would be charged against the administrator on funds which he was ready to distribute, but could not because the heirs were unknown; it was his duty to invest the money for them. "May" in the old statute meant "must." The statute now uses "shall" instead of "may": *In re Thornton*, 7 O. N. P. 335, 5 O. D. (N.P.) 151.

Where an administrator does not obey the order of court to pay a sum of money to a certain creditor, but litigates the case through all the courts, in all of which the lower decision is affirmed, the creditor is entitled to interest in preference to other creditors: *In re Robb*, 5 O. N. P. 52, 5 O. D. (N.P.) 227.

While partial distributions to a legatee by an executor, at different times under the will, become the property of the legatee and do not bear interest, yet if a note or other evidences of a loan is taken by the executor, it will not be treated as a payment, but as a loan and interest may be charged: *Brooks v. Hanna*, 19 O. C. C. 216, 10 O. C. D. 480.

In this state a general legacy bears interest, at the legal rate, from the end of the first year from the date of the notice of the appointment of the executor, unless it be clearly apparent that the testator did not so intend: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821 [affirming *Case School v. Gray*, 15 O. C. C. 488, 8 O. C. D. 241].

A widow or widower is not entitled to interest on the distributive share in personality, because the distributive share can not be known until the amount of personal property subject to distribution has been ascertained, and the distributive share computed therefrom. In this case she was not a legatee, this distinguishing it from *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821; *Hutchings v. Davis*, 68 O. S. 160, IV Longsdorf's Notes, 941.

An administrator or executor is not chargeable with interest on money which may come into his hands as the representative of a deceased person, unless he employ it in his own business, derive some benefit from farming it out, or delay to an unreasonable and unnecessary degree in making the settlement of his accounts in the probate court: *Cooch v. Irwin*, 7 O. S. 22, II Longsdorf's Notes, 267.

(s) *Debts of Administrator or Executor to Estate.*

(aa) *In General.*

An executor or an administrator of an estate of a deceased person being indebted to the estate at the time of his appointment, such indebtedness at once becomes assets in his possession, and is treated as so much money received: *Jones v. Willis*, 66 O. S. 114, IV Longsdorf's Notes, 900.

Where the executor of a will was indebted to his testator, and died while in office, without having inventoried the amount of said indebtedness and before an account was due or filed, the indebtedness was money in the hands of the executor for which his administrator must account: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

The doctrine that by his appointment as executor a debtor's debt to the testator becomes assets in his hands is a fiction employed to accomplish a useful result; but a fiction will never be allowed to work injustice when it may be avoided: *Miller v. Donaldson*, 17 O. 264, I Longsdorf's Notes, 810; *Wilson v. Wilson*, 17 O. S. 150, II Longsdorf's Notes, 824.

The contrary was held where the obligor of a bond became the obligee's administrator, and his successor was denied a right to sue on the bond; personal actions once suspended

being always suspended: *Bigelow v. Bigelow*, 4 O. 138, I Longsdorf's Notes, 212.

(But this in view of the last preceding case, and the strictures in *Hull v. Pratt*, 5 O. 72, I Longsdorf's Notes, 248, would not seem to be law).

Appointing the debtor executor does not extinguish the debt, but it becomes assets in his hands: *Bigelow v. Bigelow*, 4 O. 138, I Longsdorf's Notes, 212; *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069; *Mitchell v. Towner*, 1 Dec. Rep. 352, 7 W. L. J. 581.

And the same rule applies if he is appointed administrator: *Bigelow v. Bigelow*, 4 O. 138, I Longsdorf's Notes, 212.

Appointing as administrator *de bonis non* one who was indebted to the estate on a note given to his predecessor makes the debt assets, though it was created after the testator's death: *Martin v. Train*, 6 O. C. C. 49, 3 O. C. D. 344.

A demand existing in favor of testator against one who becomes the executor of his last will, if undischarged, is transmitted into money in the hands of such executor by virtue of G. C., § 10691. And no act of the the executor, or of the debtor, can turn it again into a mere demand or obligation: *Cheney v. Poyell*, 20 O. C. C. 398, 11 O. C. D. 279.

Appointing a debtor as executor does not extinguish his liability, accordingly the debtor's mortgage, given after resignation, to the legatee of the debt, is on due consideration, and valid against subsequent levies on the property on which the mortgage is placed: *Collins v. Nugent*, 4 Dec. Rep. 269, 1 Clev. L. Rep. 190, 7 Dec. Rep. 485, 3 Bull. 519.

G. C., § 10828, does not modify G. C., § 10691, and a debt due the estate from the executor is an asset, whether good or bad: *McGaughey v. Jacoby*, 54 O. S. 487, IV Longsdorf's Notes, 645; *Allen v. McCoy*, 57 O. S. 641, IV Longsdorf's Notes, 729 [reversing *McCoy v. Allen*, 9 O. C. C. 607, 6 O. C. D. 659; approved *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989].

(bb) *Executor Insolvent.*

The presumption that a debt due to the decedent from the executor is assets in his hands is rebuttable, and does not apply where he is insolvent during the whole period of his executorship, and although it should be included in the inventory, neither he nor his coexecutor will be liable therefor: *Brown v. Harshman*, 9 O. C. C. 1, 6 O. C. D. 10; denied in *Perkins v. Scott*, 9 O. C. C. 207, 6 O. C. D. 226.

Even if the sureties are not bound for a debt due to the deceased from the administrator, if the latter is insolvent, yet an active business man in good credit and of large

property, is not insolvent in a legal sense although it develops later that his liabilities exceed his assets: *Perkins v Scott*, 9 O. C. C. 207, 6 O. C. D. 226.

Although where one of two joint executors is insolvent, a claim due from him to his testator ought to be included in the inventory, such executors will not be held liable for the same as for so much money in their hands; nor will they be required to apply the same in payment of debts and legacies, and among the next of kin: *Brown v. Harshman*, 9 O. C. C. 1, 6 O. C. D. 10.

When the debtor of deceased is appointed administrator, the debt should be included in the inventory and becomes assets in the hands of the administrator, but if he is insolvent, he should not be held accountable for the amount of such debt: *McCoy v. Allen*, 9 O. C. C. 607, 6 O. C. D. 659 [reversed, without opinion, *Allen v. McCoy*, 57 O. S. 641, on the authority of *McCaughey v. Jacoby*, 54 O. S. 487, IV Longsdorf's Notes, 645].

(cc) Principal and Surety.

An insolvent principal maker of a note, who is named as executor in the will of his surety and accepts and qualifies as such, and who pays his own notes as they subsequently fall due as claims against the estate, is properly chargeable under the provisions of G. C., § 10691, as for so much money in his hands: *Yakey v. Strunk*, 7 O. N. P. (N.S.) 177, 18 O. D. (N.P.) 726 [affirmed, without opinion, *Yakey v. Strunk*, 7 O. N. P. (N.S.) 177].

Administrator is chargeable with all debts which he owes individually and unconditionally to the estate. This includes a debt which he owes as principal, and which is evidenced by his note, signed also by another person who is in fact only surety. But it does not include debts owing to the estate by a firm of which he is a member: *James v. West*, 67 O. S. 29, IV Longsdorf's Notes, 923; *Shields v. Odell*, 27 O. S. 398, III Longsdorf's Notes, 366; *Rossmann v. McFarland*, 9 O. S. 369, II Longsdorf's Notes, 381.

The principal that the appointment of a debtor as administrator converts the debt into assets in his hands to be accounted for, does not apply to one who is only conditionally liable to the estate. The appointment as administrator *de bonis non*, with the will annexed, of one who was surety on the bond of the previous executor, does not make a debt due the estate from such executor assets in the hands of such administrator by reason of his suretyship: *Shields v. O'Dell*, 27 O. S. 398, III Longsdorf's Notes, 366.

(dd) Surviving Partner.

Where A owned the business of B & Co., B not being a partner, but giving services for a salary and share of the profits, and on A's death B became his administrator, the assets of the business are assets of A's estate burdened with the debts of the business and with the profits due B, and B's accounts as administrator should charge himself with them: *In re Dair*, 7 O. N. P. 309, 2 O. D. (N.P.) 362.

If a surviving partner becomes administrator, the balance that may be found against him on settlement of the firm becomes assets, under G. C., § 10691, although partners do not owe each other at law, and was unliquidated, and not left uncollected by any fault of the administrator: *In re Dair*, Goebel, 233.

Debts owing to the estate by a firm of which the administrator is a member, are not the individual unconditional debts of such administrator and are not chargeable to him as money in his hands: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

(ee) Joint Administrators.

An indebtedness to the estate of a decedent from one of two administrators will be considered as having come into the joint possession of both, and as between themselves and the surety on their joint bond they are both principals: *Dorger v. Woodward*, 4 O. C. C. (N.S.) 623, 17 O. C. D. 123 [affirmed, without opinion, *Dorger v. Woodward*, 74 O. S. 502].

(ff) Joint Debtors.

If one of several joint and several debtors is made administrator, the fiction that the debt is assets in the administrator's hands does not apply: *Rossmann v. McFarland*, 9 O. S. 369, II Longsdorf's Notes, 381.

(gg) Executor Without Bond.

Indebtedness of an executor to his testator, when ascertained, is to be treated as so much money in his hands, and as part of the assets of testator's estate, where an executor without bond dies while in office without having inventoried said indebtedness and before an account was due or filed: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

(hh) Resigned Administrator.

"Personal effects and assets" includes indebtedness of an administrator, resigned, to the estate on account of assets received and converted to his own use: *Slagle v. Entrekkin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

(ii) Mortgagees.

A mortgagee, by making his debtor his executor, does not extinguish the mortgage; and because the executor is bound to make an effort to collect the debts, and because he can not bring suit against himself, he is treated as having the money already in his hands; but a remedy exists upon the mortgage, independent of the right to sue at law; and the legal fiction that he has the money due from him already in his hands, will not permit the defeat of the security, which the prudence of the testator provided in addition to the sureties on his bond: *Miller v. Donaldson*, 17 O. 264, I Longsdorf's Notes, 810.

An administrator *de bonis non* may proceed against a removed executor and against other and subsequent mortgagees to enforce a mortgage given by such executor to the testator: *Miller v. Donaldson*, 17 O. 264, I Longsdorf's Notes, 810.

(jj) Contingent Debt.

Appointing a debtor administrator does not convert the debt into assets in his hands, where his liability is only a contingent one, as where a surety on a defaulting executor's bond is made administrator *de bonis non*: *Shields v. O'Dell*, 27 O. S. 398, III Longsdorf's Notes, 366. See also XXI, B, 2, s, cc, herein.

(kk) Debt Created After Death.

The debt becomes assets, though created after the decedent's death, as where a person to whom executors loaned money of the estate, taking his note, afterwards became administrator *de bonis non*: *Martin v. Train*, 6 O. C. C. 49, 3 O. C. D. 334.

(ll) Effect of Fraud.

This doctrine can not be resorted to to work a fraud. Thus, where the only person interested in an estate, the sole asset of which was a debt due by A, who was insolvent, procured A to be appointed administrator, and by fraud induced the defendant to go on his bond for the sole purpose of making him liable for A's worthless debt, it was held that the fraud was a good defense to an action on the bond: *Campbell v. Johnson*, 41 O. S. 588, IV Longsdorf's Notes, 79.

(mm) Method of Determining Amount.

If the probate court properly acquires jurisdiction over the administrator of a deceased executor and the subject-matter, such executor at the time of his death being indebted to the testator's estate, its finding and judgment as to the amount of such indebtedness are conclusive until reversed or modified or other-

wise adjudged erroneous: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

3. Credits.

Where real estate is devised to certain persons, but the executor is given the management and control thereof for the benefit of the estate for five years after the death of the testatrix, he may charge the estate for such repairs as were necessary to maintain the rental value of such real estate during said period, but the estate can not be charged with the cost of valuable improvements thereto: *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803 [modified, *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370].

An executor who is also an attorney can not credit his account with the payment of attorney fees to outside counsel, where there is nothing to show that he was justified in employing such counsel, especially when it appears that such outside counsel was also employed adversely to the estate: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

An executor who is also an attorney can not credit himself with a charge for making up his own accounts: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

An executor who purchased at his own sale real estate belonging to his decedent's estate, taking title in his own name individually or as executor, or in the name of a third person under an arrangement whereby the latter was to occupy and farm it on shares for the executor, is entitled, in stating his account, to credits for moneys paid out for taxes, repairs and improvements, but the allowance for improvements must not exceed the amount added to the value of the land: *In re Eltzroth*, 50 Bull. 384.

Whether an executor can be allowed credit in his account for expenses incurred in the successful defense of the will depends upon the circumstances of each particular case. In a case where the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, such an allowance is not permissible: *Weir v. Weir*, 7 O. C. C. (N.S.) 289, 18 O. C. D. 199.

An executor may settle for liabilities not yet constituting causes of action, but which will ripen into enforceable claims, thus, where A having but a life estate, made leases for years which had not expired when he died, and in one of which he agreed to pay the tenant for improvements at the end of the term. A's executrix having paid the remainderman in one case to confirm the lease and let the tenant stay, and in the other having paid the tenant to cover the value of

the buildings and damages, should be allowed the same in her accounts, the arrangement being manifestly beneficial and in good faith: *Moore v. O'Brannin*, 14 O. S. 177, II Longsdorf's Notes, 644.

It was lawful for the probate court, at its discretion, to allow the administrator, in his settlement, any just and reasonable "amount expended" for a monument; but the administrator was not allowed to interfere with the heirs of the intestate in erecting one: *Curtis v. Bank*, 39 O. S. 579, III Longsdorf's Notes, 1050.

The court has no authority to order the administrator to buy a monument, nor to fix a sum as a maximum to be expended by him for that purpose: *In re Ferguson*, 81 O. S. 58 [affirming *In re Ferguson*, 6 O. N. P. (N.S.) 417, 18 O. D. (N.P.) 374].

If administrators were permitted to collect rents they are entitled to credit for paying taxes, repairs, a necessary survey, and gathering crops. These are debts of the estate: *In re Turpin*, Goebel, 124.

Where a partial or final account of an executor or administrator, together with the vouchers filed, does not show that the respective items are proper charges against the estate; the burden of proof rests upon the executor or administrator to make such showing: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

Under a will providing that all debts on the estate shall first be paid, the stock of an insolvent corporation comes into the hands of the executor as a liability, and not as an asset: *Roebeling v. Coal and Iron Co.*, 4 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 8.

An executor is not barred by the ten years statute from claiming credits for disbursements made more than ten years prior to the rendering of his final account: *In re Campbell*, 13 O. N. P. (N.S.) 386, 22 O. D. (N.P.) 578.

Upon exceptions being filed to a long delayed final account by an executor and reference of the matter for ascertainment as to the amount due, it is not competent for the referee to reopen an account filed twenty years before and to which no exceptions were ever filed: *In re Campbell*, 13 O. N. P. (N.S.) 386, 22 O. D. (N.P.) 578.

4. Partial and Final Accounts.

Although the settled accounts of an administrator may be opened, yet such settled accounts are conclusive between the administrator and the estate, except as provided by the statutes: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13.

The probate court can not, several months after it has confirmed a final account, make

an allowance for commissions to the administrator without opening the account after due notice to all interested persons. Such allowance would not be in the nature of a judgment and is barred in six years: *Snider v. Graham*, 14 O. C. C. 386, 8 O. C. D. 3.

An account is not final as long as there are assets to be administered and accounted for: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

The settlement of an account of an executor or administrator by the probate court is conclusive, as against parties with actual notice of the settlement, of all matters specified therein, and as to such matters the party cannot be required to account a second time, unless the same be impeached for fraud or manifest error. But such account is not final, as to bar further inquiry, in regard to other assets in the hands of the executor or administrator, not accountable for or passed on and for such matters the court may, at any time within the limits of the statute compel a further settlement by the process indicated: *McAfee v. Phillips*, 25 O. S. 374, III Longsdorf's Notes, 242.

The amount found by the court to be in the hands of an administrator and the order to pay the same, in the absence of fraud and collusion, are conclusive not only upon the administrator but also upon his sureties, unless reversed on error or vacated by appeal: *Smith v. Rhodes*, 68 O. S. 500, IV Longsdorf's Notes, 947.

Where the names of infants are signed to a final settlement, without lawful authority, they may, on coming of age, if not otherwise debarred, disaffirm the same and compel the administrators to make final settlement in the proper court: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

Under a former statute (1 Cureven 708), it was optional with the administrator whether or not he would file a final account: *Swearingen v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671.

An affidavit filed by a widow in lieu of a final account, and published as notice of a final account, was not notice to anybody of a proceeding for a construction of the will or determination of the rights of the devisees under the will; and the action of the court in confirming the account was not intended to and did not leave the effect of determining who were the distributees under the will or under the law: *Carnes v. McAfee*, 11 O. N. P. (N.S.) 517.

Where shares of stock are left to a widow for life, and then to be distributed according to law, her final account or affidavit in lieu thereof showing debts all paid and that she was "widow and sole legatee," and its confirmation by court does not have the effect

of construing the will and determining who were the distributees, and therefore does not bar the children's remainder: *Carnes v. McAfee*, 11 O. N. P. (N.S.) 517.

The probate court, in passing upon the validity of a final account, will not go back of a settlement made in the common pleas court which involves an adjustment of the same matters of dispute, but will be bound by the entry therein: *In re Seeger*, 7 O. N. P. 207, 1 O. D. (N.P.) 113.

Upon the death of a legatee, intestate, before payment of the legacy, the right to receive payment belongs to his personal representative unless a different disposition is made by the will, and the liability of the executor therefor to the personal representative is not discharged by payment to the heir. If the final account shows a payment to a person not entitled thereto, it is no bar to a subsequent action against him by one legally entitled to same: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

A settlement of the account of an executor, who has been removed, does not bar a subsequent suit by him, against his successor, upon a demand existing in the lifetime of his testator: *Sharp v. Pontius*, 2 O. C. C. 7, 1 O. C. D. 331.

Upon the settlement of the final account of an administrator, it is not the duty of the probate judge to provide for the payment of claims against the estate which no creditor is asserting: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

The lapse of eighteen years without disputing an executor's account and after receipts in full, is strong, if not conclusive, against relief: *Pennock v. Miller*, 1 Dec. Rep. 456, 10 W. L. J. 85.

Where an administrator has paid up all debts and distributed the whole estate, and the account was filed and approved by the court without any order of distribution, this is being "fully administered": *Goshorn v. Alexander*, 2 Dec. Rep. 597, 4 W. L. M. 139.

An administrator can not be compelled to file his first account before eighteen months from the date of his bond have expired: *State, ex rel., v. Moore*, 3 Dec. Rep. 68, 2 Gaz. 405 [reversing *State, ex rel., v. Moore*, 3 Dec. Rep. 62, 2 Gaz. 389].

An order approving a partial account is conclusive unless attacked in the mode provided by statute, but this is only in respect to matters adjudicated therein: *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130.

Where an executor dies without filing any account of the administration of his trust it is the duty of his personal representative to

file such an account for him and pay over to the successor in the trust any balance that may be found due the estate from the deceased executor: *Black v. White*, 87 O. S. 413.

C. EXCEPTIONS AND HEARING.

1. Nature.

Where exceptions are taken to an account of an administrator or executor of a deceased executor upon the face of the record, the investigation relates to the original estate, but necessarily the estate of such deceased executor is also involved: *In re Sidwell*, 67 O. S. 464, IV Longsdorf's Notes, 933.

A citation will not issue after the lapse of ten years from the hearing of the last account filed; a citation can not issue until the expiration of the eighteen months from the time of the appointment as administrator; neither could it issue between the time of filing the account and the time of its being passed upon by the court; the proper remedy is by exception to the account: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

An executor's duty is not wholly performed when he files an account, the duty to file which is imposed by G. C., § 10822. His further duty is left as it must always be left where an account is assailed, to be determined by the exercise of sound, reasonable discretion: *In re Sidicell*, 67 O. S. 464, IV Longsdorf's Notes, 933.

In a suit by an administrator *de bonis non* against the administrator of a deceased executor who had resigned during his lifetime, no right of bail can intervene to prevent judgment against the defendant if he is liable; nor is an order of the probate court, duly entered of record, on exceptions filed to an administrator's or an executor's account, a bar to an action by an administrator *de bonis non* against such executor for matters found by the probate court against the widow and heirs on such exceptions: *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069.

2. Jurisdiction.

Jurisdiction to hear and determine an administrator's account is acquired by the probate court on the filing of the account and that jurisdiction is not lost by the subsequent removal of the administrator, but the court has no authority, after the administrator has been removed and his successor appointed and qualified, to compel the former administrator to file an account of his administration: *In re Miller*, 8 O. N. P. 385, 11 O. D. (N.P.) 624.

Although the probate courts of this state do not have general equity jurisdiction, yet in determining matters of account they must be governed by equitable principles: *In re Eltzroth*, 50 Bull. 384.

Exceptions may be filed to an administrator's account, and the probate court can and must hear them. Action on his bond where a jury can be had is not the exclusive remedy and this rule applies where he has not charged himself with a debt owed by himself to the estate: *In re Raab*, 16 O. S. 273, II Longsdorf's Notes, 773.

G. C., § 10832, which gives authority to the probate court to allow in settlement by an administrator any just and reasonable amount he may have expended for a tombstone or monument for the deceased, is intended as a guide to the court and to administrators in dealing with that subject: *In re Ferguson*, 81 O. S. 58.

It is the duty of the probate judge upon the hearing of an administrator's or executor's account, whether exceptions have been filed thereto or not, to scan closely the amounts claimed to have been paid for funeral expenses, and in the absence of statutory or testamentary provisions, the allowance for such expenses must be reasonable, having regard to the amount of the estate, the station in life of the deceased, and the customs of the people in the same station, and if unreasonable and extravagant should be disallowed even as against legatees and next of kin: *Kroll v. Close*, 82 O. S. 190, IV Longsdorf's Notes, 1059.

The probate court will not go back of a settlement made in the common pleas court, which involves the same matters of dispute, but will look to the entry of the upper court for its limitation: *In re Seegar*, 7 O. N. P. 207, 1 O. D. (N.P.) 113.

Where a debtor is appointed administrator of the estate of his creditor, the debt becomes assets in his hands; and on exceptions to his final account, claiming that he has failed to charge himself with such debt, the probate court may hear evidence and determine the validity of such claim and the amount of such debt: *In re Raab*, 16 O. S. 273, II Longsdorf's Notes, 773.

If an executor is invested by the will with powers that are unlimited, the probate court will not hear exceptions to his acts unless fraud is shown. If such executor becomes insane, and a trustee appointed for him files the final account for such executor, exceptions to the acts done while of unsound mind will not be considered: *In re Reynolds*, 3 O. N. P. 292, 2 O. D. (N.P.) 11.

3. Parties.

A creditor of an heir at law of a decedent, whose estate is being administered, has no such interest in the estate as qualifies him to file or maintain exceptions to the account offered in settlement of said estate by said administrator, and has no legal capacity to maintain such an action: *In re Sturges*, 6 O. N. P. (N.S.) 331, 18 O. D. (N. P.) 344.

Where a married woman dies, domiciled in Ohio, but letters of administration are taken out in Pennsylvania, by means of which possession of her personal estate in that state is obtained, and her administrator there files his accounts and vouchers in the proper court, and the children and heirs of the deceased then appear and file exceptions, a suit can not be maintained by such children and heirs of the intestate, for the distribution of the money so held by the administrator, while the settlement account and the exceptions are pending, and the amount subject to distribution is undetermined: *Adams v. Adams*, 17 O. S. 83.

An accounting by executors and administrators and distribution can be compelled by chancery at the instance of creditors, legatees, and next of heir. They can not ask it in their own right, but as fiduciaries: *Cram v. Green*, 6 O. 429, I Longsdorf's Notes, 348; *Cadwallader v. Longley*, 12 Dec. Rep. 756, 1 D. 497.

Under exception to the allowance of an executor's accounts taken by a legatee, other legatees under the will may join the excepting legatee, and be made parties in prosecuting error; although they did not participate in the proceedings in the court below: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605.

4. Evidence.

On hearing exceptions to an administrator's account, the administrator is a competent witness for either party: *In re Raab*, 16 O. S. 273, II Longsdorf's Notes, 773.

Death of an administrator to whose account exceptions are pending, excludes the exceptor from testifying in support of the same or similar exceptions to the final account filed for the deceased administrator by his executrix. G. C., § 11495 applies: *In re Runyan*, 4 O. N. P. 335, 7 O. D. (N.P.) 236.

5. Reference to Commissioner.

The court may refer the account and exceptions to a special master commissioner: *McMahon v. Ambach*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

In a reference of the accounts of an administrator and exceptions thereto, the ac-

count and exceptions constitute the issues, and the administrator and the exceptors are the parties: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

Where the commissioner provided for in G. C., § 10833, reports, and the same is confirmed and an appeal taken to the common pleas court, that court may hear the case upon such report and other testimony, or it may refer the accounts and exceptions to a new commissioner appointed for that purpose. In either event, error will not lie: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

Upon a reference being made under G. C., § 10833, the course of proceeding is not according to the usages of courts of chancery, but according to provisions of the code of civil procedure, and especially G. C., §§ 11490 and 11491: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

6. Revivor.

An administrator *de bonis non* having by petition which was treated as an exception under G. C., § 10820, procured a reopening of his predecessor's account and a finding of an amount due, the predecessor appealed and died. It was held that the proceedings were not ended by his death and may be revived: *In re Ziegler*, 4 O. N. P. 182, 6 O. D. (N. P.) 244.

7. Review.

Proceedings in error upon disallowance of exceptions to accounts of executors, are not, as a rule, *in personam*, but *in rem*, and, if regular, are binding upon all persons equally, whether they are personally present to take part in the controversy, or hold themselves aloof; and this rule applies to judgments in an ancillary administration in another state as well as to judgments in the domiciliary administration in Ohio: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, on other points, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

Exceptions by one party to the disallowance of exceptions to the accounts of an administrator in the probate and common pleas courts, are available in behalf of other parties who, in common pleas court, are allowed to come in and are recognized as excepting to such accounts. Such parties have, therefore, a right to prosecute error through such exceptions: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, on other points, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

An objection to allowing persons who first became parties to a proceeding in error to the disallowance of exceptions to the ac-

counts of an administrator in the court of common pleas to prosecute error in the circuit court upon exceptions by other parties in the lower courts, on the ground that the original parties were parties to a contest of such accounts in an ancillary administration in another state, and that the parties who came in subsequently were not, and that judgments which would be *res judicata* as to original parties would not be so as to the others, is not tenable or valid; and particularly where the objections urged are upon the ground that the courts were without jurisdiction in the ancillary administration, which, if true, would render the judgment void as to all parties: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, on other points, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

Under exceptions to the allowance of an executor's accounts taken by a legatee, other legatees under the will may join the excepting legatee, and be made parties in prosecuting error, although they did not participate in the proceedings, in the court below: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, on other points, *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938].

An account of an administrator with exceptions thereto having been referred to a special commissioner by the probate court under G. C., § 10833, and such commissioner having made his report, the same being confirmed, and an appeal taken to the court of common pleas, that court may hear and determine the cause upon such report and other testimony if necessary, or may, if it deems it expedient and proper, refer the account and exceptions to a new commissioner appointed by the court for that purpose. The court may pursue either course as to it may seem best, and error will not lie for so doing: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

Exceptions to an allowance for extraordinary services in an administrator's account by creditors constitute a direct attack on the allowance, and not a collateral attack, and the allowance is then subject to review upon the exceptions the same as any other disputed item of the administrator's account: *McMahon v. Ambach*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

D. EFFECT OF ORDER SETTLING ACCOUNTS.

1. Collateral Attack and *Res Adjudicata*.

In a proceeding in the probate court to sell three parcels of land to pay debts, all questions that were legally determined in such proceeding as to all the land are *res adjudicata*.

case in a subsequent proceeding in a partition of one parcel not sold in the probate court proceeding: *Simpson v. Simpson*, 9 O. C. C. (N.S.) 137, 19 O. C. D. 503.

A judgment of the court of common pleas upon appeal from probate court overruling and disallowing a claim made by an executor of his mother's estate, upon exception being filed to his account, that he and his brother were entitled to all the proceeds of a farm belonging to the estate, by virtue of an agreement made between them and the testator, is not a bar to a proceeding brought by the executor under G. C., § 10728, or compensation for his services in working the farm, under a claim of an express or implied agreement therefor; the claim in one case being different and inconsistent with the claim in the other: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

Approval of final distribution is not *res judicata* to exonerate the executor except as to those whose receipts are on file, and not as to those actually entitled but not paid by reason of the executor's mistake, the statute permitting filing final receipts to perpetuate evidence and is not compulsory, and unpaid distributees can collect from him: *Negley v. Gard*, 20 O. C. 310, I Longsdorf's Notes, 910; *Swearingen v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671.

The settlement of the final account of an executor or administrator showing the payment of money to a person not entitled thereto, is no bar to a subsequent action against him for the recovery of the money by one who is legally entitled to the same: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

The settlement of an estate in a court of probate is an *ex parte* proceeding, *prima facie* evidence only of the correctness of the proceeding, and binding no rights except when made in conformity to law: *Bank v. Carpenter*, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

The order of the probate court overruling exceptions of widow and heirs to the executor's account is not *res judicata* against action by the administrator *de bonis non* against him: *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069.

The settlement of the accounts by the probate court is conclusive against parties with actual notice as to all matters set out therein, and no second accounting as to them can be required unless they are impeached for fraud or error: *McAfee v. Phillips*, 25 O. S. 374, III Longsdorf's Notes, 242.

But such account is not final as to assets in the executor's hands not accounted for or passed on. As to them the probate court may compel a further account at any

time within the statutory limit: *McAfee v. Phillips*, 25 O. S. 374, III Longsdorf's Notes, 242.

Unless an appeal has been taken, or the judgment reversed, the amount found due by the probate court is conclusive, in the settlement of the administrator's account, as against the bondsmen: *Slagle v. Entekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

The appearance of an administrator as a party to a cause and his allegation of probable liability against the estate, does not make the judgment thereafter obtained *res judicata* as to creditors of the estate who were not parties to the action and who had at the time another action pending to which the estate was a party defendant, and the plea of *res judicata* can not stand against the equities of creditors so situated whose action has resulted in a judgment: *Fleming v. McGuffey*, 8 O. N. P. (N.S.) 430, 19 O. D. (N.P.) 521.

The settled accounts of an administrator are conclusive between him and the estate, except as provided by the statutes: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91].

Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, can not be attacked collaterally by exception to her account as administratrix of the said estate: *In re Hess*, 14 O. C. C. (N.S.) 463, 23 O. C. D. 449.

The verity or legality of a distribution can not be questioned in the probate court by reopening the account after the lapse of eighteen months, but must be determined in an independent action: *In re Koehnken*, 1 O. C. C. (N.S.) 126, 15 O. C. D. 245, 8 O. N. P. 657, 11 O. D. (N.P.) 799.

An account containing items of credit for statutory commissions, extra services and attorney's fees, which was duly allowed and confirmed by the probate court, can not, on the filing of a second account more than one year thereafter, be reopened for hearing, and such items be disallowed, on exceptions filed thereto, when it is not claimed or found that there was any error or mistake therein, or in their allowance: *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

After a final account showing distribution of the balance has been filed and confirmed, an allowance several months later of compensation to the administrator without reopening on notice or hearing as to the parties interested, is not a judgment, and after six years is barred by limitations, and real estate can not be ordered sold to pay it:

Snider v. Graham, 14 O. C. C. 386, 8 O. C. D. 3.

Approval of an executor's accounts will not be opened up by suit in equity unless the judgment of the probate court was obtained by fraud. The probate court is a court of record, and its judgments as binding as those of any other court: *Woodward v. Curtis*, 19 O. C. C. 15, 10 O. C. D. 400 [affirmed, without opinion, *Woodward v. Curtis*, 63 O. S. 575].

Where the objection to the accounts is not that the executor omitted items, but that payments by him were not authorized by the will, this raises no question of fraud, and it will be presumed that the probate court passed on this question: *Woodward v. Curtis*, 19 O. C. C. 15, 10 O. C. D. 400 [affirmed, without opinion, *Woodward v. Curtis*, 63 O. S. 575].

Exceptions to the account raise a "matter of dispute" under G. C., § 10835, and, after they have been heard and determined by court, can not again be questioned on the hearing of a subsequent account without leave of court: *In re Stayner*, 33 O. S. 481, III Longsdorf's Notes, 685.

The probate court can not grant such leave after its determination has been appealed to the common pleas and partly heard there. G. C., § 10835, authorizing opening of former accounts does not apply to authorize a disregard of the finding of the common pleas: *In re Stayner*, 33 O. S. 481, III Longsdorf's Notes, 685.

Nor will the common pleas on an appeal to a subsequent account rehear the former exceptions on evidence that could have been adduced at the former hearing. And it may refuse to do so, though the former exceptions were not taken to it by an appeal: *In re Stayner*, 33 O. S. 481, III Longsdorf's Notes, 685.

Where an executor who was indebted to his testator, died before an account was due or filed, and his administrator, under G. C., § 10822, reported that no assets of testator came to the deceased executor, to which report legatees under the will filed exceptions upon hearing it was held, that the indebtedness is to be treated as money and assets of the testator's estate; that the findings of the probate court as to the amount of indebtedness are conclusive until reversed; and that the administrator of the deceased executor must satisfy the amount so charged or the legatees under the will may maintain an action against the estate of the deceased executor to recover the amounts due them under the will: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

No collateral attack can be made on the finding on a final account. Accordingly, an

unpaid creditor of the settled estate can not intervene in a proceeding to sell the real estate of a deceased heir of the debtor, and attack the final account in order to have his claim declared a lien on such land superior to the heir's title: *Smith v. Hayward*, 5 O. N. P. 501, 5 O. D. (N.P.) 462.

After the expiration of the eight months allowed by G. C., § 10834, for filing exceptions when the account is settled in the absence of a person interest and without actual notice to him, the judgment of a probate court settling the final account of an executor or an administrator becomes absolute and conclusive and can not be attacked except for fraud of the prevailing party: *Crawford v. Zeigler*, 84 O. S. 224.

An executor is not barred by the ten years statute from claiming credits for disbursements made more than ten years prior to the rendering of his final account: *In re Campbell*, 13 O. N. P. (N.S.) 386, 22 O. D. (N. P.) 578.

2. Correction for Mistake and Fraud.

The settlement of an account is conclusive as to all matters set out and specified therein and the party rendering same can not be required to account a second time unless the account be impeached for fraud or manifest error: *McAfee v. Phillips*, 25 O. S. 374, III Longsdorf's Notes, 242.

Uncontested partial accounts of an executor or administrator may, upon proper exceptions made at final hearing, be opened up for fraud, mistake or error under G. C., § 10835, and where such accounts have been contested and adjudicated, they may also, in furtherance of justice, be opened up by leave of court: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

The accounts of executors or administrators are impeachable for fraud, and if necessary, the whole account must be restated: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

If it appear that mistake or fraud has entered into the settlement of the account, to that extent, and to that extent only, may they be reformed and corrected: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

After the expiration of the eight months allowed by G. C., § 10834, for filing exceptions when the account is settled in the absence of a person interested and without actual notice to him, the judgment of a probate court settling the final account of an executor or an administrator becomes absolute and conclusive and can not be attacked except for fraud of the prevailing party: *Crawford v. Zeigler*, 84 O. S. 224.

If legal services were in fact rendered by an administrator, the fact that the circuit court may disagree with the probate court as to the amount to be allowed for such services, does not of itself justify the circuit court in substituting its own judgment for that of the probate court, where no appeal was taken in time from the probate court; but it must first find if the judgment was procured by fraud before it is authorized to open it up and to set it aside: *Crawford v. Zeigler*, 84 O. S. 224.

When an executor or administrator has filed in the probate court an account of final distribution and the same has been approved and confirmed by the court and the executor or administrator discharged from the trust, such account is conclusive unless impeached for manifest error, or for fraud within four years after the discovery of the fraud: *Henry v. Doyle*, 82 O. S. 113.

Upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein, except as to matters in dispute between two parties which had been previously heard and determined by the court: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

Upon settlement of an account, all former accounts may be opened to correct a mistake or error, even though no exception was filed to the original account: *Lambright v. Lambright*, 74 O. S. 198, IV Longsdorf's Notes, 1009.

It was said that in § 174 of the administrators' act, as revised in 1840 (S. & C. 599), it is provided that upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein: *Woodmansie v. Woodmansie*, 32 O. S. 18, III Longsdorf's Notes, 618.

One can not maintain a suit in equity to open an executor's account unless the judgment of the probate court was obtained by fraud. And where the objection to the accounts is not that the executor omitted items but that payments by him were not authorized by the will, this raised no question of fraud, and it will be presumed that the probate court passed on this question: *Woodward v. Curtis*, 19 O. C. C. 15, 10 O. C. D. 400 [affirmed, without opinion, *Woodward v. Curtis*, 63 O. S. 575].

The probate court has power, upon hearing exceptions, to determine as to fraud of the executor, and to charge him in his account accordingly: *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 15.

The settlement and account bind no right except where made in conformity to law:

Bank v. Carpenter, 7 O. (pt. 1) 21, I Longsdorf's Notes, 360.

G. C., § 10835, permitting on every settlement the correction of errors in former accounts, includes the power to correct mistakes of the court as well as of the administrator, and as to items omitted, as well as incorrect: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

If infant heir's names are signed without authority to a final settlement with heirs in lieu of a final account, such infants, on coming of age, can disaffirm and compel the executor to make a final settlement in court. But they must pursue the remedy given by law, which is a plain and adequate one, and until it is exhausted can not sue in equity to correct errors and mistakes: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

Payment to a person not entitled to the distributive share (as here to the child of a deceased legatee instead of to the legatee's administrator) is not protected by confirmation of the executor's final account and no bar to an action to recover the amount: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

Fraud by one standing in a fiduciary relation will avoid the settlement of the account induced thereby, and such final settlement may be attacked in a court of equity in an independent action upon a complaint that the final settlement was obtained by fraud; and the common pleas has jurisdiction in such action: *Rote v. Stratton*, 2 O. N. P. 27, 3 O. D. (N.P.) 156.

A demurrer does not lie to the petition of a widow to set aside a contract embodying a family settlement, entered into between herself and the heirs at law of her deceased husband, where she had no knowledge of the value of her rights or of the law governing them, and was misinformed by the administrator with reference thereto both as to the law and facts, and was told by the heirs that the proposed settlement was all she was entitled to and by an attorney that it was the only settlement which could be made, and she believed these statements and relied upon them until a comparatively recent date, when the discovery was made by her that her interest in the estate was much more valuable than was assumed in the contract of settlement: *Fuller v. Felchers*, 10 O. N. P. (N.S.) 425, 21 O. D. (N.P.) 202.

Where the executor is given unlimited powers by the will, the court will not hear exceptions to his account unless fraud is shown: *In re Reynolds*, 3 O. N. P. 292, 2 O. D. (N.P.) 11.

Where, under a testamentary power to sell lands, the executor, in bad faith, sells them

for less than their true value, he should be charged with the loss on exception to his account in the probate court: *Brown v. Reed*, 56 O. S. 264, IV Longsdorf's Notes, 689 [affirming *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 15].

Even where there is fraud or manifest error, the acquiescence of the beneficiary in such wrongful application of the trust fund by the administrator releases the latter as such, and his sureties, from liability to the beneficiary: *In re Koehnken*, 6 O. C. C. (N. S.) 359, 17 O. C. D. 840.

G. C., § 10835, authorizing and regulating the opening up of account of executors and administrators, is remedial, and should receive a reasonable construction, so as to suppress the mischief and advance the remedy: *In re Leidigh*, 15 O. D. (N.P.) 193 [affirmed, without opinion, *In re Leidigh*, 71 O. S. 485].

3. Review.

An Ohio probate court, although it has admitted to probate an Ohio will, and has issued letters to the executor, has not power to review the accounts of such executor respecting property situate in the state of Michigan, and for which he has duly accounted to the proper court in that state under the ancillary administration granted him by the laws of that state: *In re Crawford*, 68 O. S. 58, IV Longsdorf's Notes, 938 [affirming *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605].

An order refusing to remove an administrator is not included in the "orders, judgments and decrees" authorized by G. C., § 10848. It is therefore not included in the orders from which an appeal may be taken by virtue of G. C., §§ 10858, 10859 and 10860: *Ebersole v. Schiller*, 50 O. S. 701, IV Longsdorf's Notes, 523.

When a case pending in the probate court is reserved and sent to the common pleas court, no appeal will lie from the final judgment in such case to the circuit court: *In re Correy*, 4 O. C. C. 220, 2 O. C. D. 510.

An action brought by an administrator *de bonis non* against a former administrator by virtue of G. C., § 10820 is appealable and does not abate by the death of the former administrator: *In re Zeigler*, 4 O. N. P. 182, 6 O. D. (N.P.) 244.

The appeal provided for in G. C., §§ 10859, 10860, refers only to such cases as are brought under G. C., § 10848, and, these are cases in which it is sought to make the executor or administrator pay upon proceedings in settlement of estates, and do not cover matters contained in G. C., §§ 10859

and 10860: *Kislingbery v. Donovan*, 8 O. N. P. 476, 11 O. D. (N.P.) 535.

An account filed and passed on, especially if part of it is in the nature of a distribution, is conclusive and can be gotten rid of only by appeal or error: *Clark v. Clark*, 16 O. C. C. 103, 8 O. C. D. 752.

A settlement by the probate court of the amount due from an administrator, not appealed from, is, in the absence of irregularity, a bar to a subsequent action against him on the same demand: *Ramsey v. McGregor*, 13 Dec. Rep. 578, 1 C. S. C. R. 327.

Exceptions to an allowance for extraordinary services in an administrator's account by creditors constitute a direct attack on the allowance, and not a collateral attack, and the allowance is then subject to review upon the exceptions the same as any other disputed item of the administrator's account: *McMahon v. Ambach*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

Upon petition in error in the settlement of the accounts of an administrator, the judgment may be modified by affirming as to some items, and reversing as to others: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

Where there is a reversal as to an item of an administrator's account for the want of the finding of a fact in the report of the master, the cause as to that item may be remanded to the court below for a finding as to such fact, and for judgment accordingly: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

The appeal provided for in G. C., § 10859, relates only to proceedings brought under G. C., § 10848 and the succeeding sections: *Barr v. Closterman*, 2 O. C. C. 387, 2 O. C. D. 251 [affirmed, without opinion, *Closterman v. Barr*, 27 Bull. 392].

The settlement made by an administrator will not be opened up forty years after the estate was closed in order to let in the claim of the widow for her first year's support, where no such claim was asserted at the time the estate was being settled: *Evans v. Evans*, 13 O. C. C. (N.S.) 62, 21 O. C. D. 635 [affirming *Evans v. Evans*, 9 O. N. P. (N.S.) 589, 20 O. D. (N.P.) 676, and affirmed, without opinion, *Evans v. Evans*, 83 O. S. 482].

In error proceedings by a legatee upon disallowance of his exceptions to an executor's account, other legatees may join although they were not parties below. Such proceedings are *in rem* and bind all persons, whether parties or not: *In re Crawford*, 21 O. C. C. 554, 11 O. C. D. 605 [affirmed, on other points, *In re Crawford*, 68 O. S. 58].

The verity or legality of a distribution can not be questioned in the probate court by reopening the account after the lapse of eighteen months, but must be determined in an independent action: *In re Koehnken*, 1 O. C. C. (N.S.) 126, 15 O. C. D. 245 [modifying and affirming *In re Koehnken*, 8 O. N. P. 657, 11 O. D. (N.P.) 799].

E. ADJUSTMENT BY MUTUAL AGREEMENT.

A settlement with heirs in lieu of a final account is conclusive unless impeached. And where a partial account was settled in court, and the final settlement was made with the heirs and the assets surrendered to them, such settlement is final as to all matters that a final account in court would have embraced, and is final as to all errors or mistakes in the partial account, which had been of record for over twenty years: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

An agreement of "complete settlement" between executor and heirs, in lieu of a final account in court, of all matters administered is not broad enough to include undiscovered breaches of trust outside the administration: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

In so far as the compromise of a will contest involves an adjustment of disputed matters, the probate court in settling the executor's account will be limited by the entry in the will case: *In re Seeger*, 7 O. N. P. 207, 1 O. D. (N.P.) 113.

A contract for the settlement of an estate made between all the beneficiaries and executors of a solvent estate, and not inconsistent with the will, whereby the claim of a legatee, who is also a large creditor, is to be adjusted in a particular way, he being fully aware of the condition of the estate, is binding, and he can not afterwards object to it. The law favors settlements of difficulties by heirs in settling estates where the object is to adjust claims: *In re Worthington*, 5 O. N. P. 63, 5 O. D. (N.P.) 524.

XXII. COMPENSATION.

A. BASIS OF COMPENSATION.

1. In General.

Construing G. C., §§ 10809 and 10813 together, compensation is computed on the aggregate of real and personal estate, as graduated by G. C., § 10837, and not each separately, and the higher rate should fall first on the personalty: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

G. C., § 10837, providing for compensation is identical with that provided for assignees by G. C., § 11143, and the same

rule applies to both: *Andrews v. Johns*, 59 O. S. 65, IV Longsdorf's Notes, 759; *Shaw v. Building Association*, 6 O. C. C. 41, 3 O. C. D. 340.

Attorney's fees of \$550 are not excessive where settling the estate amounting to over \$23,000 extended over four years and required advice, filing suits to construe will and to sell real estate making abstract of title, and filing accounts: *In re Wolfe*, 4 O. N. P. 336, 7 O. D. (N.P.) 220.

A trust company which was appointed without objection as administrator of an estate, and has performed services in that capacity is entitled to compensation therefor, notwithstanding the invalidity of the act under which the appointment was made, and the measure of such compensation is the amount allowed by statute to legally appointed executors and administrators: *Bank v. Smith*, 4 O. C. C. (N.S.) 237, 16 O. C. D. 317 [affirmed, without opinion, *Smith v. Bank*, 74 O. S. 505].

Expenses of coming from another state to accept the executorship is a proper item: *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 154.

The administrator assumes the risk of the fund realized from the sale being insufficient to pay his own fees and those of his attorney and the court costs incident to the general administration. They can not be paid from the fund to the prejudice of a mortgagee: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

The executor or administrator of a surviving partner who was winding up the affairs of the partnership, is not, as a matter of law, precluded from receiving compensation out of the partnership funds for his services in the performance of this duty: *Dayton v. Bartlett*, 38 O. S. 357, III Longsdorf's Notes, 974.

An administrator is entitled to expenses incurred in obtaining the appointment, but not to those incurred in trying to hunt up assets in order to pay his wife her share as an heir: *Huston v. King*, 7 Dec. Rep. 575, 3 Bull. 1142.

On distribution in kind, as where on sale of real estate to pay debts, a judgment creditor accepted the buyer's note and mortgage as payment, compensation is to be allowed as if so much money was distributed, for it is equivalent to paying the creditor and a loan of it by him to the buyer: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90 [approved *Andrews v. Johns*, 59 O. S. 65, IV Longsdorf's Notes, 759].

2. Attorney's Fees.

Attorney's services may be allowed for in preparing the inventory; settling the de-

ceased's interest in partnerships; settling a claim without suit by allowing offsets; investigating worthless claims, and distributing them in kind among the distributees; arranging a claim so as not to defer suing on it for the estate's benefit, but so as not to violate the bond, arranging for partial distribution before the statutory time; settling a surety debt due from the estate; advising on some questions of descents involved; filing the final account: *In re McAlpin*, 8 O. D. (N.P.) 654, 38 Bull. 231.

Attorney's services can not be allowed for to the administrator for items which he could and should have done for himself, as preparing the notice of appointment; serving notice of the making of the inventory; deciding that the estate is liable on charitable subscriptions which no one disputes; deciding that securities held in trust do not belong to the estate; listing property for taxation about which there is no doubt; advising the administrator as to his compensation, for this is for his own benefit: *In re McAlpin*, 8 O. D. (N.P.) 654, 38 Bull. 231.

The court does not determine the fees which an executor may pay his attorney, but it will only allow him to charge the estate with reasonable attorney fees for such services as were necessary and proper in the settlement of the estate: *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803 [modified *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370].

The fact that an executor is also an attorney does not preclude an allowance to him of fees for attorneys employed by him, where no allowance is made to him personally for performance of the same services; and the rendering of legal services for an executor is not necessarily inconsistent with the performance of like services by the same attorneys for the widow of the decedent: *King v. Alt*, 11 O. N. P. (N.S.) 433, 22 O. D. (N.P.) 183.

A reasonable allowance of fees will be made on equitable principles to counsel who, although not employed by the administrator or trustee, have rendered services which inured for the benefit of the trust: *In re Oskamp*, 1 O. N. P. (N.S.) 197, 49 Bull. 568.

The fact that an executor is a man of affairs with business experience and ability does not afford ground for denying to him the aid of counsel in the settlement of the estate: *In re Ullman*, 12 O. C. C. (N.S.) 340, 21 O. C. D. 370 [modifying and affirming *In re Ullman*, 9 O. N. P. (N.S.) 12, 19 O. D. (N.P.) 803].

Where the personal representative has, in good faith and in proper cases, employed

counsel to render his services for the benefit of the estate, the court should allow him what he has paid therefor. But he can not bind the estate for such debt: *McBride v. Brucker*, 5 O. C. C. 12, 3 O. C. D. 7; *Mellen v. West*, 5 O. C. C. 89, 3 O. C. D. 46.

An administrator who pays an attorney for assistance in managing the estate may be reimbursed in full or in part, and the item would have a preference, under G. C., § 10714, as part of the expenses. But the administrator has the burden to show the necessity and reasonable value thereof; and a judgment against him for the services does not bind the estate not to oppose its allowance: *Thomas v. Moore*, 52 O. S. 200, IV Longsdorf's Notes, 569.

Fees for legal services to an executor or administrator are a part of the expenses of administration and are a preferred claim against the estate: *In re Maholm*, 51 Bull. 209 [affirmed, without opinion, *In re Maholm*, 72 O. S. 679].

An administrator in his trust capacity can not make a contract with an attorney as to fees and services. It should be with the administrator alone, and charged as an expense of the trust, and passed upon by the probate court; if court should not allow the entire amount paid, the administrator himself is liable for the balance: *McMahon v. Merrill*, 8 O. D. (N.P.) 583, 37 Bull. 21 [reversed *Merrill v. McMahon*, 5 O. N. P. 77, 7 O. D. (N.P.) 136].

When an action has been commenced in partition, but afterwards the administrator of the common ancestor filed a cross-petition asking the sale of the real estate described to pay the ancestor's debts, and the property was sold on such cross-petition, no attorney fee can be allowed counselor for the plaintiffs under G. C., § 12050: *Myers v. Myers*, 5 O. N. P. (N.S.) 85, 17 O. D. (N.P.) 551.

3. Provisions Against Compensation.

Legacies to sons in excess of what they would have inherited, with a direction that in consideration thereof, no fees, commissions or charges for administering the estate shall be paid to them, disentitle them to commissions under G. C., § 10838 and the preceding sections: *In re Dellenbaugh*, 17 O. C. C. 342, 9 O. C. D. 380 [affirmed, without opinion, *In re Dellenbaugh*, 62 O. S. 658].

Increased legacies, intended by the will to be in lieu of compensation preclude the executors who take them from receiving any other compensation: *Rote v. Warner*, 17 O. C. C. 342, 9 O. C. D. 536 [affirmed, without opinion, *Rote v. Warner*, 57 O. S. 633].

B. COMMISSIONS.

1. *When Purchasers are Not Lienholders.*

To entitle the administrator to his commissions, the amount need not actually have passed through his hands, but he can make a charge for administering upon anything having a money value, upon which commissions might be computed: *In re Duddy*, 7 O. N. P. 589, 5 O. D. (N.P.) 412.

Where the administrator has charged the statutory six per cent. on the first thousand dollars and four per cent. on the next four thousand, an administrator *de bonis non*, who succeeds him, can only charge the percentage his predecessor could have charged upon money subsequently collected, viz, two per cent.: *In re Waring*, 7 O. N. P. 553, 5 O. D. (N.P.) 415, 1 Goebel, 146.

An administrator is entitled to commission on securities which must be considered and are treated as money, and which require the same care and responsibility: *In re Duddy*, 7 O. N. P. 589, 5 O. D. (N.P.) 412.

The phrase "personal estate" used in G. C., § 10837, which allows executors full compensation upon the amount of personal estate collected and accounted for by them, includes stocks, bonds and other securities belonging to the estate, and an executor is, therefore, entitled to the statutory commissions thereon: *Bank v. Smith*, 4 O. C. C. (N.S.) 237, 16 O. C. D. 317 [affirmed, without opinion, *Smith v. Bank*, 74 O. S. 505].

An administrator is legally entitled to his statutory commissions although he may have failed to charge himself with all assets received by him or has asked for credits for sums not paid by him. Unfaithful administration of the estate will not deprive an executor or administrator of a right to compensation for his services, so far as they have been beneficial to the persons interested in the estate: *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

Compensation and charges for making sale of real estate to pay debts are to be paid before mortgages or other liens, and is to be computed on the percentum authorized by G. C., § 10837: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90.

The probate court has jurisdiction under G. C., § 10492, to apportion the statutory commissions between two or more executors in accordance with the services performed by each, where the accounts between the estate on the one hand and the executors on the other have not been settled and determined: *Meyers v. Hopkins*, 7 O. C. C. (N.S.) 240, 18 O. C. D. 208.

Where there is a bequest of the income of certain funds, commissions due the administrator should be prorated against principal

and income: *Boggs v. Taylor*, 20 O. S. 172, III Longsdorf's Notes, 454.

An executor is not entitled to commissions on real estate which formed part of the residuary estate, and was conveyed in accordance with an agreement between the parties: *Bank v. Smith*, 4 O. C. C. (N.S.) 237, 16 O. C. D. 317 [affirmed, without opinion, *Smith v. Bank*, 74 O. S. 505].

Advancements are no part of the estate upon which an administrator can collect or charge commissions, and can only be considered on distribution: *Dow v. Dow*, 3 O. N. P. (N.S.) 125, 15 O. D. (N.P.) 576.

Where the testator directed certain legacies to be paid by his executors and devised lands charged with the payment of the legacies and costs of administration, and the devisee paid and took receipts from the legatees and tendered the amount of costs of administration to the executors, exclusive of any per cent. on the legacies, the executors are not entitled to a per cent. on the legacies: *Williams v. Williams*, 8 O. S. 300, II Longsdorf's Notes, 343.

Where executors procure settlement of large mortgage debts by release to the creditors of the equity of redemption, which was of great benefit to the estate, an allowance of a commission on the whole amount, though but little money was handled, will not be reversed after twenty-five years' acquiescence: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

2. *Where Purchasers are Lienholders.*

Where a mortgagee, whose lien is fixed by the court, becomes a purchaser, the executor or administrator is not entitled to a per centum compensation on that part of the purchase money applicable to the satisfaction of his mortgage: *Stone v. Strong*, 42 O. S. 53, IV Longsdorf's Notes, 90 [approved, *Andrews v. Johns*, 59 O. S. 65, IV Longsdorf's Notes, 759].

C. EXTRA COMPENSATION.

The statutes of the state bearing upon the settlement in the probate court of the estates of deceased persons, taken together, show that the allowance to an administrator for extraordinary services in the settlement of the estate is part of the statement of his account, and is to be considered by the court accordingly: *McMahon v. Ambach & Co.*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

A claim for extra compensation will be disallowed unless facts entitling to it are shown: *Piatt v. St. Clair*, W. 526, I Longsdorf's Notes, 42.

Expenses and services in bringing suit to construe the will, looking after real estate,

collecting rents and paying taxes for two years, not being part of the usual duties, justify extra compensation: *In re Wolfe*, 4 O. N. P. 336, 7 O. D. (N.P.) 220.

Claims for extra services must be fully itemized so that the court and all interested may understand the exact nature and extent: *In re Wolfe*, 4 O. N. P. 336, 7 O. D. (N.P.) 220.

If lands devised are charged with legacies, and the devisee pays the legacies, the executors are not entitled to sale of the land to pay a commission on such disbursement. Whether they are entitled to extra compensation for seeing to the payment is for the probate court: *Williams v. Williams*, 8 O. S. 300, II Longsdorf's Notes, 343.

On distributions in kind the administrator may make charges based on the values, but is not entitled to extra fees for the risk and care thereof: *In re Duddy*, Goebel, 130.

No extra compensation will be allowed to executors for expense and counsel fees in matters of differences from disagreement between themselves, for heirs are entitled to a harmonious administration; nor for counsel fees in contest of the will, for this is the business of the heirs or those interested in the will: *In re Johnston*, 4 O. N. P. 156, 7 O. D. (N.P.) 1.

G. C., § 10838, is intended to cover all the ordinary expenses of closing up the estate. Executors are entitled to no extra compensation under this and the preceding section, where an unusual amount of time was expended and counsel employed in litigation made necessary because of a misunderstanding between the executors as such: *In re Johnston*, 4 O. N. P. 156, 7 O. D. (N.P.) 1.

The burden is upon the administrator to show that the services rendered him were such for which an extra allowance is provided. Attorney's fees for services rendered an administrator which the administrator could have performed himself will not be allowed: *In re McAlpin*, 8 O. D. (N.P.) 654, 38 Bull. 231.

Failure to serve notice on beneficiaries under the will of the pendency of a motion to fix the amount due the executor and trustee for extraordinary services, deprives the court of jurisdiction to hear and determine the motion: *Ballard v. Mack*, 17 O. C. D. 839, 3 O. L. R. 249.

An executor's services as attorney may be allowed for in so far as extraordinary. As in applying for the sale of certain chattels, but not to sell corporate stock at private sale. Or in construing a will on petition to sell real estate. Or where subdividing and surveying are necessary in selling land. Or even for taking out letters and making accounts, if complicated, and instructing as to

duties if the estate is large, but not for giving the bond. And not for interference with the executor's practice as an attorney: *Chatfield v. Swing*, 6 Dec. Rep. 666, 7 Am. L. Rec. 326.

The fact that an executor is also an attorney does not preclude an allowance to him of fees for attorneys employed by him, where no allowance is made to him personally for performance of the same services; and the rendering of legal services for an executor is not necessarily inconsistent with the performance of like services by the same attorneys for the widow of the decedent: *King v. Alt*, 11 O. N. P. (N.S.) 433, 22 O. D. (N.P.) 183.

Fees of an attorney of an administrator in an action to sell real estate to pay debts, general costs of administration, and premiums due a surety company upon the administrator's bond, can not be allowed as extraordinary expenses under G. C., § 10838: *Sherman v. Millard*, 6 O. C. C. (N.S.) 338, 17 O. C. D. 175.

Whether an allowance to an administrator for extraordinary services is in fact made at the time of or prior to the filing of a settlement account, such allowance can not take effect as prejudicing the rights of others interested in the settlement of the estate who have not had notice until the court, after legal notice, acts upon the settlement account itself: *McMahon v. Ambach & Co.*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

D. FORFEITURE.

An executor who refused to obey the order of court to file an account, although served with five citations, should not receive an allowance for extra services: *Cairns v. Hedges*, 2 O. C. C. 103, 1 O. C. D. 387.

Failure of an administrator to properly administer an estate does not of itself afford reason for not allowing him compensation: *In re Craig*, 10 O. D. (N.P.) 733.

Incorrect accounts in the administrator's favor, where no willful default or gross neglect has occasioned loss, will not deprive him of compensation if the services were valuable. The court does not have a discretion. "May" in G. C., § 10837, means "shall": *Campbell v. McCormick*, 1 O. C. C. 504, 1 O. C. D. 281.

E. ATTACHMENT OF COMPENSATION.

Compensation of an executor can not be reached by his creditor, as by attachment, before creditor's bill or otherwise, they are allowed by the probate court. It would embarrass the settlement of estates and invade the jurisdiction of the probate court: *Overturf v. Gerlach*, 62 O. S. 127, IV Longsdorf's Notes, 826.

Since the provisions for compensation of executors and administrators are the same as for assignees, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

XXIII. BOND.

A. NECESSITY.

The giving of bond by an administratrix is not a judicial requirement, and failure to give bond does not, *per se*, render her appointment void: *Mitchell v. Albright*, 10 Dec. Rep. 301, 20 Bull. 101.

The failure of the probate court to grant permission to testamentary trustees to execute a trust, with or without a bond, as authorized by G. C., § 10591, was not a jurisdictional defect in a case brought against such trustees, and others, to contest the validity of the will, which created the trust, appointed the trustees, and executed them from giving bond: *Martin v. Falconer*, 10 Dec. Rep. 771, 23 Bull. 333.

Executors or administrators, whether appointed in this state or elsewhere, who have not given bond in this state, and who were original parties to the action, are not authorized to prosecute an appeal to the district court without giving an appeal bond or undertaking: *Dennison v. Talmage*, 29 O. S. 433, III Longsdorf's Notes, 485.

Where a will makes a person both trustee and executor, each separate from the other, such person must give separate bonds: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535, 1 O. D. (N.P.) 639.

G. C., § 10606, makes the same provision as to allowance for services as does G. C., § 10618, in regard to administrators: *McMahon v. Ambach*, 79 O. S. 103, IV Longsdorf's Notes, 1044.

When the administration of an estate is committed without bond to one named as executor in a will by the terms of which bond is excused, and a party interested files a motion to require bond, it rests in the sound discretion of the court as to whether or not bond should be required. Administration bonds are favorites of the law, and should be required of an executor, though excused by will, whenever a party interested moves that bond be required, or show such situation with reference to assets of the estate as would render the giving of such bond either prudent or proper; or such bond may be required, if the court deem it necessary, when the administration of the estate is committed to such executor: *In re Wilson*, 14 O. N. P. (N.S.) 443.

Where A by deed conveyed all of his real estate to his grandson B and later by will devised all of his real estate to his grandson whom he named as executor without bond,

and C, another grandson and an heir at law of the decedent filed actions to set aside said deed and will and afterwards filed a motion in the probate court to require bond of the executor to whom administration was committed without bond, C, the grandson making the motion is a "party interested" within the meaning of G. C., § 10607, and such situation with reference to the assets of the estate is one that makes the requirement of bond both prudent and proper and the court should so order: *In re Wilson*, 14 O. N. P. (N.S.) 443.

A "party interested" within the meaning of G. C., § 10607, is one having an interest, share or concern in some project or affair; one involved, as financially interested or one concerned in a cause or its consequences; one liable to be affected or prejudiced; or one concerned for his own advantage; one who has a probable, though as yet an undetermined interest based upon some claim of right; or one who has any right in the nature of property but less than title: *In re Wilson*, 14 O. N. P. (N.S.) 443.

B. FORM.

The bond is not invalidated by adding to the statutory requirements a condition to pay debts and legacies, even though the executor were a trustee as to some of the legatees, for the same bond may secure both kinds of trusts: *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728.

An executor's bond, describing the testator as James L., can not by parol evidence, be made applicable to the estate of Joseph L.: *McGovney v. State*, 20 O. 93, I Longsdorf's Notes, 897.

A defective bond, in not having the required number of sureties, will not affect the administrator's capacity to recover in an action while the appointment remains unrevoked: *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

A probate judge is not liable for accepting a bond of an administrator with the sureties name forged, and upon such bond issuing letters of administration: *Ingersoll v. Smith*, 36 Bull. 302 (supreme court, without opinion.)

C. CONTENTS.

The omission of an administrator to give a bond with the requisite number of sureties upon it, will not affect his right to recover in an action where letters have been issued by the probate court upon the bond as given, and remain unrevoked: *Slagle v. Entrekin*, 40 O. S. 637, IV Longsdorf's Notes, 240.

D. JOINT BONDS.

If two administrators give a joint bond and get joint possession of the assets each is liable for the other, and the death of one does not end his continuing liability for subsequent defalcations of the other as to assets which had come into their joint possession: *Eckert v. Myers*, 45 O. S. 525, IV Longsdorf's Notes, 295.

As to the surety, both are principals jointly liable to indemnify him, and he may require the estate of the deceased to answer for the whole defalcation and not merely to contribute part: *Eckert v. Myers*, 45 O. S. 525, IV Longsdorf's Notes, 295.

Two executors who give a joint and several bond are each liable for the other's delinquency and bound to indemnify all the sureties. That each procured one surety does not throw the loss on one surety instead of on the co-executor: *Seymour v. Stole*, 2 Dec. Rep. 648, 4 W. L. M. 323 [reversing *Channel v. Stone*, 2 Dec. Rep. 475, 3 W. L. M. 205].

E. ADDITIONAL BONDS.

Where sale is ordered and the bond is insufficient, additional bond may be required: *Wade v. Graham*, 4 O. 126, I Longsdorf's Notes, 209.

It was questioned whether the bond covered a surplus of money left in hand from the sale of real estate: *Griswold v. Frikk*, 22 O. S. 79, III Longsdorf's Notes, 59.

Failure to give the new bond for the sale of real estate (G. C., §§ 10950, 10951) may be erroneous, but is not jurisdictional, and does not invalidate the title: *Mauarr v. Parrish*, 26 O. S. 636, III Longsdorf's Notes, 335; *Arrowsmith v. Harmoning*, 42 O. S. 254, IV Longsdorf's Notes, 109. See also GUARDIAN AND WARD.

F. FOR WHAT LIABILITIES BOND IS GIVEN.

Moneys received by an administrator as the proceeds of land sold under a petition of partition, are within the condition of the administrator's bond: *Campbell v. English*, W. 119, I Longsdorf's Notes, 10.

Where the executor is a residuary legatee, G. C., § 10608, provides a method whereby the probate court may, in a measure, dispense with the general administration: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 1002.

Under a devise to be put out at interest and appointing an executor who settled up the rest of the estate and began to pay interest without being appointed trustee and was required to give a new bond as executor, it was held that the latter bond is liable for the fund. The sureties are estopped

to claim the principal to be a trustee and no longer executor. Obligors are estopped to deny the existence of what the obligation recites: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308; *In re Kaufman*, Goebel, 98.

For matters for which the administrator must account, see Accounts, XXI, herein.

G. BREACH.

Where the administrator of an estate, is required by the probate court to file an account of the expenses of his administration, preparatory to his stating a final account, and does so, which expense account includes an amount due his attorney for services rendered in the settlement of the estate, and for necessary expenses paid by him in discharge of his duties as such attorney, and said account, on hearing by that court, is approved and allowed, and the administrator is ordered by the court to pay to said attorney the sum so found due him out of the assets of the estate in his hands for distribution, a failure to comply with such order is a breach of the administration bond for which the sureties thereon are liable: *Smith v. Rhodes*, 68 O. S. 500, IV Longsdorf's Notes, 947 [distinguishing *Thomas v. Moore*, 52 O. S. 200, IV Longsdorf's Notes, 569].

An administrator has no power to bind the estate of his intestate by a negotiable note given by him as administrator. His refusal to pay such note is not a breach of the condition of his bond, and in an action on the bond his sureties are not estopped to deny the validity of a judgment recovered against the administrator on the note in a separate action against him: *Curtis v. Bank*, 39 O. S. 579, III Longsdorf's Notes, 1050.

Where the breaches alleged in the bond of an executor or administrator consist in his failing to return an inventory, and his wasting and converting the assets to his own use, in such case, the action should be brought for the benefit of the estate, and not for any particular creditor, legatee or distributee: *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

A deposit in a reputable bank by a trustee or administrator as such, and not mingled with his own funds, without negligence, in good faith and in the usual course of business, is not at his risk. Accordingly, where the treasurer of a corporation under bond to pay over all moneys coming to his hands, so deposits them and the bank fails, his sureties are not liable: *Benefit Association v. Ferson*, 3 O. C. C. 84, 2 O. C. D. 48; *Ramsey v. McGregor*, 13 Dec. Rep. 578, 1 O. S. C. R. 327. See also TRUSTS.

H. ORDER SETTLING ACCOUNT.

The settling of the account is not conclusive as to the surety without notice: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

I. SURETIES.

1. Liability.

(a) In General.

G. C., § 10826, does not change, but is simply declarative of the former law, *i. e.*, the administrator is chargeable with his own debt to the estate as assets, and therefore the sureties on his bond are liable for such debt, whether the administrator is solvent or insolvent: *Perkins v. Scott*, 9 O. C. C. 207, 6 O. C. D. 226.

(b) Breach of Duty by Executor.

The obligation of a surety on an administrator's bond can not be extended beyond the plain terms of the undertaking. Therefore, sureties upon the bond of an administratrix are not liable for money, the proceeds of a policy of life insurance held by decedent, for which such administratrix receipted as such, but which was not assets of the estate being administered upon by her, and was held by her "only as trustee for the beneficiaries entitled thereto" under a policy of insurance carried by her decedent: *Murphy v. Dorsey*, 3 O. C. C. (N.S.) 119, 13 O. C. D. 157.

An administrator can not bind the estate by a negotiable promissory note; and the sureties on his bond are not liable for the payment of the same: *Curtis v. Bank*, 39 O. S. 579, III Longsdorf's Notes, 1050.

Where on an executor's death an administrator *de bonis non* was appointed, and he gives bond merely as such, instead of as administrator *de bonis non* with the will annexed, the sureties are liable for assets received by him, although they were not aware there was a will and trusts thereunder: *Newberger v. Finney*, 17 O. C. C. 215, 9 O. C. D. 720.

The surviving administrator, and the representatives of the deceased administrator, will be jointly liable to indemnify the surety: *Eckert v. Myers*, 45 O. S. 525, IV Longsdorf's Notes, 295.

(c) Proceeds of Land Sold to Pay Debts.

Sureties of an administrator are liable on their bond, for the proceeds of lands sold by the administrator, under an order of court for the payment of debts: *Wade v. Graham*, 4 O. 126, I Longsdorf's Notes, 209.

Accordingly, where the executor does sell the real estate, under order of court, in

order to divide the residue among the heirs (of which the sureties on his bond had no notice), the sureties are not liable for the executor's refusal to pay over the proceeds to the devisees: *Flickinger v. Saum*, 40 O. S. 591, IV Longsdorf's Notes, 43.

(d) Debts Owed by Executor.

The sureties on the bond of an insolvent administrator are liable for money in his hands arising from debts owing by him to the estate, to the same extent that the sureties on the bond of an insolvent executor are liable for such money: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

The indebtedness of an executor to his testator is assets with which he is chargeable, as so much money in his hands; and the sureties on his bond are liable for his failure to administer and distribute same according to law and the will, even though he was insolvent during the continuance of his administratorship: *McCaughy v. Jacoby*, 54 O. S. 487, IV Longsdorf's Notes, 645.

(e) Effect of Giving New Bond.

Where an executor gives a new bond under the provisions of G. C., §§ 10861, *et seq.*, the sureties thereon are liable to a succeeding administrator, *cum testamento*, for assets embezzled by the executor before the new bond was given: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308 [following *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240; distinguishing *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130].

(f) Sureties of Removed Executor.

Sureties on a bond, given by an executor who has been removed, are liable to the succeeding administrator for the indebtedness of such executor to the estate for assets received by him and converted to his own use. It may be recovered in suit on the bond: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308 [approving *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240].

(g) Wrongful Distribution of Estate.

For wrong distribution of an estate the administrator and sureties on his bond are liable to the rightful distributees: *Saler v. Pease*, 10 O. D. (N.P.) 722.

Where the administrator is ordered by the court to pay to his attorney a sum found due him out of the assets of the estate in his hands for distribution, a failure to comply with such order is a breach of the adminis-

tration bond for which the surety thereon is liable: *Smith v. Rhodes*, 68 O. S. 500, IV Longsdorf's Notes, 947.

(h) *Joint Liability.*

Where an administrator upon his appointment gives bond for the faithful performance of his duties, and then also gives another bond, as required by statute, in a proceeding to sell real estate, the sureties on both bonds are jointly liable for the proceeds of such sale, the last bond not superseding the first: *Kehnast v. Daum*, 4 O. N. P. 366, 6 O. D. (N.P.) 401.

(i) *Secondary Liability.*

The liability of the sureties in the subsequent bond is secondary to that of the sureties on the bond in force at the time the estate was wasted, and if the former have made good the loss, they may recover against the latter the full amount paid by them on account thereof: *Corrigan v. Foster*, 51 O. S. 225, IV Longsdorf's Notes, 539.

The sureties on an administrator's general bond and those on the additional bond to sell real estate (G. C., § 10790), are co-sureties; and though either bond could be separately sued, yet all could be sued at once; hence if one surety on the additional bond has to pay he may sue all the others for contribution, and send a summons to another county for such as reside there: *Kehnast v. Daum*, 4 O. N. P. 366, 6 O. D. (N.P.) 401.

(j) *Giving Receipt.*

As to what effect the giving of a receipt to the administrator for money not actually received has upon the liability of the bondsmen of the administrator, is a question which must be determined upon equitable principles in a proper action: *In re Koehnken*, 1 O. C. C. (N.S.) 126, 15 O. C. D. 245.

(k) *Amount.*

The sureties on the bond of an administrator are liable for the proceeds of life insurance, which is payable to executors, administrators, etc., paid the administrator after his appointment, and not accounted for by him: *Webb v. Roettinger*, 12 O. C. C. 730, 1 O. C. D. 191 [affirmed, without opinion, *Webb v. Roettinger*, 37 Bull. 56].

M, an administrator, on allowing the widow to take certain assets at the appraisal, took her note therefor at twelve months instead of nine, and with only one surety, and he not good. The administrator *de bonis non*, knowing the note to be uncollectible, paid her a balance due on her year's

allowance, part before and part after the note matured. It was held that he did wrong, and M and his sureties are not liable to the extent of such payments, but only for the rest of the loss: *White v. Moe*, 19 O. S. 37, II Longsdorf's Notes, 924.

Interest on the penalty of an administrator's bond is recoverable from the time of demand on the sureties: *Webb v. Roettinger*, 12 O. C. C. 730, 4 O. C. D. 270 [affirmed, without opinion, *Webb v. Roettinger*, 55 O. S. 686]. See also BONDS, SURETY.

A judgment against an executor is conclusive as to the amount due, as against sureties on an executor's bond unless there is fraud or collusion: *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240; *Faran v. Robinson*, 17 O. S. 242, II Longsdorf's Notes, 830. See also JUDGMENT.

2. *Discharge.*

The liability of a surviving surety is not discharged by mere delay on the part of the creditor to prosecute his action against the estate of the principal debtor within the time prescribed in G. C., § 10722, or in G. C., § 10746: *Moore v. Gray*, 26 O. S. 525, III Longsdorf's Notes, 325.

Where the probate court released sureties on an administrator's bond, being induced to do so by a fraudulent presenting of a forged new bond, an original action in the common pleas court will lie to annul such judgment: *Howenstine v. Sweet*, 13 O. C. C. 239, 7 O. C. D. 498.

An order releasing the sureties under G. C., § 10861, is not effectual until a valid new bond is given, and if the new bond is a forgery the old sureties continue liable upon the order being vacated: *Howenstine v. Sweet*, 13 O. C. C. 239, 7 O. C. D. 498.

Sureties are not discharged by the insolvency of the administrator: *Perkins v. Scott*, 9 O. C. C. 207, 6 O. C. D. 226.

Sureties are not discharged from liability by fraud of the executor in procuring their execution of the bond, where the beneficiaries of the estate are themselves innocent of fraud: *McGaughey v. Jacoby*, 54 O. S. 487, IV Longsdorf's Notes, 645.

Neglect of a creditor to present his claim for allowance whereby the estate of one surety is released under the limitation of G. C., § 10746, does not discharge a cosurety; and an estate relieved from direct liability to the creditor, under this limitation, is nevertheless liable to contribute to the cosurety, who has paid more than his moiety of the debt, for the right of action among cosureties accrues only when one has paid more than his proportion of the liability: *Camp v. Bostwick*, 20 O. S. 337, II Longsdorf's Notes, 998.

Death of a surety is not ground to require a new bond, if the sureties or their estates are sufficient. But the estate must pay the cost of this application, for it was made by the surviving surety for his and its security: *State v. Brashear*, 3 Dec. Rep. 346, Law and Bank Bull. 346.

An administrator has no power to bind the estate by a negotiable note given as administrator. Such note is not negotiable. Where it was given for a monument, and the court approved the account showing such expenditure, as if paid, this does not cure the want of power, and where an indorsee got judgment on the note to be satisfied out of the assets and payment is refused, the sureties are not estopped in an action on the bond to deny the validity of the judgment. Giving a note relieves the sureties: *Curtis v. Bank*, 39 O. S. 579, III Longsdorf's Notes, 1050.

A sale, ordered and made, of an obligation or demand existing between one who later becomes executor of the decedent's estate, and the decedent during his life time, carries to the purchaser no liability that subsisted between the estate and the executor and the sureties on the executor's bond: *Oheney v. Powell*, 20 O. C. C. 398, 11 O. C. D. 279.

3. Indemnity.

An indemnity bond under G. C., § 10867, made to save the sureties on an executor's bond against loss, covers past as well as future failures of the executor to pay, from which the sureties suffer loss after the date of the bond: *Buffington v. Bronson*, 61 O. S. 231, IV Longsdorf's Notes, 806.

A bond to indemnify sureties against an executor's past failure to pay over, given under G. C., § 10867, is supported by sufficient consideration, for it is given pursuant to an order of court in a legal proceeding, and is the means of continuing the executor in the trust: *Buffington v. Bronson*, 61 O. S. 231, IV Longsdorf's Notes, 806. See also BONDS, SURETY.

The bond of a residuary legatee is a lien as against the legatee upon realty conveyed in trust for protection of the surety on the bond: *Tidd v. Bloch*, 4 O. C. C. (N.S.) 216, 16 O. C. D. 113.

J. ACTION ON BOND.

1. Right to Action.

The act of February, 1816 (G. C., § 10869) (Swan's Stat. 162), pointed out "the manner in which suits may be prosecuted, on the bonds of executors, administrators, and officers" formerly: *State v. Conway*, 18 O. 234, I Longsdorf's Notes, 846.

The word "suit" as used in G. C., § 10869, is synonymous with "action": *Kennedy v. Thompson*, 3 O. C. C. 445, 2 O. C. D. 254.

An administrator who has been removed and his successor appointed and qualified ceases to be an officer in the administration of the estate, but he is liable to his successor for the unadministered assets of the estate remaining in his hands, and with his sureties may be sued on his official bond under G. C., § 10834, which gives a remedy against one so removed that does not exist against one who has not been deprived of his office: *In re Miller*, 8 O. N. P. 385, 11 O. D. (N.P.) 624.

Actions on the bond are governed by the law in force when the bond was given: *McGooney v. State*, 20 O. 93, I Longsdorf's Notes, 897; *Treasurer v. Lennington*, 7 O. (pt. 1) 266, I Longsdorf's Notes, 380.

The right of action on an executor's or administrator's bond for the benefit of the estate, given by G. C., § 10871, was not abrogated or superseded by the organization of the probate court, or by the code of civil procedure: *Mighton v. Dawson*, 38 O. S. 650, III Longsdorf's Notes, 1000.

The remedy on the bond of an executor is cumulative, and not exclusive: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

The summary remedy by citation in the probate court (G. C., §§ 10848-10856) was cumulative and did not repeal the right to sue on the bond (G. C., §§ 10869, *et seq.*): *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

When an administrator dies leaving a balance due from him to the estate, his successor can not maintain an action against the personal representatives of such administrator, but his only remedy is an action on the bond under G. C., § 10823: *Curtis v. Lynch*, 19 O. S. 302, II Longsdorf's Notes, 953.

Any remedy the sureties on the new bond may have against the sureties on the prior bonds must be sought in a proper suit: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308.

The bond can only be enforced against the surety by a personal action, even if the bond is within the jurisdiction of the court. And the settling of the account is not conclusive as to the surety without notice: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

G. C., § 10740, exempting executors and administrators from the suit of creditors for eighteen months from the date of the bond, or further time allowed by the court, has, in the latter case, no application to suits brought upon the administration bond; for where the debt of a creditor has been allowed,

and the personal representative has funds in his hands applicable to its payment, if the estate is solvent, the creditor is entitled to its payment within the eighteen months from the date of the administration bond, and after that time, upon demand made, if payment is not made, he may bring suit upon the bond and recover, notwithstanding further time is given to collect the other assets of the estate: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

If the executor as residuary legatee gives bond under G. C., § 10608, conditioned to pay all the debts and legacies, presentation of a claim for allowance is not necessary before suing on the bond: *Stevens v. Hartley*, 13 O. S. 525, II Longsdorf's Notes, 623.

The statute, G. C., § 10869, allowing a creditor to sue on the bond of an administrator who neglects to pay on demand, makes a demand or an excuse for its omission, necessary to be averred, and its omission is fatal. Averring an allowance of the claim by the administrator is not a substitute: *Woodson v. State*, 17 O. 161, I Longsdorf's Notes, 802; *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015. See also DEMAND.

2. Liquidation.

If a court rendered judgment against an executor and the probate court ordered him to pay over the amount, that is equivalent to a finding of the amount by the probate court and ordering it paid to sustain suit on the bond: *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728.

The bond can be sued on only under G. C., §§ 10869 to 10873. G. C., § 10869, gives the creditor a remedy after he is entitled to payment and the amount has been ascertained. G. C., § 10870, gives a remedy to the legatee, widow, or distributee under like circumstances. G. C., § 10871, gives a remedy to anyone interested in case of other maladministrations and breaches if the court authorizes suit: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015.

Leave of court to sue is necessary, under G. C., § 10871, and should be granted only on a showing of necessity, but if granted will be presumed properly granted: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015.

A legatee or distributee can not maintain an action on the bond against the executor or the administrator for payment of his legacy or distributive share under G. C., § 10870, within the statutory time allowed for creditors to present their claims, without an order of the probate court requiring such payment: *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

The bond can not be sued on by the heir until the amount due plaintiff has been settled by court: *Treasurer v. Hall*, 3 O. 225, I Longsdorf's Notes, 160.

The administrator *de bonis non* can not maintain the action without liquidation of the amount due and without leave of court: *Guttridge v. Vanatta*, 27 O. S. 366, III Longsdorf's Notes, 363.

Where an account is filed, no action on the bond can be had until the account is passed upon by the court; nor could a bill of discovery and account in equity have been brought: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

One of several heirs can not sue on the administrator's bond for his share of a fund where the probate court has not found the exact amount due him, but the finding only shows the amount due the estate but he can in such case sue on behalf of all the heirs to the fund: *In re Spraul*, 37 Bull. 181.

The specific amount, if any, due the plaintiff must have first been fixed by the court, as provided by law: *Henry v. Doyle*, 82 O. S. 113.

A demand by the legatee and a refusal by executor are prerequisites to bringing action thereon: *Henry v. Doyle*, 82 O. S. 113.

The amount due need not be liquidated to authorize an action by the administrator *de bonis non* on the bond of his predecessor (G. C., § 10873), for he sues for the benefit of all: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

Such liquidation is only necessary when the action is by a creditor, widow, legatee, or other distributee, for then the action is for the private benefit of the plaintiff: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

A statute directing upon what liquidation of an administrator's accounts action would lie on the bond does not apply to pending suits: *Treasurer v. Lennington*, 7 O. (pt. 1) 266, I Longsdorf's Notes, 380.

The act of November 1, 1840, §§ 90, 182, Swan, §§ 354, 373, providing that demand must be made before action against an administrator, provides also that previous laws shall not be repealed as to any liability then accrued, and hence does not apply to a claim on an executor's bond already accrued: *McGovney v. State*, 20 O. 93, I Longsdorf's Notes, 897.

A foreign executor can not be sued by the children and heirs of the intestate before liquidation: *Adams v. Adams*, 7 O. S. 83, II Longsdorf's Notes, 273.

3. Time Action Brought.

A person suing the surviving obligors of an administrator's bond and the adminis-

tratrix of a deceased surety, sues as to the latter in the character of creditor, for he seeks to charge the surety's estate and not the administratrix personally. Accordingly, the action does not lie until eighteen months after date of the latter's bond unless within one of the exceptions of G. C., § 10740. If the petition does not show such lapse of time, it is demurrable: *Hammerle v. Kramer*, 12 O. S. 252, II Longsdorf's Notes, 560.

G. C., § 10740, exempting the administrator from suit for eighteen months, or the further time allowed by court, does not apply to suits on his bond: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

If a claim is allowed and the estate is solvent and the administrator has funds to pay, the creditor is entitled by law to payment within the eighteen months, and if not paid, may, after that time and after demand, sue on the bond, though further time is allowed to the administrator. Such further time is not evidence that money once on hand has been disbursed: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

A legatee or distributee's action on the bond for nonpayment of his share (G. C., § 10870, can not be brought within the four years allowed to creditors to present claims under an earlier form of the statutes, except on order of the probate court requiring such payment under G. C., § 10762: *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

4. Jurisdiction.

A justice of the peace has no jurisdiction of an action on the bond; G. C., § 10874, specifies the tribunal: *Hackworth v. Robinson*, 31 O. S. 655, III Longsdorf's Notes, 616.

The common pleas and not the probate court is the proper place to sue on an executor's bond. The provision requiring it to be sued in the court in which it was filed was enacted before the institution of probate courts, and their creation did not transfer the jurisdiction of common law action to them. (Now G. C., § 10874): *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

The superior court has no jurisdiction of an action founded on an administration bond; that jurisdiction rests with the court of common pleas: *Chatfield v. Faran*, 12 Dec. Rep. 750, 1 D. 488.

It was questioned whether, in proceedings on bonds of executors and guardians in the probate court, under act of April 17, 1857, either party has a right to demand a jury: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 700.

The probate court has no jurisdiction on an action on a bond of an administrator or executor: *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 15 [affirmed, on other grounds, *Brown v. Reed*, 56 O. S. 264, IV Longsdorf's Notes, 689].

5. Limitation.

A suit on an administrator's bond is barred in ten years: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

6. Set-off.

In an action under G. C., § 10870, a surety may set off against the claim of a distributee who is also a distributee of the estate of a cosurety, the amount he might recover from the estate of his cosurety, or, under G. C., §§ 10876, *et seq.*, from the plaintiff, as a distributee of that estate: *Fisher v. Cassidy*, 49 O. S. 421, IV Longsdorf's Notes, 462.

Sureties of a delinquent administrator being compelled to pay may set off the statutory fees that would have been allowed him if faithful: *Candler v. Von Martels*, 11 Dec. Rep. 744, 29 Bull. 49 (editorial).

7. Parties.

(a) Plaintiff.

(aa) Creditors.

County commissioners may maintain a suit on the bond of an administrator, or an executor, where the county is injured by the misconduct of such officer: *Commissioners v. Noyes*, 35 O. S. 201, III Longsdorf's Notes, 773.

A creditor, legatee, or other distributee, after ascertainment of his distributive share may sue on the bond, G. C., §§ 10869, 10870, without leave of court: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015; *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251.

(bb) Legatees.

The legatee's action on the bond for the benefit of the estate (now G. C., § 10871) was not abrogated by the organization of the probate court or by the civil code. Such action need not be in the name of the state, but may be brought in the legatee's name, the court authorizing him to sue. Finding the amount of the legacy, or order for its payment is not necessary before suing: *Mighton v. Dawson*, 38 O. S. 650, III Longsdorf's Notes, 1000 [reversing *Dawson v. Mighton*, 4 Dec. Rep. 204, 1 Clev. L. Rep. 115].

As early as 1816, a statute was passed giving an action of debt on the administration bond to any person injured. Swan's Stat. (1841) p. 162. And the act of March 23, 1840, Swan's Stat. (1841) p. 373, provides that suit may be brought on the executor's bond by a legatee, when he is entitled to the payment of his legacy; and that provision has been retained in the statutes of our state: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

(cc) Distributees.

The action on the bond, under G. C., § 10871, by any person interested, for maladministrations and breaches of bond, before the amount is liquidated, must be for the benefit of the estate and not of any particular distributee: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015; *Dawson v. Dawson*, 25 O. S. 443, III Longsdorf's Notes, 251; *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

(dd) Administrator De Bonis Non.

An administrator *de bonis non* has the right and power to sue for and recover the assets of the estate wherever found: *Jelke v. Goldsmith* 52 O. S. 499, IV Longsdorf's Notes, 581.

An administrator *de bonis non* may institute a suit against a late executor or administrator for the recovery of property of the estate which he has failed to account for: *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069.

If the estate is not finally settled and the administrator has gone away, the administrator *de bonis non*, and not the heirs, must sue the administrator's bond, for the personality does not descend to the heirs, but goes to the administrator: *Luce v. Treasurer*, W. 654, I Longsdorf's Notes, 51.

An administrator *de bonis non* can maintain an action against a former executor or administrator for assets of the estate which have come to his hands and are not accounted for. The judgment obtained against such former administrator on such claim is evidence against him and his sureties in an action on his administration bond, and can only be impeached by the sureties by proving fraud or mistake: *O'Conner v. State*, 18 O. S. 225, I Longsdorf's Notes, 844.

Leave of court to sue on an executor's bond need not be obtained by the administrator *de bonis non*. G. C., § 10873: *Gutridge v. Vanatta*, 27 O. S. 366, III Longsdorf's Notes, 363.

An administrator *de bonis non* may maintain an action on the bond of a deceased administrator, without having the amount due

to the estate he represents from the deceased administrator ascertained, by the finding or judgment of a court, before bringing the action: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

At common law, no action could be sustained by an administrator *de bonis non* against the representatives of a deceased administrator or the sureties on his official bond: *Blizzard v. Filler*, 20 O. 479, I Longsdorf's Notes, 920.

Where an administrator died, and his account having been filed by his administrator, and exceptions having been filed to same by the administrator *de bonis non*, the court found that he was indebted to the estate, the administrator *de bonis non* can not maintain an action on such finding against the representative of the deceased administrator, but he must seek his remedy, under the statute, on the administration bond of the decedent: *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953.

(ee) Heirs.

An heir can not sustain an action against security on an administrator's bond, until the administrator's accounts are settled with the court, or plaintiff's right established by judgment: *Treasurer v. Hall*, 3 O. 225, I Longsdorf's Notes, 160.

An heir individually can not maintain an action on the administrator's bond where the finding of the probate court does not show the amount due each heir; such heir can, however, maintain an action in behalf of himself and other heirs, and the amount due has been determined by the probate court: 37 Bull. 181 (editorial).

(b) Defendants.

If a defaulting administrator has moved out of the estate his sureties may be sued alone without following the principal debtor into another jurisdiction: *Luce v. MacDonald*, W. 654, I Longsdorf's Notes, 51.

Whether it is a misjoinder of defendants in an action by the administrator *de bonis non* on the bond of his predecessor to join the devisees and executors of a deceased surety, G. C., § 10873, authorizing the action against the "legal representatives" was questioned: *Gutridge v. Vanatta*, 27 O. S. 366, III Longsdorf's Notes, 363.

Suit should be brought against all the obligors. It is error to render a several judgment, leaving the action to proceed against the others: *Voss v. Loomis*, 1 O. C. 20, 1 O. C. D. 12.

Where one of two or more executors or administrators has in his hands the balance remaining for distribution, an action may be

maintained against him personally, as for money had and received, without joining his coexecutor or coadministrator: *Negly v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

Parties requiring a claim to be rejected and giving bond for expenses of resisting it under G. C., § 10610, should be made parties to the action on it, for they must make the defense. The administrator, by making the contest himself, indicates an intention not to rely on the statute, and should make them parties if the claimant does not do so. Becoming parties on their own motion and being dismissed on the claimant's motion is not sufficient to hold them for costs, for it gives them no opportunity to make the defense. The administrator should see that the judgment awards costs against them: *Fullerton v. Davis*, 1 O. C. C. 572, 1 O. C. D. 320.

For the general discussion of the subject of parties, see PARTIES.

8. Defense.

Confirmation of an account purporting to be final will not bar an action on the bond under G. C., § 10871, to recover assets converted to the executor's own use and not accounted for: *Mighton v. Dawson*, 38 O. S. 650, III Longsdorf's Notes, 1000 [reversing *Dawson v. Mighton*, 4 Dec. Rep. 204, 1 Clev. L. Rep. 115].

The sureties on an executor's bond are estopped from showing as a defense that such executor was not duly appointed or that the will was not duly probated, where the bond was approved by the probate court and contained a recital of such appointment and a condition to administer the estate according to law and the will, etc.: *Hoffman v. Fleming*, 66 O. S. 143, IV Longsdorf's Notes, 901.

If a creditor holds assets enough to cover his claim, the refusal of the administrator to sell land to pay it, is no breach of duty. Accordingly, in a suit on his bond for not selling land to pay a claim, it is a good defense that the claimant as surviving partner has assets of the firm, decedent's share of which would liquidate the demand: *Everett v. Waymire*, 30 O. S. 308, III Longsdorf's Notes, 532.

It is no defense to the action on the administration bond for the surety to plead and prove, that exceptions to the account of the administrator, filed by a creditor of the estate, had been withdrawn by him in consideration of the part payment of his claim by the administrator: *Smith v. Rhodes*, 68 O. S. 500, IV Longsdorf's Notes, 947.

Fraud is a defense to an action on the bond, if participated in by the only person interested in the estate: *Campbell v. Johnson*, 41 O. S. 588, IV Longsdorf's Notes, 79.

The executor's fraud in procuring the sureties to sign the bond is no defense if the beneficiaries in whose interest the bond is resorted to were innocent of the fraud: *McGaughey v. Jacoby*, 54 O. S. 487, IV Longsdorf's Notes, 645.

An answer by a surety on the bond that decedent's estate consisted solely of a debt due him from the administrator who was unable to pay same, and that the administrator and the widow induced the surety to go on the bond in order to make him responsible for the administrator's otherwise worthless debt states a good defense to a suit on the bond: *Campbell v. Johnson*, 41 O. S. 588, IV Longsdorf's Notes, 79.

Where the same person is both administrator and guardian of the heirs, and it becomes his duty to pay money in the former capacity to himself in the latter, it will generally be presumed that he did so. But this presumption is rebuttable, and if he charged himself as guardian and did not credit its payment to himself as guardian, he will be estopped to deny that he holds it as administrator, and the heirs may recover on his administrator's bond: *Wilson v. Wilson*, 17 O. S. 150, II Longsdorf's Notes, 824.

• K. PLEADING.

The amount must first be liquidated by allowance judgment or award, and this must be averred; or, if the estate is insolvent, the exact sum due must be found by an order of distribution before action. This remedy is for the sole benefit of the claimant, and execution issues for him alone: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015; *Cadwallader v. Longley*, 12 Dec. Rep. 756, 1 D. 497.

Only when such action is brought by a creditor, legatee, widow, or other distributee, is the plaintiff required to allege and prove his right to a sum liquidated by allowance, judgment, order or award: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

Availing failure of a resigned administrator to pay his successor the amount found due on settlement of accounts, sufficiently assigns breach of his bond "to administer according to law": *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

There is no liability unless the executor has received assets applicable to the claim. The mere breach does not make him liable for debts beyond assets. Accordingly, the fact of such assets must be averred and if the pleading can be construed either way, it will be taken against the pleader so averring no such assets: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015.

A declaration upon an administrator's bond, in a suit brought at the instance of a creditor, must aver a demand, or an excuse for the omission; an averment that the claim was allowed by the administrator on presentation for that purpose is not sufficient: *Woodson v. State*, 17 O. 161, I Longsdorf's Notes, 802.

In an action of debt on an administrator's bond, brought under the act of March 1, 1834, 1 Curwen, 140, it was necessary to aver in the declaration a demand upon the administrator for payment, or sufficient matter of excuse for not having made such demand: *State v. Cowles*, 5 O. S. 87, II Longsdorf's Notes, 162.

In addition to proof of liquidation or ascertainment, it must be shown that there has been demand of payment: *State v. Cutting*, 2 O. S. 1, I Longsdorf's Notes, 1015.

In an action against an executor, upon his bond as residuary legatee, it is not necessary that the petition allege the presentment of the claim for allowance, or other matters specified in G. C., § 10740: *Stevens v. Hartley*, 13 O. S. 525, II Longsdorf's Notes, 623.

If the petition does not show the lapse of time necessary for suit on the bond, it is demurrable. Where the action is against the surviving bondsmen and administratrix of deceased bondsmen, plaintiff assumes, as to such administratrix, the character of creditor of the estate. When the claim does not fall within any of the exceptions in § 98 of the administrator's act, such action can not be maintained until the expiration of sixteen months: *Hammerle v. Kramer*, 12 O. S. 252, II Longsdorf's Notes, 560.

The heir suing as such must show how he becomes heir: *Treasurer v. Hall*, 3 O. 225, I Longsdorf's Notes, 160.

A petition setting forth the condition of the bond and averring nonperformance thereof is good on demurrer, though open to a motion: *Gutridge v. Vanatta*, 27 O. S. 366, III Longsdorf's Notes, 363.

Under G. C., § 10873, the petition is sufficient if alleging the appointment by the proper authority of an administrator *de bonis non*, without averring that he had given bond: *Gutridge v. Vanatta*, 27 O. S. 366, III Longsdorf's Notes, 363.

A general allegation in an action on an administrator's bond that he did not settle up the estate in the time required by law and still refuses to settle, not having been demurred to is sufficient to sustain a verdict. Even if the damage were but nominal it would be a breach: *O'Conner v. State*, 18 O. 225, I Longsdorf's Notes, 844.

Where a removed administrator has settled with the court, and the balance in his hands is ascertained, suit may be sustained against

his sureties, without obtaining a separate judgment against him. In such suit, there is no necessity to aver that the removed administrator had notice of his successor's appointment: *Treasurer v. McElvain*, 5 O. 200, I Longsdorf's Notes, 265.

For the general discussion of the subject of pleading, see PLEADINGS.

L. EVIDENCE.

The finding by the probate court of the amount which the administrator, guardian or assignee, has to pay over, and order by that court to pay over, if free from collusion or fraud, is conclusive upon the sureties unless an appeal has been taken, or the judgment has been reversed on error: *Gardner v. Ashbrook*, 34 Bull. 287.

Where by request of the heirs the executor defers the sale of real estate for three years after the time required by the will, and in the meantime collected the rents, the executor having resigned, the probate court found an amount in his hands and ordered it paid over to the administrator *de bonis non*. In an action by the latter against the executor's bond the sureties claimed the amount found was made up of such rents and that they had no notice of the proceedings in the probate court. It was held that in the absence of fraud or collusion, the finding of the probate court is conclusive on the sureties, and such finding is not impeachable for want of jurisdiction by showing that it related to rents: *Gardner v. Ashbrook*, 34 Bull. 287 [superior court, without opinion].

A judgment against a former administrator for assets not accounted for is evidence against his sureties, and can only be impeached by them for fraud or mistake: *O'Conner v. State*, 18 O. 225, I Longsdorf's Notes, 844; *Gandolfo v. Walker*, 15 O. S. 251, II Longsdorf's Notes, 728; *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240; *Faran v. Robinson*, 17 O. S. 242, II Longsdorf's Notes, 830; *Todd v. Lewis*, 12 Dec. Rep. 443, 2 H. 280.

Executor or administrator's bond is governed by the laws in force at the time it was entered into; and such bond, describing decedent as James L. Finley, can not, by parol evidence, be made applicable to Joseph L. Finley; therefore the obligors thereon are not responsible for the estate of the latter: *McGovney v. State*, 20 O. 93, I Longsdorf's Notes, 897.

The settling of the account is not conclusive as to the surety without notice: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

An order granting further time, although conclusive of the fact that it is allowed, is no evidence against a creditor that money

previously received has been disbursed by the administrator: *Greer v. State*, 2 O. S. 574, I Longsdorf's Notes, 1085.

A *devastavit* by an administrator can not be suggested and proved in a suit on the administrator's bond, against the administrator and his securities: *Stewart v. Treasurer*, 4 O. 98, I Longsdorf's Notes, 207.

In an action by an administrator or executor, it can not be shown that his bond has but one surety. His appointment can not be collaterally impeached therefor: *Slagle v. Entrekin*, 44 O. S. 637, IV Longsdorf's Notes, 240.

Sureties are estopped to deny due probate and appointment when the bond recites appointment and it is approved by the probate court: *Hoffman v. Fleming*, 86 O. S. 143, IV Longsdorf's Notes, 901.

The burden of proof (in an action under G. C., § 10873), is not on the administrator *de bonis non* to show specific injury to the estate and its amount, nor is he limited to a recovery of the amount, wasted or converted into money, but the defendants must account for all property shown by the inventory to have come to the executor's hands and are liable for it, though not wasted, but still on his hands: *Douglas v. Day*, 28 O. S. 175, III Longsdorf's Notes, 397.

For the general discussion of the subject of evidence, see EVIDENCE.

XXIV. SUIT FOR INSTRUCTION BY COURT.

Under G. C., § 10857, an administrator may institute an action in the court of common pleas asking the judgment of the court whether he should pay a certain year's allowance made by the appraisers of the estate to the widow under G. C., § 10656: *McCalla v. McCalla*, 46 Bull. 280.

If there is anything to construe, a suit to construe will lie: *Hollister v. Howe*, 4 O. N. P. 168, 6 O. D. (N.P.) 157.

An executor may maintain a civil action, under G. C., § 10857, in the court of common pleas, asking the direction of the court in any matter affecting the trust estate or property to be administered and the rights of the parties in interest: *Merrick v. Merrick*, 37 O. S. 126, III Longsdorf's Notes, 899.

A trustee should confine his acts to the carrying into effect of the provisions of the trust under which he is acting, and if in doubt apply to the proper court for instruction: *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

An action can not be maintained in cases where no trust is involved: *Collins v. Collins*, 19 O. S. 468, II Longsdorf's Notes, 959; *Corry v. Fleming*, 29 O. S. 147, III Longsdorf's Notes, 451.

An action can be maintained by an executor under G. C., § 10857, to obtain the true construction of a will, only in cases where a trust is invoked or where the executor has duties to perform, in carrying out the provisions of the will, which require the guidance of the court: *Chase v. Isherwood*, 1 O. N. P. 31, 5 O. D. (N.P.) 1.

An action to enforce a trust, is not governed by G. C., § 10857, and the plaintiffs are not to be impeded in the lawful pursuit of their rights, because they ask a construction of the will: *Spreen v. Sandman*, 2 O. C. C. 441, 1 O. C. D. 577.

Where in an action seeking the enforcement of a trust in favor of plaintiff, an executor and trustee discloses that another was setting up claims to the trust fund in every respect similar, making it perilous for him to proceed without the direction of the court which he asks in pursuance of 54 v. 204 (G. C., § 10857), this gives the court jurisdiction with the power of a court of chancery to make parties and require them to interplead and on the issues thus made to ascertain the beneficiary and enforce the trust: *Society v. Society*, 25 O. S. 128; III Longsdorf's Notes, 214.

G. C., § 10857, is not confined to ambiguous wills, but applies where altered circumstances render a literal interpretation of a charity undesirable: *Cincinnati v. McMicken*, 6 O. C. C. 188, 3 O. C. D. 409 [affirmed, without opinion, *McMicken v. Cincinnati*, 29 Bull. 168].

In such suit the question whether the trustees have so acted as to forfeit the estate to the heirs, can not be considered: *Cincinnati v. McMicken*, 6 O. C. C. 188, 3 O. C. D. 409 [affirmed, without opinion, *McMicken v. Cincinnati*, 29 Bull. 168].

In a case brought under G. C., § 10857, where a husband refuses to take under his wife's will, his rights may be settled by a suit thereunder: *Wilson v. Hall*, 6 O. C. C. 570, 3 O. C. D. 589 [affirmed, without opinion, *Hall v. Wilson*, 53 O. S. 679].

A trustee in doubt as to his powers has the right to apply to a court of equity to define them and give judicial sanction to his acts; but in such case, the court will only define the trusts and will not order a sale of property where no adverse right is asserted: *Wiswell v. Church*, 14 O. S. 31, II Longsdorf's Notes, 633.

Where there has been no money paid to the administrator upon the mortgage, and the administrator refuses to cancel the mortgage or neglects to bring suit in foreclosure, then a remedy may be found in G. C., § 10857: *Jones v. Green*, 21 O. C. C. 96, 11 O. C. D. 548.

An administrator's petition for sale of land to pay debts may have a construction of the will to ascertain to whom it was given the title: *Farrar v. Fallesino*, 4 O. C. C. 235, 2 O. C. D. 519.

The executor may maintain the action provided for in G. C., § 10857, at any time after his qualification, whether the legacy alleged to be invalid, and concerning which the direction of the court is asked, is payable immediately or at some future time: *Gordon v. Groesbeck*, 1 O. C. C. 320, 1 O. C. D. 176.

Where a will makes disposition of property of testator, both real and personal, a presumption arises that he intended to dispose of his whole estate, unless the contrary appears. And the intention of the testator must be gathered from all parts of the will, and not from isolated passages: *Gillen v. Kimball*, 34 O. S. 352, III Longsdorf's Notes, 721.

Where a husband by will directs that his wife shall be allowed to dispose of all the rest, residue and remainder of his estate, not hereinbefore disposed of, to take effect at her death, and she dies twelve years before the husband, he dies intestate and the wife had no power to dispose of the residue of her husband's estate. The heirs took by descent: *Thomas v. Hobson*, 10 O. C. C. (N. S.) 351, 20 O. C. D. 214.

A bequest of so much of my personal property as he may desire to use absolutely, conveys the right to consume as well as to use. General legacies are to be paid out of personality first, then the realty, unless changed by will: *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218.

The legatees and distributees of a testator are indispensable parties to a suit in a federal court by an heir at law to obtain a construction of the will, unless special circumstances are shown which bring the case within some recognized exception to such rule: *Stevens v. Smith*, 126 Fed. Rep. 706, 14 O. F. D. 357.

Trustees who have refused to qualify if made parties, can not ask any relief: *Noble v. Martin*, 4 O. C. C. 365, 2 O. C. D. 598.

A petition, in a cause under G. C. § 10857, to obtain a construction of a single item of a will, which does not set forth the entire will, is bad on general demurrer: *Devenney v. Devenney*, 74 O. S. 96, IV Longsdorf's Notes, 1006.

Where a will required an executor to erect a monument, and he applied under G. C., § 10857, for a construction of the will, but in his petition he did not allege that he had, or would in the future have any money to be applied to such purpose, the court held that the facts did not call for any judgment

of the court: *Rothgeb v. Mauck*, 35 O. S. 503, III Longsdorf's Notes, 802.

In an action brought by a trustee of a charitable trust under G. C., § 10857, to construe the trust, and the common pleas court holds there is no trust, the trustee has the right to appeal to the circuit court in the interest of the *cestui que* trust: *Hunt v. Edgerton*, 9 O. C. C. (N.S.) 353, 19 O. C. D. 377.

An action under G. C., § 10857 and the next following section is appealable: *Swing v. Townsend*, 24 O. S. 1, III Longsdorf's Notes, 155.

A guardian may bring a suit under G. C., § 10857, to obtain the instruction of the court as to whether a claim made upon the ward's estate is legal: *Wing v. Hibbert*, 7 O. N. P. 124, 8 O. D. (N.P.) 65, 20 O. C. C. 404, 11 O. C. D. 190.

The proceedings authorized by G. C., §§ 10853, 10854 and 10855, do not exclude the executor from bringing an action, G. C., § 10858, asking a construction of the will, involving the determination of the rights of the legatees: *Davis v. Hutchings*, 15 O. C. C. 174, 8 O. C. D. 52 [reversed, on other grounds, *Davis v. Davis*, 62 O. S. 411, IV Longsdorf's Notes, 837].

Before G. C., § 10857 was passed it was held that where no trust was involved, and no advice or guidance to an executor or other trustee was required, parties claiming under or against a will can not maintain an action for the mere purpose of obtaining the court's opinion as to its meaning or legal effect: *Bowen v. Bowen*, 38 O. S. 426, III Longsdorf's Notes, 980; *Corry v. Fleming*, 29 O. S. 147, III Longsdorf's Notes, 451.

XXV. PERSONAL LIABILITY.

A. CONTRACTS.

1. Of Executor.

An executor continuing a business under a will is personally liable for its debts thereby contracted with a right to indemnity out of the property; and from this springs an equity in the trade creditors to resort primarily to the property if the executor is insolvent, but the petition must aver there is such a fund to be reached else demurrer lies: *Railway v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

Executors and administrators are personally liable for the services of attorneys employed by them, but their contracts therefor do not bind the estate, although the services are rendered for the benefit of the estate, and are such as the executor or administrator may properly pay for, and receive credit for the expenditures in the settlement of

his accounts: *Thomas v. Moore*, 52 O. S. 200, IV Longsdorf's Notes, 569.

An administrator's purchase on credit of the equity of redemption in chattels mortgaged to the decedent is beyond his powers, and his promise as administrator to pay does not bind the estate, but binds him personally: *West v. Dean*, 15 O. C. C. 261, 8 O. C. D. 797.

The executor selling assets to the widow on her unsecured note is liable for their appraised value, though he receives them back to sell and can not realize the price: *Osw v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

An executor giving an error bond is not relievable in chancery from the personal liability thus resulting from his own act, though the estate is solvent: *Leslie v. Willey*, W. 145, I Longsdorf's Notes, 14.

A contract by an administratrix to pay a contingent fee to a law firm out of the proceeds of an action for death by negligence binds her personally though made by her as administratrix. She is a beneficiary, and absolute control of the fund is not necessary to the validity of the contract, but she is not bound as administratrix: *Connell v. Brumbach*, 18 O. C. C. 502, 10 O. C. D. 149 [affirming *Hurd v. Railhay*, 4 O. N. P. 404, 6 O. D. (N.P.) 549].

Where an administrator entered into a contract with an attorney to prosecute a claim against a railway company for his decedent's death for a certain percentage of the amount recovered, in which contract nothing was said as to the nature of the liability, whether personal or as representative of the estate, and the administrator subsequently compromised with the railway company, he is personally liable to the attorney for the stipulated compensation: *Armstrong v. Siddall*, 12 O. C. D. 627.

An administrator is liable personally for a contract made by him in relation to the estate committed to his charge, at least to the extent of the assets which he receives from the estate. To be relieved of such personal liability an express contract that the party shall look to the estate only is necessary. The fact that nothing was said about the administrators paying anything personally is not sufficient to relieve him or charge the estate: *Armstrong v. Siddall*, 12 O. C. D. 627.

Where the holder of two decrees for the sale of mortgaged premises of a deceased, and the executor agreed that the latter might sell the mortgaged lands, he promising to pay the decrees in full out of the proceeds, but the executor paid nothing on the decrees and distributed the estate to others, the executor became personally lia-

ble to the holder of said decrees. His conduct was a fraud, and the statute of limitations could not begin to run in his favor until said creditor had notice of the act: *Bank v. McIntire*, 40 O. S. 523, IV Longsdorf's Notes, 41.

Where a testator in his will provided for the erection of a family vault and that a specific sum should be used for that purpose, and further provided "that the sum of \$500 shall be set aside and invested in good farm mortgages, etc., and the income held as a perpetual fund for the care of such vault after the same is erected," it was held, that the executor can not, even by consent of all persons having an interest in the estate of the decedent, use said sum in the erection of the vault, and if it is so used the executor is chargeable therewith and must account therefor as provided in said will: *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

Where executors are given power to loan money upon mortgage for a specified time, they have a discretion to loan it for less periods than the whole time named, to re-loan, and to change the mortgage securities. If they take insufficient security, but later procure the borrower to furnish other security deemed by them to be sufficient and such as they would have been justified in taking in the first place, they are not liable for loss happening through unforeseen defects in the latter security: *Miller v. Proctor*, 20 O. S. 442, II Longsdorf's Notes, 1009.

Where a widow elected to take under a will and qualified and acted as executrix, it was held that she did not become personally liable for the debts, beyond the assets which came to her hands applicable, in the exercise of the discretion vested in her, to their payment: *Watts v. Watts*, 38 O. S. 480, III Longsdorf's Notes, 987.

The personal representative of an executor who died in office, before an account was due or filed in reference to the trust, is not liable, under G. C., § 10634, to the administrator *de bonis non* of the testator in an action brought against him alone as such personal representative, to recover for unadministered assets of such testator, where none of such assets came into the possession or under the control of such personal representative: *Jones v. Willis*, 66 O. S. 114, IV Longsdorf's Notes, 900.

Recovery personally against one sued in a representative capacity can not be had if the averments show recovery is sought in the latter capacity and the court has refused to allow amendment. As where executors having contracted to sell real estate under a power, and refused to do so, and a recovery against the estate is sought, if the contract

is void against the estate an amendment to charge them personally is properly refused: *Fleischman v. Shoemaker*, 2 O. C. C. 152, 1 O. C. D. 415.

An administrator of the assignee of a perpetual leasehold is not personally liable for rents and taxes to the owner of the fee covenanted in the lease: *Gauson v. Moor-man*, 17 O. C. C. 618, 9 O. C. D. 396, 5 O. N. P. 254.

An administratrix having a claim for wrongful death of her husband agreed to pay an attorney one third of the amount he should recover, she being the chief beneficiary of the suit, and he retained that amount and she now claims it is excessive. It was held that her contract was in her capacity of beneficiary, and masquerading as trustee in name only, will not be allowed to defeat a charge on the fund for just compensation: *Merrell v. McMahon*, 5 O. N. P. 77, 7 O. D. (N.P.) 136 [reversing, *sub nomine*, *McMahon v. Merrill*, 8 O. D. (N.P.) 583, 37 Bull. 21].

Where an administrator sells at judicial sale land to which his intestate had no title, and the purchaser is ignorant as to the facts regarding the title, an action by the purchaser will lie against the administrator in his individual capacity for the amount paid for the land, and in such a case the administrator can not, in his individual capacity, escape liability by virtue of the doctrine of *caveat emptor*: *Fisher v. Fisher*, 15 O. C. C. (N.S.) 273, 23 O. C. D. 525 [affirmed, without opinion, *Fisher v. Fisher*, 86 O. S. 365].

Where lands are sold by an executor at private sale for their full value, such executor must account for the total amount of the purchase price received by him, if necessary for the payment of debts. If sold for less than the full value he must nevertheless account for the full value thereof: *Black v. White*, 87 O. S. 413.

Where the sole devisee of lands is appointed executor of the will of the testator and sells such lands in his individual capacity as devisee, the proceeds of such sale come into his hands as executor and where the personal estate is insufficient to pay the debts of the testator he must apply the proceeds of the sale of such lands to the payment thereof: *Black v. White*, 87 O. S. 413.

Where an executor under full power of sale in the will in bad faith sells for a manifestly inadequate price he is chargeable with the loss; and the probate court on exceptions to his account has power to so charge him: *Brown v. Reed*, 56 O. S. 264, IV Longsdorf's Notes, 689 [affirming *Reed v. Brown*, 10 O. C. C. 44, 6 O. C. D. 15].

2. Of Decedent.

A widow, who is executor of her husband's estate, takes all of his property, and agrees to assume to carry out all the contracts made by the husband, is personally liable on such a contract: *Stewart v. Duerr*, 20 O. C. C. 505, 11 O. C. D. 310.

Promissory notes, payable to a debtor as trustee, and belonging to him as executor and trustee of an estate, and of which distribution is not yet ordered, are not subject to attachment on a claim against him personally, although he is one of several devisees of the estate, and on division of the whole it appears that his share of the whole would be greater than the amount of the notes garnisheed: *Varnish Co. v. Joy*, 8 O. C. C. 157, 4 O. C. D. 323.

If joint promissory notes made by the decedent and the one who became his administrator are paid by the latter out of the estate, his account must be surcharged with his share, since G. C., §§ 10733 and 11258, do not exempt him from liability: *In re Jones*, 57 Bull. 122.

If the chief contractor dies and his administrator completes the contract, the original liabilities attach to the later work, and a subcontractor who did work for the decedent can reach money due on account of the later work as being all done under the same contract: *Horton v. Carlisle*, 13 Dec. Rep. 113, 2 D. 184.

B. TORTS OF EXECUTOR.

The estate can not be made liable by the executor's false and fraudulent representations. A buyer's only recourse is against the executor personally or by rescinding; he can not urge it even by counterclaim: *Westfall v. Dungan*, 14 O. S. 276, II Longsdorf's Notes, 653; *Dunlap v. Robinson*, 12 O. S. 530, II Longsdorf's Notes, 581.

New liabilities can not be created by an executor. Thus, where an executor managing an estate in which there is an elevator, by negligence of his employes injures a passenger, he is not liable as executor, but can be sued personally only: *Deschler v. Franklin*, 20 O. C. C. 56, 11 O. C. D. 188.

Joint executors are liable for each others' *devastavit*, if there has been a joint possession of assets, and if one has yielded possession to the other and dies before *devastavit* his executor and the survivor are jointly liable: *Eckert v. Myers*, 45 O. S. 525, IV Longsdorf's Notes, 295.

C. LEASES OF DECEDENT.

If executor enters into possession of land leased by the testator and receives the profits,

he becomes personally liable to the lessor for accruing rents to the extent of the profits of the land during such occupancy: *Becker v. Walworth*, 45 O. S. 169, IV Longsdorf's Notes, 267.

A perpetual lease is not an asset, and hence the administrator is not liable for the rents—the dowress and heir are alone liable—if the administrator occupied, and continued the business (a hotel) therein, he is only their agent or tenant: *Gausen v. Moorman*, 17 O. C. C. 618, 9 O. C. D. 396 [affirming *Gausen v. Moorman*, 5 O. N. P. 254, 5 O. D. (N.P.) 287].

D. PAYMENT OUT OF ORDER OF PRIORITY.

1. Debts.

An administrator, who, having knowledge of a claim, and having funds in his hands, pays all other claims in full and thereby exhausts the funds in his hands, is liable personally to the remaining creditor for the full amount of his claim so unpaid: *In re Wakefield*, 7 O. N. P. 562, 5 O. D. (N.P.) 395.

If the administrator pay out all the personal estate to one creditor, where the estate is solvent, by selling the realty, and does not apply for such sale, it is a *devastavit*: *Abbott v. Cole*, 5 O. 86, I Longsdorf's Notes, 249.

After two decrees of foreclosure and sale the mortgagor died, giving his executor by his will power to sell real estate. The holder of the decrees agreed that the executor could sell under the power, he promising to pay the decrees out of the proceeds. The executor used the whole proceeds in paying other claims, and the holder sued the executor. It was held that (1) the promise was an allowance of the claim; (2) the holder had a specific interest in the proceeds, and when these were applied to other debts he had a like interest in the other assets; (3) the executor, having paid out all funds, is personally liable, and limitations did not begin to run until the creditor had notice of the act (and the burden of proving the bar is on the party setting it up): *Bank v. McIntire*, 40 O. S. 528, IV Longsdorf's Notes, 41.

Death revokes an agency to receive money and pay it over to another, and administrators making collections and disbursing in accordance with the agency, are liable: *Johnson v. Johnson*, W. 594, I Longsdorf's Notes, 46.

An administrator with notice of a valid claim, but paying out the whole estate on other claims, is liable personally not only for its share, but for the full amount: *In re Wakefield*, Goebel, 5.

An executor is protected by an order of the probate court compelling him to make payment to certain distributees: *Jackman v. Wasigary*, 56 Bull. 1.

2. Legacies.

The determination as to who shall participate in the estate of a decedent must be made by the executor or administrator on his own responsibility and without the protection of an order of court: *Skardon v. Robinson*, 8 O. L. R. 412, 55 Bull. 373.

If the amount recovered by an administrator for the death of the decedent is paid by him to some of the beneficiaries to the exclusion of the others, such recovery is a bar to a subsequent action by the excluded beneficiary against the wrongdoer. The remedy of the beneficiary is against the administrator: *Pritz v. Railway*, 12 O. N. P. (N.S.) 481, 22 O. D. (N.P.) 570.

An executor can not by agreement divert trust funds and he is personally liable to account therefor: *Jones v. Creamer*, 13 O. C. (N.S.) 585, 22 O. C. D. 223.

E. IN OTHER CASES.

Omission in judgment of the words "that it shall be levied on goods and chattels of decedent," does not render the administrator personally liable: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

An administrator of a nonresident appointed on the personalty here and distributing it according to our law instead of the foreign law is liable to the proper distributees, though his final account was approved by our probate court: *Swearingen v. Morris*, 14 O. S. 424, II Longsdorf's Notes, 671.

A person paying a judgment got against him by an administrator, which is afterward reversed, can hold the administrator personally to repay if the money is still in his hands and not charged to him by the proper court, and such payments are not voluntary: *Gillmore v. Meeker*, 2 Dec. Rep. 63, 1 W. L. M. 276.

XXVI. ACTIONS BY OR AGAINST EXECUTOR.

A. NATURE OF ACTION.

1. Attachment.

Distributee's share is not subject to attachment before an order of distribution: *Orlopp v. Schueller*, 72 O. S. 41, IV Longsdorf's Notes, 987 [reversing *Orlopp v. Schueller*, 4 O. C. C. (N.S.) 611, 16 O. C. D. 127; *contra*, *Sampsell v. Sampsell*, 17 O. C. C. 455, 9 O. C. D. 510].

A nonresident executor can be sued by attachment of assets and constructive service: *Wire Co. v. Meyers*, 11 O. N. P. (N.S.) 652, 22 O. D. (N.P.) 733.

Promissory notes, payable to a debtor as trustee, and belonging to him as executor and trustee of an estate, and of which distribution is not yet ordered, are not subject to attachment on a claim against him personally, although he is one of several devisees of the estate, and on division of the whole it appears that his share of the whole would be greater than the amount of the notes garnisheed: *Varnish Co. v. Joy*, 8 O. C. C. 157, 4 O. C. D. 343.

An administrator to whom the court issues a special order to inventory and wind up a business becomes, in fulfilling such special duty, an officer of the court, and the sheriff, in taking the property from him under a writ of attachment, is guilty of technical contempt under G. C., § 12137, as a rescue of property in custody of an officer: *In re Seymour*, 3 O. N. P. 81, 4 O. D. (N.P.) 450. See also CONTEMPT.

2. Wrongful Death and Personal Injuries.

Recovery under G. C., §§ 10770, 10772 and 10773, for wrongful death of decedent does not bar a recovery by the administrator on an action for injuries as is provided for by G. C., § 11397: *Railway v. Van Alstine*, 77 O. S. 395, IV Longsdorf's Notes, 1034.

G. C., § 11397, gives to the personal representative of a deceased person the right to prosecute an action for injuries to a person began by such deceased to recover in the interest of the estate such damages as were suffered by the deceased because of the wrongful acts of another, even though the death was the direct consequence of the injuries inflicted: *Railway v. Van Alstine*, 77 O. S. 395, IV Longsdorf's Notes, 1034.

G. C., §§ 10770, 10772 and 10773, give an independent right of action for the benefit of the persons named in G. C., §§ 10772 and 10773, where death has resulted from the injuries, to recover for such pecuniary loss as they have sustained by the decease of the injured person, such right being subject to the condition that the act, neglect or default, is such as would have entitled such person to maintain an action and recover damages in respect thereof if death had not ensued: *Railway Co. v. Van Alstine*, 77 O. S. 395, IV Longsdorf's Notes, 1034.

The laws of Indiana govern in an action in the federal court in Ohio against a railroad company for death by reason of the company's negligence occurring in Indiana: *Railroad Co. v. Thiebaud*, 114 Fed. 918, 52 C. C. A. 538, 12 O. F. D. 254.

Where the death of a person employed in a mine is occasioned by acts of negligence on the part of his employer which are not "willful," but are such as would have entitled the injured person to recover if he had lived, an action to recover damages for such wrongful death may be maintained by the administratrix under the provisions of G. C., §§ 10770, *et seq.*, as amended 101 v. 198: *Rankine v. Coal Co.*, 15 O. C. C. (N.S.) 17, 23 O. C. D. 349 [affirmed, without opinion, *Coal Co. v. Rankine*, 88 O. S. —].

3. Garnishment.

An executor or administrator may be garnisheed by a creditor of a legatee and anything coming to him thereon on final settlement will be bound. G. C., § 11829 is broad enough to cover such officer: *Sampsell v. Sampsell*, 17 O. C. C. 455, 9 O. C. D. 510.

Garnishment proceedings may be instituted against legacies in such cases where it appears upon the filing of the final account that the contingency of lack of funds to pay the legacy or a part thereof to the defendant is not likely to arise: *Orlopp v. Schueller*, 4 O. C. C. (N.S.) 611, 16 O. C. D. 127 [modified, *Orlopp v. Schueller*, 72 O. S. 41, IV Longsdorf's Notes, 987].

Money due from an executor can not be garnisheed before an order of distribution is made. There is no indebtedness between the administrator and the defendant until after the order of distribution is made: *Bently v. Strathers*, 8 Dec. Rep. 44, 5 Bull. 288.

The executor or administrator of the estate of a decedent can not be held as garnishee before the filing of a final account in an action brought by a creditor of a creditor of the estate: *In re Heller*, 14 O. N. P. (N.S.) 604, 58 Bull. 445.

4. To Recover Assets.

G. C., § 10634 does not confer upon an administrator *de bonis non* the right to sue the administrator of his predecessor when the predecessor died in office: *Herckelrath v. Van Nes*, 1 O. D. (N.P.) 263, 31 Bull. 35.

The personal representative of an executor who died in office, before an account was due or filed in reference to the trust, is not liable under G. C., § 10634, to the administrator *de bonis non* of the testator in an action brought against him alone as such personal representative, to recover for unadministered assets of the estate of such testator, where none of such assets came into the possession or under the control of such personal representative: *Jones v. Willis*, 66 O. S. 114, IV Longsdorf's Notes. 900; *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989.

Where an administrator dies in office, the administrator *de bonis non* may sue only for assets in specie. If the specific goods have been converted by the original administrator, representatives or creditors could maintain an action for the conversion, but such action could not be maintained by the administrator *de bonis non*: *In re Herckelrath*, 7 O. N. P. 537, 1 O. D. (N.P.) 696, 5 O. D. (N.P.) 565, 33 Bull. 49.

A guardian's agreement with the administrator in order to prevent his selling the homestead to pay debts that he will sell land of the ward in another state and pay the proceeds to the administrator is valid, and the administrator can maintain an action against the guardian for the proceeds: *Bradstreet v. Shank*, 8 Dec. Rep. 57, 5 Bull. 362. See also GUARDIAN AND WARD.

A bequest of an annuity to A, in trust for his wife and family during A's life, may be sued upon by A's administrator on A's death, no other trustee having been appointed: *Cincinnati v. Strobbridge*, 7 O. N. P. 532, 9 O. D. (N.P.) 652. See also PARTIES.

If a debtor who resides in Ohio promises to pay to the administrator of a foreign creditor, who was appointed at the domicile of such deceased creditor without notice that an administrator has also been appointed in Ohio, and such debtor pays after notice of the appointment of the Ohio administrator, such debtor is not liable to a subsequent action by the Ohio administrator: *Crawford v. Missionary Society*, 10 O. N. P. (N.S.) 676.

5. In Nature of Creditor's Bill.

An action, in the nature of a creditor's bill, may be brought against the administrator to subject assets to the payment of money, ordered paid by the probate court upon the settlement of the administrator's accounts: *Warner v. York*, 1 O. C. C. (N.S.) 73, 15 O. C. D. 310 [affirmed, without opinion, *York v. Warner*, 75 O. S. 595].

Whether a creditor can maintain a suit to compel payment of purchase money to the estate on a collusive sale by the administrator or to rescind such sale was raised but not decided in *Baker v. Lambkin*, 11 O. C. C. 103, 5 O. C. D. 54.

On creditor's bill against an executor to subject the interest of a legatee or distributee the executor may require one who claims the legacy or share by assignment to interplead, and the common pleas has jurisdiction: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823. See also INTERPLEADER.

An equity suit—as a creditor's bill—lies to reach an heir's interest in an executor's hands, for this court can mould its decrees so as not to interfere with the exclusive juris-

diction of the probate court: *Boswell v. Hall*, 6 O. N. P. 497, 8 O. D. (N.P.) 590. See also CREDITOR'S BILL.

6. Concealment or Embezzlement of Estate.

The provisions of G. C., §§ 10676-10681, do not authorize proceedings by a creditor, devisee, legatee, heir, or other person interested in the estate against the executor or administrator for concealing, embezzling or conveying away assets of the estate: *Meinzer v. Bevington*, 42 O. S. 325, IV Longsdorf's Notes, 115.

A proceeding to recover concealed assets and for the removal of an administrator can be joined: *Harris v. Westervelt*, 15 O. C. C. 534, 8 O. C. D. 367.

Where a stepfather receives money of his stepchildren innocently and mingles it with his own under the impression that his promise to support the children was a valid consideration therefor, a complaint filed by them in the probate court after attaining their majority, charging under G. C., § 10673, that the fund had been concealed, embezzled or conveyed away by their stepfather, does not give jurisdiction to that court or to the common pleas on appeal to render judgment against the stepfather for the amount involved: *In re Ledig*, 9 O. N. P. (N.S.) 169, 21 O. D. (N.P.) 713.

G. C., §§ 10673-10681, do not apply to those who merely assist or connive at others taking assets: *In re Sattler*, 10 Dec. Rep. 440, 21 Bull. 161, Goebel, 183.

7. Accounting.

A surviving executor may file a bill for an account against the administrator of his deceased coexecutor, for their relation is that of joint tenants: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426.

A deceased executor having given no bond and having died before an account was due or filed, it became the duty of his administrator to provide for the satisfaction of the amount charged against his estate by the probate court, and on his failure to act, it appearing that all the testator's debts have been paid, the legatees may maintain an action against the estate of the deceased executor for an account and to recover the amounts due under the will: *Jones v. Willis*, 72 O. S. 189, IV Longsdorf's Notes, 989 [distinguishing *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069; *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953; *Jones v. Willis*, 66 O. S. 114, IV Longsdorf's Notes, 900].

A distributee may sustain a suit in equity against an executor to enforce a trust in his

favor, there being no debts: *Taylor v. Huber*, 13 O. S. 288, II Longsdorf's Notes, 609.

The rule that an administrator can not be sued for distribution until the amount is liquidated, applies to a foreign administrator. He is treated the same as a domestic one: *Adams v. Adams*, 7 O. S. 83, II Longsdorf's Notes, 273. See also CONFLICT OF JURISDICTION.

For accounts of executors and administrators, see Accounts, XXI, herein.

8. To Cancel Receipts.

A distributee may sue an administrator to cancel receipts obtained by deceit, on the principle of *quia timet*, but can not have a recovery of the distributive share if there is not an averment of settlement of the estate and a balance for distribution: *Duhme v. Mehner*, 18 O. C. C. 706, 6 O. C. D. 78.

9. For Allowance of Claim.

A proceeding commenced by an executor or an administrator, under G. C., § 10728, for the allowance of a claim which he owns himself, is an action or suit in his behalf, and so far as that proceeding is concerned, he is not the executor of the estate: *In re Ward*, 21 O. C. C. 753, 12 O. C. D. 44.

10. Action of Debt.

An action of debt on simple contract lies against executors and administrators: *Tupper v. Tupper*, 3 O. 387, I Longsdorf's Notes, 181.

11. In Aid of Execution.

The statutory provisions for proceeding in aid of execution by action apply to an action against the estate of a decedent: *Lauer v. Smith*, 1 O. C. C. (N.S.) 121, 14 O. C. D. 47 [affirmed, without opinion, *Smith v. Lauer*, 65 O. S. 563].

12. To Enforce Gift.

Gifts *causa mortis* which pass into the hands of the administrator must be enforced by an action at law: *Myer v. Shaney*, 1 Dec. Rep. 98, 2 W. L. J. 183.

13. For Benefit of Creditors.

An executor may maintain an action for benefit of creditors if the personal estate is insufficient to pay the debts of the estate: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

Where an executor holds the joint note of the members of a firm, and buys their business, having the means to pay for it, but by mutual agreement credits the price on the note, no money passing, is not on that ac-

count illegal or in fraud of creditors, but is a valid sale, especially as it was the only way to obtain any payment on the note: *Bank v. Wehrle*, 18 O. C. C. 535, 9 O. C. D. 330 [affirmed, without opinion, *Bank v. Wehrle*, 61 O. S. 654]. See also FRAUDULENT CONVEYANCES.

B. JURISDICTION.

Under the provisions of G. C., § 11277, actions against an executor, administrator, guardian, or trustee, may be brought either in the county where he resides, or was appointed, or in which personal service of a summons may be obtained upon him: *Osborn v. Lidy*, 51 O. S. 90, IV Longsdorf's Notes, 531.

A creditor can not transfer the settlement of the estate from the probate court to chancery: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

But a creditor may invoke the aid of chancery to recover assets and put them in the administrator's hands where the administrator claims them as his own, or is so situated as to them that protection against him is necessary, but the settlement must then be left to the probate court: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

Jurisdiction is conferred on the probate court under G. C., § 10848, in a suit under such section to compel distribution, and such court may render judgment in favor of a person interested in final distribution as creditor, legatee, heir or other distributee: *Jackman v. Wasignary*, 56 Bull. 1.

The probate court is not limited to fixing the amount due each heir: *Jackman v. Wasignary*, 56 Bull. 1.

The probate court has no jurisdiction to compel an administrator to pay a specific debt of a decedent and the common pleas court does not acquire such jurisdiction on appeal from an order so made: *Moorman v. Miller*, 48 Bull. 12.

Where a stepfather receives money of his stepchildren innocently and mingles it with his own under the impression that his promise to support the children was a valid consideration therefor, a complaint filed by them in the probate court after attaining their majority, charging under G. C., § 10673, that the fund had been concealed, embezzled or conveyed away by their stepfather, does not give jurisdiction to that court or to the common pleas on appeal to render judgment against the stepfather for the amount involved: *In re Ledig*, 9 O. N. P. (N.S.) 169, 21 O. D. (N.P.) 713.

Probate court without jurisdiction to determine to whom estate shall be distributed, but is limited to amount each heir is to re-

ceive: *Skardon v. Robinson*, 8 O. L. R. 412, 55 Bull. 373.

Action in another state against an administrator is without jurisdiction, and the foreign judgment is void. He can only be sued in the county where he was appointed or resides (G. C., § 11277): *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

Action by a foreign executor, to recover compensation and damages under G. C., § 11084, for land wrongfully held by a railroad company may be brought when an authenticated copy of the will and probate thereof has been duly admitted to record in the county in which the real estate affected is located: *Trust Co. v. Railroad*, 6 O. N. P. (N.S.) 454.

If a debtor who resides in Ohio promises to pay to the administrator of a foreign creditor, who was appointed at the domicile of such deceased creditor without notice that an administrator has also been appointed in Ohio, and such debtor pays after notice of the appointment of the Ohio administrator, such debtor is not liable to a subsequent action by the Ohio administrator: *Crawford v. Missionary Society*, 10 O. N. P. (N.S.) 676.

Ohio courts may have jurisdiction over case of wrongful killing of an employe by a railway in another state only when it is shown that such state allows the enforcement of the statute of this state of like character. It is not enough to show merely that the courts of that state entertain actions to recover for wrongful killing in another state: *Railway v. Fox*, 64 O. S. 133, IV Longsdorf's Notes, 868 [reversing *Railway v. Fox*, 20 O. C. C. 442, 11 O. C. D. 148].

No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the state of Ohio: *Railroad Co. v. Chambers*, 73 O. S. 16, IV Longsdorf's Notes, 998.

An administrator appointed in this state can not maintain an action in this state, under the laws of the state of Illinois, authorizing the personal representative of a person who comes to his death by the wrongful act, neglect or default of another, to maintain an action against such other for damages, for the benefit of the widow or next of kin of such deceased person: *Woodard v. Railroad*, 10 O. S. 121, II Longsdorf's Notes, 416 [affirming *Woodward v. Railroad*, 2 Dec. Rep. 32, 1 W. L. M. 196].

Where service of summons upon defendant railroad company was defective, and later service was not made within 60 days, and not until after the expiration of two years in which the action must be brought, it is not saved by G. C., § 11233, and the court is

without jurisdiction: *Railroad v. Collins*, 11 O. C. D. 334 [affirmed, without opinion, *Collins v. Railroad*, 63 O. S. 577].

Where the injury occurred in another state, there is no right of action here where there is none in that state. And such action can only be brought here where, by the laws of the other state such actions are allowed for injuries sustained in Ohio. In Michigan, the conductor and brakeman are fellow servants, and therefore, in an action in Ohio for the death in Michigan of the latter, caused by the former's negligence, the railroad is not liable: *Ott v. Railway*, 18 O. C. C. 395, 10 O. C. D. 85 [affirmed, without opinion, *Ott v. Railway*, 62 O. S. 661].

It is in violation of the constitution to permit a suit for damages for wrongful death to be maintained where deceased was a citizen of Ohio, while denying the right to maintain such suit where the deceased was not a citizen of Ohio: *Chambers v. Railway*, 207 U. S. 142, 16 O. F. D. 142, 6 O. L. R. 498.

Where an administrator pays out money to the widow and heirs for their support, without order of court, and in consequence has to obtain an order to sell real estate to pay a debt hitherto unknown to him, the court will not help the heirs to compel him to pay over again: *Glass v. Greathouse*, 20 O. 503, I Longsdorf's Notes, 922.

G. C., § 10678, is unconstitutional in so far as it professes to authorize a judgment without any provision for trial by jury, or a right of appeal in cases where the defendant does not admit the truth of the complaint, for the court has no constitutional power to try such a case: *Howell v. Fry*, 19 O. S. 556, II Longsdorf's Notes, 969.

The probate court is authorized to determine every disputed question of fact which might be necessary in the ascertainment of the amount justly due from the administrator to the distributees: *Doan v. Bitely*, 49 O. S. 588, IV Longsdorf's Notes, 472 [approved, *Wiler v. Gas & Fuel Co.*, 17 O. C. D. 257, affirmed, without opinion, *Gas & Fuel Co. v. Wiler*, 72 O. S. 628].

The probate court is without authority, either under G. C., § 10832, or under the general jurisdiction which it has with reference to the settlement of estates of decedent, to order that, if the widow and next of kin fail to erect a suitable monument at the grave of decedent within a time named, the administrator shall proceed so to do at a specified cost: *In re Ferguson*, 6 O. N. P. (N. S.) 417, 18 O. D. (N.P.) 374.

With reference to the trusts that executors and administrators are called upon to administer, the probate court is without authority to go beyond the direction and control conferred by law, or to require the per-

formance of an act which is outside of, or beyond, a legal administration of the estate: *In re Ferguson*, 6 O. N. P. (N.S.) 417, 18 O. D. (N.P.) 374.

The common pleas court has no jurisdiction to compel an administrator of an estate to receive payment of an unmatured note from an executor of another estate under G. C., § 10735. Jurisdiction of the subject-matter is vested exclusively in the probate court under G. C., § 10492, and such court, as an incident to the exercise of such power, may order the cancellation of a mortgage securing the same: *Denmead v. Sharp*, 14 O. D. (N.P.) 300.

Where the probate court, in the exercise of its exclusive jurisdiction over the administration of estates under G. C., § 10492, orders the payment of an unmatured note, but without cancelling a mortgage securing the same on the ground of an alleged want of jurisdiction, the court of common pleas may then be appealed to for such relief: *Denmead v. Sharp*, 14 O. D. (N.P.) 300.

The laws of Ohio governing the administration of the estates of decedents are applicable to the estates of deceased inmates of the National Soldiers' Home, located near Dayton, Ohio: *Howell v. Soldiers' Home*, 8 O. L. R. 121.

A disposition of funds made on execution between judgment lienholders in a summary way can only be made when the persons entitled are within the control of court. If one of them has a judgment in the United States court, as this court has no control over the officers of that court to compel satisfaction of the judgment, the sheriff will not be ordered to pay on it: *Shuee v. Ferguson*, 3 O. 136, I Longsdorf's Notes, 153. See also JUDICIAL SALES.

C. PARTIES.

1. In General.

In a controversy which concerns the residue of an estate, legatees who have been paid are not necessary parties: *Trust Co. v. Smith*, 4 O. C. C. (N.S.) 237, 16 O. C. D. 317.

The beneficiaries must be named in an action under G. C., § 10773, since the jury must determine how the money is to be distributed: *Hartzell v. Shannon*, 8 Dec. Rep. 265, 6 Bull. 756; *Hartzell v. Shannon*, 6 Dec. Rep. 1093, 10 Am. L. Rec. 444.

In an action to recover compensation for refusal to convey land, specific performance being impracticable, the real representatives of the deceased selling party are necessary parties: *Orabill v. Marsh*, 38 O. S. 331, III Longsdorf's Notes, 972.

As a general proposition an administrator is not a proper party in a partition suit,

and the court of common pleas acquires no power to adjudicate against him, notwithstanding the service of summons and his appearance: *Stout v. Stout*, 82 O. S. 358.

Summary proceedings against persons withholding assets, under G. C., §§ 10673-10681, are not authorized by a creditor, distributee, etc., against the administrator: *Meinzer v. Bevington*, 42 O. S. 325, IV Longsdorf's Notes, 115.

A mortgagee may institute a foreclosure suit against a deceased mortgagor in the court of common pleas, making the heirs, administrator or executor and lienholders parties, and is not obliged to work out his rights in the probate court through the administrator or executor: *Bank v. Ide*, 20 O. C. C. 665, 10 O. C. D. 800.

In an action against purchasers of real estate from an executor and successive grantees, wherein fraud is charged in the sale and alienation of said lands which were acquired by the executor with a trust fund, the fact that the executor is not represented in the action by a successor is not a fatal defect, where it appears that the purchasers became quasi trustees and successors to the trust: *Moton v. Dewell*, 13 O. C. C. (N.S.) 81, 22 O. C. D. 31.

2. Plaintiff.

The administrator *de bonis non* can sue on and have judgment for the debt owed by the executor or administrator to the estate: *Tracy v. Card*, 2 O. S. 431, I Longsdorf's Notes, 1069; *Mitchell v. Towner*, 1 Dec. Rep. 352, 7 W. L. J. 581.

A distributee may sustain a suit in equity against an executor to enforce a trust in his favor, there being no debts: *Taylor v. Huber*, 13 O. S. 288, II Longsdorf's Notes, 609.

An accounting by executors and administrators and distribution can be compelled by chancery at the instance of creditors, legatees, and next of heir. They can not ask it in their own right, but as fiduciaries: *Oram v. Green*, 6 O. 429, I Longsdorf's Notes, 348; *Cadwallader v. Longley*, 12 Dec. Rep. 756, 1 D. 497 [followed *Taylor v. Huber*, 13 O. S. 288, II Longsdorf's Notes, 609].

An administrator may bring a suit after the letters are ordered, but before they in fact issued: *Morris v. Bills*, W. 343, I Longsdorf's Notes, 27.

It is within the sound discretion of the court to permit the substitution of an administrator as a party plaintiff, without notice or the issuing of summons or the entering of a conditional order of revivor: *Morris v. Schmidt*, 8 O. N. P. (N.S.) 215, 19 O. D. (N.P.) 469.

The personal representative of a deceased who brings an action for wrongful death is a mere nominal party. Objection to his bringing suit must be taken by demurrer, as for want of legal capacity to sue, or by special denial. A general denial does not traverse the representative capacity of the administrator: *Coney Island Co. v. Mitsch*, 3 O. N. P. (N.S.) 81, 15 O. D. (N.P.) 653.

Under G. C., § 10772, which provides that actions for damages for wrongfully causing the death of a person, as provided by G. C., § 10770, shall be brought in the name of the personal representative of the deceased, an executor as well as an administrator of the decedent may bring the action: *Wittman v. Railway*, 8 O. N. P. 279, 10 O. D. (N.P.) 563.

An action to recover for the royalty due upon a sale of coal in place, is a personal action, and must be brought in the name of the personal representative, and not in the name of the heirs at law, although the estate is otherwise fully settled: *Coal Co. v. Hughes*, 9 O. C. C. 121, 19 O. C. D. 139.

An executor in his official capacity is the proper party to bring an action for the recovery of certain funds belonging to his estate in the hands of a third person: *Ward v. Ward*, 12 O. C. D. 59.

An action to recover intestate property must be brought by an executor or administrator; a sole distributee can not sue: *Reed v. Jordan*, 12 O. C. C. 161, 5 O. C. D. 527.

The distributees of the personal estate of an intestate can not join in an action against the administrators for their distributive share. (This was before the code.): *Waldsmith v. Waldsmith*, 2 O. 156, I Longsdorf's Notes, 114.

A guardian appointed in another state having sold lands there which had descended to his wards, the ancestor's administrator appointed here and claiming the lands were necessary to pay debts can not sue the guardian here for the proceeds, for the guardian is responsible to the court that appointed him and the proceeds are substantially in the jurisdiction that the land was in: *Donley v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

Under the law of Kentucky which gives to the husband all the wife's personal property after payment of debts, her administrator and not the husband can bring suit to recover personalty which she had conveyed without his consent: *Reed v. Jordan*, 12 O. C. C. 161, 5 O. C. D. 527. See also HUSBAND AND WIFE.

3. Defendant.

In an action on a contract against a partnership, where one of the partners dies, plaintiff has his election to make the personal rep-

resentative of deceased a party, or proceed against the survivor: *Gaines v. Thurman & Co.*, 8 O. N. P. (N.S.) 521, 20 O. D. (N. P.) 95.

Where a cause of action accrues before the expiration of the time in which an executor may be sued, suit can not be maintained against the heirs, under G. C., §§ 10876 and 10877, relating to estate of deceased persons in the hands of heirs, etc.: *Bevitt v. Diehl*, 12 O. D. (N.P.) 383.

The sureties could not be sued for a wasting of the assets until the *devastavit* has been first established, as by judgment against the administrator finding it or unsatisfied execution: *Stewart v. Treasurer*, 4 O. 98, I Longsdorf's Notes, 207; *Treasurer v. Kemp*, 5 O. 240, I Longsdorf's Notes, 272.

In an action to compel the administrator to account, the sureties are not proper parties defendant. They are not the proper persons to adjust the account: *Treasurer v. Hall*, 3 O. 225, I Longsdorf's Notes, 160; *Cadwalader v. Longley*, 12 Dec. Rep. 756, 1 D. 497.

Where money for distribution is in the hands of one of two executors and he distributes it erroneously, action for their shares by unpaid distributees may be brought against him alone without joining his co-executor: *Negley v. Gard*, 20 O. 310, I Longsdorf's Notes, 910.

If the prevailing party in the court of common pleas dies after his attorney has executed a waiver of summons in error and before the petition in error, and such waiver is filed in the circuit court, the death of such prevailing party should be made known to the circuit court, and his executor should be made a party defendant by amendment of the proceedings under G. C., § 11363: *Railroad v. Weedman*, 83 O. S. 88.

A suit for fees, against an administratrix, in her representative capacity can not be maintained: *Hurd v. Railway*, 4 O. N. P. 404, 6 O. D. (N.P.) 545.

A bill to charge the estate must make the personal representative a party: *Piatt v. St. Clair*, 5 O. 555, I Longsdorf's Notes, 314.

If compensation, instead of performance, which has become impracticable, is sought of an agreement to convey land, an action against the executor alone is bad. The real representatives of the deceased vendor are necessary parties, and if they have disabled themselves to convey they are chargeable with making compensation: *Crabill v. Marsh*, 38 O. S. 331, III Longsdorf's Notes, 972. See also SPECIFIC PERFORMANCE.

On bill for specific performance of a decedent's contract or compensation the administrator must be made party, for the personalty is primarily liable for debts: *Maass v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

In a suit to subject land in the hands of heirs to pay a debt the administrator need not be a defendant if the land and not the personalty is primarily liable. As where a debtor conveyed land in trust to indemnify a surety, the surety can resort to the land first, and can not be compelled to look to the personalty, and, hence, need not make the administrator defendant: *Gary v. May*, 16 O. 66, 1 Longsdorf's Notes, 751. See also PARTIES.

In a suit to reach stockholders' liability, foreign executors may be sued if they can be found here: *Craig v. Railroad*, 2 O. N. P. 64, 3 O. D. (N.P.) 146. See also CORPORATIONS.

For the general discussion of the subject of parties, see PARTIES.

D. ABATEMENT AND REVIVOR.

A suit against an executrix as such abates as to her under G. C., § 11399, when she ceases to represent the estate, and it should be revived as provided in G. C., § 11401: *In re Dunham*, 8 O. C. C. 160, 4 O. C. D. 325, 1 O. D. (N.P.) 329.

Where a cause of action has arisen under G. C., § 10634, it shall not cease to exist upon the death of the former executor or administrator, but shall survive against his representatives: *Tracy v. Card*, 2 O. S. 431, 1 Longsdorf's Notes, 1069 [distinguishing *Blizzard v. Fuller*, 20 O. 479, 1 Longsdorf's Notes, 920].

The removal of the defendant, and appointment of an administrator *de bonis non* takes away the legal right to defend, and if pleaded will abate the suit: *Gorinly v. Skinner*, W. 680, 1 Longsdorf's Notes, 52.

Where a cause of action has been revived without objection against the administrator of a deceased defendant, and upon being served with summons he entered an appearance and filed a demurrer, nothing further appearing of record, the revivor must be regarded as sufficient: *Glass v. Buzzard*, 14 O. C. C. (N.S.) 427, 23 O. C. D. 144 [affirmed, without opinion, *Buzzard v. Glass*, 85 O. S. 461].

Where a case is revived in the name of the administrator of the original plaintiff, the question of his appointment becomes a determined fact and proof thereof is unnecessary, in the absence of any allegations or specific denial of the appointment in the pleadings: *Osseforth v. Traction Co.*, 9 O. N. P. (N.S.) 360, 20 O. D. (N.P.) 285.

An administrator has no right to revive a cause of action against the estate of a decedent which has been barred by the statute of limitations, or which has been ordered cancelled by a court of competent jurisdiction. It is his duty to defend the estate against

such claims: *Baen v. Weller*, 12 O. D. (N. P.) 128.

In case of the death of the defendant in an action for breach of promise, the action is revived in name of executor: *Cooper v. West*, 7 Dec. Rep. 470, 3 Bull. 431.

In case of death of plaintiff pending an action for injury by negligence, the action is revived again in the name of the executor: *Coal Co. v. Smith*, 53 O. S. 313, 14 Longsdorf's Notes, 602. See also ABATEMENT AND REVIVOR OF ACTIONS.

E. PLEADING.

If a declaration against administrators shows the liability to be personal, the words "as administrators," will be regarded either as descriptive or as surplusage, and the judgment will be *de bonis propriis*: *Waldsmith v. Waldsmith*, 2 O. 156, 1 Longsdorf's Notes, 114.

In an action by distributees for the distributive shares against the administrator or executor holding a balance of the funds of the estate in his hands after final settlement, he need not be named as executor or administrator in the petition, as this can show only the nature and origin of the liability when the judgment should be against him individually and not against the assets of the estate: *Waldsmith v. Waldsmith*, 2 O. 156, 1 Longsdorf's Notes, 114.

An averment that plaintiff was duly appointed administrator by the surrogate court of New York city, etc., sufficiently shows his capacity to sue as against demurrer, for as judicial notice can not be taken of the laws of courts of other states, if there is no such court having probate jurisdiction it must be set up by answer: *Kerr v. Lydecker*, 51 O. S. 240, 14 Longsdorf's Notes, 540.

An averment of appointment as administrator must be made issuably, stating the date and place, profert of the letters being abolished, and this may be compelled by motion, though it is not open to demurrer: *Neil v. Cherry*, 2 Dec. Rep. 28, 1 W. L. M. 155.

An averment that A, administrator of B, deceased, plaintiff, says etc., is *descriptio personae*, and does not show suit by him as administrator, and is demurrable: *Neil v. Cherry*, 2 Dec. Rep. 28, 1 W. L. M. 155.

Plene administravit is an immaterial plea in Ohio and no defense, for the judgment is *de bonis testatoris*: *Abbott v. Cole*, 5 O. 86, 1 Longsdorf's Notes, 249.

Under the statute of 1854 (S. & C. 619), upon demurrer the petition is sufficient, if alleging the appointment by the proper authority of an administrator *de bonis non*, without averring that he had given bond:

Gutridge v. Vanatta, 27 O. S. 366, III Longsdorf's Notes, 363.

In a suit brought under G. C., § 10870, by a legatee or other distributee against an executor or administrator, it is necessary to allege and prove a demand upon, and neglect or refusal by, the defendant before the commencement of the action: *Henry v. Doyle*, 82 O. S. 113.

In suit for wrongful death occurring in another state, it is not necessary to aver who, under the law of such other state, would be the beneficiary or who would be authorized to bring the action. In the absence of such provisions, the law of Ohio would govern in respect thereto: *Railway v. Andrews*, 14 O. C. C. 564, 8 O. C. D. 73.

Where an answer, in partition of realty of a decedent, alleges that there is not sufficient personal property to pay debts, the court will permit the action to go to decree after the lapse of the statutory period from the death of the decedent, and upon distribution will order that a sufficient amount from the sale be turned over to the administrator to pay indebtedness of the estate as certified by the probate court: *Wilson v. Irwin*, 11 O. N. P. (N.S.) 175.

An administrator's action for rent on a parol lease made by him is not demurrable. There being several cases in which the administrator is entitled to possession of land the action is possible, and he need not set up the exceptional matter: *Bowler v. Erhard*, 4 Dec. Rep. 256, 1 Clev. L. Rep. 173.

Removal of an administratrix under G. C., § 10629, and proceeding against her for concealment of assets (G. C., § 10673) may be joined in the same application: *Harris v. Westervelt*, 15 O. C. C. 534, 8 O. C. D. 367.

In an action in nature of a creditor's bill against a legatee or distributee, the administrator with the will annexed may interplead another claimant to the fund: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

In an action to charge the executor in that capacity, an amendment may be allowed so as to charge him personally: *Becker v. Wolworth*, 45 O. S. 169, IV Longsdorf's Notes, 267.

Where the articles required the survivors at death of a partner to take his share at a value fixed by appraisers chosen by them and the executors, and a fraudulent appraisal was had by collusion, no remedy on behalf of the heirs against the survivors and executors jointly exists; there is no trust. The executors are liable for not realizing a proper sum. The survivors take the interest of the deceased irrespective of the appraisal, and therefore not in trust for the estate, and are liable to the executors and not to the heirs, and the executors' action is for a re-

appraisal or for a judicial ascertainment of what is due; the survivor's liability arises out of the partnership articles and that of the executors arises out of the fraud, hence there is a misjoinder of actions: *Jones v. Proctor*, 5 O. N. P. 315, 5 O. D. (N.P.) 416. See also PARTNERSHIP.

For the general discussion of the subject of pleading, see PLEADINGS.

F. EVIDENCE.

In an action against an administrator, properly summoned as such, who appears and makes a defense, and prosecutes error to the common pleas, there is sufficient evidence by admission of his capacity as administrator without formal proof to that effect: *Squires v. Martin*, 5 O. C. C. (N.S.) 313, 14 O. C. D. 232 [affirmed, without opinion, *Martin v. Squires*, 52 O. S. 634].

An executor suing on notes payable to the decedent must prove the death and his appointment, else he has failed to show title: *In re Dunham*, 8 O. C. C. 160, 4 O. C. D. 325.

When defendants in the suit are named as administrators, evidence may be given to charge them in their individual character: *Waldsmith v. Waldsmith*, 2 O. 156, I Longsdorf's Notes, 114.

Plaintiffs who claim as heirs for distribution must show how they are heirs: *Waldsmith v. Waldsmith*, 2 O. 156, I Longsdorf's Notes, 114.

A statute of Pennsylvania will be enforced in Ohio for negligently causing death in that state to a citizen of that state: *Schell v. Iron & Sheet Co.*, 4 O. C. C. (N.S.) 172, 16 O. C. D. 209 [but see *Railway v. Chambers*, 73 O. S. 16, IV Longsdorf's Notes, 998, and *Chambers v. Railway*, 207 U. S. 142, 16 O. F. D. 628, 6 O. L. R. 498].

In an action under G. C., § 10771, in this state for wrongful death in Indiana, it is competent to introduce and prove the statute of Indiana and the decisions of the courts in that state construing the same, and it is for the trial court, in instructing the jury, to construe such decisions: *Railway v. Terry*, 14 O. C. C. 536, 7 O. C. D. 597.

Where there is an act in Indiana similar to G. C., § 10770, but a subsequent act regulates the liability of railroads for injuries to employes, fixes the rules of evidence which shall govern in such cases, and provides that the decisions or statutes of other states shall not be pleaded as a defense, both acts are to be treated *in pari materia*, and the enforcement of such acts in Indiana is not the equivalent of the enforcement of the statute of this state of like character. Ohio courts can not hear a suit for the wrongful death of a railroad employe occurring in Indiana: *Railway*

v. *Fow*, 64 O. S. 133, IV Longsdorf's Notes, 868 [reversing *Railway v. Fow*, 20 O. C. C. 440, 11 O. C. D. 148].

In a suit against the estate for millinery sold to the decedent, and the defense was that it was sold to his wife, evidence that after the death the wife was allowed by the executor to take possession of the stock of goods as hers, is not competent. Neither the decedent's subsequent conduct nor the executor's could affect the question: *Johnston v. Hawkins*, 31 O. S. 137, III Longsdorf's Notes, 568.

In a summary proceeding to compel an attorney to deliver money or securities to an executor, which he had received from the decedent, he is not a competent witness against the executrix as to testify to the terms on which decedent delivered the papers to him: *Cotton v. Ashley*, 13 O. C. C. 535, 7 O. C. D. 242. See also WITNESSES.

Executors sued a son of testator for the purchase price of land conveyed to the son by the testator. The son pleaded that part of the price was remitted as a gift and that he had paid the rest and offered declarations of the testator to support this defense. The executors then offered a clause in the will making a bequest to the son, but also showing that the testator did not consider the land paid for. It was held that the son never having recognized the will as operative, this clause was a mere self-serving declaration of the testator and not competent. Nor are self-serving declarations competent to rebut other declarations: *English v. Arnold*, 35 Bull. 315 [without opinion in the supreme court].

For the general discussion of the subject of evidence, see EVIDENCE.

G. JUDGMENT.

In a judgment against one as administrator, the omission of the provision that it shall be levied on the goods and estate of the decedent, does not limit the judgment to the administrator individually: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

A judgment against an administrator is only *prima facie* evidence against the heirs and their grantees of a claim against the estate, where, as in Ohio, there is no privity between an administrator and the heirs of a decedent: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484.

A judgment ordering levy on the assets of the testator in the executor's hands, is the same thing as the words "to be levied on the property of the testator," and is therefore not erroneous: *Haymaker v. Haymaker*, 4 O. S. 272, II Longsdorf's Notes, 92.

A being sued individually for plaintiff's share of money of an estate, and answering that he held the money as administrator, a judgment against him as such after trial on the merits is valid and binds the estate. He can not obtain two trials on the ground that he should be sued as administrator if he neglected to object before trial: *Ten Eick v. Dye*, 9 Dec. Rep. 511, 14 Bull. 214.

Equity in subjecting property to debts in the hands of heirs and their alienees, the administrator being a party, will so shape its decree as to finally adjust and settle the estate: *Piatt v. St. Clair*, W. 261, I Longsdorf's Notes, 22, 6 O. 227, I Longsdorf's Notes, 333; *Hampson v. Sumner*, 18 O. 444, I Longsdorf's Notes, 856.

Judgment against an administrator as such on a petition against him as such will if on a contract by him beyond his powers, be effective against him personally: *West v. Dean*, 15 O. C. C. 261, 8 O. C. D. 797. See also PARTIES.

Executions against executors or administrators, for debts due from the deceased, shall, except in cases provided for, run against the goods and estate of the deceased in their hands: *Thomas v. Chamberlain*, 39 O. S. 112, III Longsdorf's Notes, 1011.

The verdict should be for a gross sum, to be subsequently apportioned among the beneficiaries in such manner as is fair and equitable, and a refusal by the court to give special charges, necessitating a finding by the jury proportioning the amount to be recovered among those for whose benefit the action was brought, is not error: *Traction Co. v. Room*, 16 O. D. (N.P.) 101, 3 O. L. R. 36, 1 *Hoses* 429.

Where the amount due from an administrator to the estate is ascertained and determined by the probate court, it is not error for the court to order its payment to his successor in the administration of the estate: *In re Ziegler*, 3 O. N. P. 307, 6 O. D. (N.P.) 54; *In re Ziegler*, 4 O. N. P. 182, 6 O. D. (N.P.) 244.

To the extent that G. C., § 10673 professes to authorize the court to render judgment for the value of the property where there is a controversy between the parties, it is unconstitutional. In such case, defendant has a right to a jury trial: *Howell v. Fry*, 19 O. S. 556, II Longsdorf's Notes, 969.

For form of judgments against an executor or administrator: *Gray v. Askeo*, 3 O. 466, I Longsdorf's Notes, 183.

H. SET-OFF.

In an administrator's suit a demand against the decedent may be set off: *Granger v. Granger*, 6 O. 35, I Longsdorf's Notes, 319.

But not, however, a demand for payments since his death on an agreement existing before, *e. g.*, as security. He must look to the general assets for this. The bare possibility was not a debt: *Granger v. Granger*, 6 O. 35, I Longsdorf's Notes, 319. See also SET-OFF.

I. LIMITATION.

The appointment of an executor or administrator under the laws of Ohio does not suspend the operation of the statute of limitations: *Liggett v. Liggett*, 3 O. N. P. (N.S.) 518, 51 Bull. 59.

The neglect of the creditor, whereby the estate of one surety is released, under the statute of limitations, from its direct liability, does not discharge a cosurety from his liability for the whole or any part of the debt: *Camp v. Bostwick*, 20 O. S. 337, II Longsdorf's Notes, 998.

Laches in bringing suit for an accounting by an administrator of a deceased partner against a surviving partner, to work an estoppel, can not be predicated upon mere lapse of time. The burden is on the partner asserting the defense to show knowledge in the administration of a *residuum* of partnership property after settling the firm's affairs: *Peters v. Firestone*, 12 O. N. P. (N.S.) 609, 22 O. D. (N.P.) 296.

An administrator is not the trustee of a continuing and explicit trust, as to legatees, devisees, and next of kin, so as to prevent the running of the statute of limitations: *Herckelrath v. Van Nes*, 31 Bull. 35 [petition in error refused, without opinion, *Herckelrath v. Van Nes*, 30 Bull. 308].

An action against an executor or administrator for failure to file his settlement accounts is barred by such lapse of time, after the default of an administrator to file his settlement accounts, as would be sufficient to bar an action on the administration bond: *Philips v. State*, 5 O. S. 122, II Longsdorf's Notes, 165.

The proviso contained in G. C., § 10773, requiring actions to be brought within a specified time, is a condition qualifying the right of action, and not a mere limitation on the remedy: *Railway v. Hine*, 25 O. S. 629, III Longsdorf's Notes, 273.

Where a creditor takes from his debtor a note, and also a mortgage on real estate to secure the same, and the debtor afterwards dies, and the action against the personal representatives on the note becomes barred, the creditor may nevertheless have his remedy in equity on the mortgage: *Fisher v. Mossman*, 11 O. S. 42, II Longsdorf's Notes, 477.

Failure to appoint an administrator of an estate will not suspend the statute of limitations: *Tobias v. Richardson*, 5 O. C. C. (N.

S.) 74, 16 O. C. D. 81 [affirmed, without opinion, *Tobias v. Richardson*, 72 O. S. 626].

Where, under the doctrine of subrogation, an indebtedness exists in favor of a wife against the estate of her husband, the limitation under G. C., § 10746, of actions by creditors does not operate as a bar against recovery by her administrator of the amount so due: *Glenn v. Eicher*, 11 O. C. C. (N.S.) 95, 20 O. C. D. 821 [affirming *Eicher v. Darby*, 17 O. D. (N.P.) 780, 5 O. L. R. 102, affirmed, without opinion, *Glenn v. Eicher*, 81 O. S. 553].

The limitation contained in G. C., § 10773, that every action based on a claim for wrongful death shall be brought within two years, is a part of the right of action itself and not merely a limitation on the remedy; and the saving clause of G. C., § 11233, relating to causes commenced or attempted to be commenced in due time but which have failed for some reason other than on the merits, is without application in such a case: *Collins v. Railroad*, 11 O. N. P. (N.S.) 251, 22 O. D. (N.P.) 245.

The action is, by the express provision of G. C., § 10773, barred in two years after the death of the deceased: *Stoltz v. Railroad*, 7 O. N. P. 129, 7 O. D. (N.P.) 514.

G. C., § 10746, that an administrator who has given notice of his appointment can not be sued after two years from giving bond, and G. C., § 10722, that a claimant must sue within six months after rejection of his claim must be construed together, and does not prolong the time beyond two years on a claim due at decedent's death but not presented and rejected until the two years were nearly expired: *Harris v. O'Connell*, 85 O. S. 136.

An heir induced by fraud to agree to surrender rights against an administrator must seek to set aside such agreement within four years from discovery of the fraud: *Duhme v. Mehner*, 3 O. N. P. 266, 5 O. D. (N.P.) 107.

Where executors of a deceased partner have collusively allowed a fraudulent appraisement to be made of the decedent's interest in the firm, the cause of action against them for failure to realize a proper amount is barred in four years from discovery of the fraud, and is not ten years under G. C., § 11227: *Jones v. Proctor*, 5 O. N. P. 315, 5 O. D. (N. P.) 416.

Where a claim presented by a creditor to the executor or administrator of an estate, is accepted and allowed by such executor or administrator as a valid claim against the estate which he represents, but is subsequently disallowed and rejected by the successor of the executor or administrator who allowed it, the four years' statute of limitation provided by G. C., § 10746, begins to

run in such case only from the time of the rejection of said claim: *Stewart v. McLoughlin*, 47 O. S. 555, IV Longsdorf's Notes, 394 [approved and followed, *Bray v. Darby*, 82 O. S. 47].

Probably an action to recover a legacy would lie before four years are up, but the legatee may be compelled to give bond to repay it if necessary: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481.

The time within which an action may be brought to subject lands, sold in fraud of creditors, to the payment of debts, is not fixed by the general statute of limitation of actions, but by the special provision of G. C., § 10777, which permits it to be brought within four years from the death of the fraudulent grantor: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

An heir's right of action against the administrator personally for not paying over his distributive share as ordered by court is barred in six years from the administrator's default; it is not a case of continuing trust: *Duhme v. Mehner*, 3 O. N. P. 266, 5 O. D. (N. P.) 107.

The distributee's action is barred in six years after thirty days from the order of distribution: *Lease v. Downey*, 5 O. C. C. 480, 3 O. C. D. 335.

The surviving husband's share in his deceased wife's personal estate, not asserted until nineteen years after said estate has been accounted for and distributed by her administrator, is barred under any possible construction of the statute of limitations: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, which was affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. — and *Stevens v. Robinson*, 88 O. S. —].

A motion for citation and attachment proceedings against an administrator will lie under G. C., § 10825 and G. C., § 10668, until more than ten years have elapsed from the date of hearing of the last account filed by such administrator: *Gilbert v. Marsh*, 4 O. N. P. 338, 7 O. D. (N.P.) 230.

A cause of action accrues, within the meaning of the statute of limitations, when there coexists a demand capable of present enforcement; a suable party against whom the demand may be enforced; a party in being who has a present right to enforce. Hence when a note becomes due after the death of the payee the title thereto and the right to enforce its payments vests in the administrator, and the 15 year limitation (G. C., § 11221) begins to run from the date of the administrator's appointment. But if the note falls due during the life time of the holder

and maker (both of whom are *sui juris*), a cause of action in favor of the former, and against the latter, immediately accrues, and the statute thereupon begins and will continue to run unless something intervenes to stop it; the death of the payee, and failure to appoint an administrator will not, however suspend it: *Tobias v. Richardson*, 5 O. C. C. (N.S.) 74, 16 O. C. D. 81.

Where executors collusively concur in a fraudulent appraisal of decedent's interest as a partner, and thus are liable as for fraud, which liability is barred in four years from its discovery, are sued jointly with the survivors by the heirs for an accounting of the firm's concerns, but no claim against the executors to account for what was lost by their fraud until an amendment to the petition filed more than four years after discovery, the claim against them is barred: *Jones v. Proctor*, 5 O. N. P. 315, 5 O. D. (N.P.) 416.

The disability must exist at the accrual of the cause of action. If time once begins to run it, nothing stops it but some act of the party himself. Thus death does not stop the statute though the heir is under disability: *Granger v. Granger* 6 O. 35, I Longsdorf's Notes, 319; *Williams v. Presbyterian Society*, 1 O. S. 478, I Longsdorf's Notes, 999; *Hinde v. Whitney*, 31 O. S. 53, III Longsdorf's Notes, 562; *Bartlow v. Kinnard*, 38 O. S. 373, III Longsdorf's Notes, 976; *Irwin v. Garretson*, 13 Dec. Rep. 704, 1 C. S. C. R. 533.

That no administrator was appointed against whom to prosecute the action does not prolong the time; a creditor can have himself appointed: *Granger v. Granger*, 6 O. 35, I Longsdorf's Notes, 319.

Nor merely informing the administrator of the existence of a set-off without taking legal steps to enforce it: *Irwin v. Garretson*, 13 Dec. Rep. 704, 1 C. S. C. R. 533.

A judgment in favor of an administrator on a claim against the estate by reason of the statute of limitations is no bar to a new suit to reach assets newly found, for these are new and later facts, giving a remedy not then existent: *Matton v. Clapp*, 8 O. 248, I Longsdorf's Notes, 431. See also JUDGMENT.

Death of the mortgagor does not postpone the right to foreclose until expiration of the time to sue an administrator, no personal judgment being asked: *Hathaway v. Lewis*, 13 Dec. Rep. 160, 2 D. 260, 2 Gaz. 404. See also MORTGAGES.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

J. PROCESS.

Personal service within the state upon a foreign executor is good, although neither the executor nor the decedent was domiciled in Ohio; and although decedent left no property in Ohio: *Craig v. Railroad*, 2 O. N. P. 64, 3 O. D. (N.P.) 146.

Foreign executors are subject to suit in the same manner they are permitted to sue, and constructive service may be had in an attachment suit against a nonresident executor, where the property of the decedent which is attached is within the state: *Steel Co. v. Meyers*, 11 O. N. P. (N.S.) 652, 22 O. D. (N.P.) 733.

K. SETTLEMENT.

A settlement by the widow and administratrix of a decedent killed by a wrongful act is void as against the minor children of the deceased, where it does not appear that the probate court consented to and approved the settlement: *Railroad v. Hottman*, 1 O. C. C. (N.S.) 17, 15 O. C. D. 140 [affirmed, without opinion, *Railroad v. Hottman*, 70 O. S. 475].

An action by the heirs against coadministrators for fraudulently conveying land of the testator to themselves is in its nature joint and several and that a settlement with one of the administrators, and a dismissal of the action as to him, reserving the right to proceed against the others for a recovery of the land, constitutes no bar to such recovery: *Piatt v. Longworth*, 27 O. S. 159, III Longsdorf's Notes, 349.

L. ESTOPPEL.

An administrator is estopped from prosecuting an action for the wrongful death of his intestate against a second defendant, after having brought suit against another party on the same claim and accepted a settlement therefor; and this is true, whether the two defendants occupy the relation of joint or quasi joint tort feorsors: *Shank v. Koen*, 10 O. N. P. (N.S.) 513, 20 O. D. (N.P.) 280.

An administrator of the promisee is estopped from prosecuting an action on a note executed in furtherance of a scheme to defraud creditors: *Baker v. Hall*, 9 O. N. P. (N.S.) 396, 20 O. D. (N.P.) 445.

M. COSTS.

No costs against an administrator in a suit begun against the decedent and surviving could be recovered in actions begun before 1831: *Farrier v. Cairns*, 5 O. 45, I Longsdorf's Notes, 246.

Executors are chargeable with cost *de bonis testatoris* if sued after the time for settlement has expired. The statute only protects them before that time: *Sproat v. Cutler*, W. 157, I Longsdorf's Notes, 15. See also COSTS.

N. REVIEW.

An action for money against an executor or trustee is appealable where plaintiff's right arises under principles of subrogation, as where an estate is looked to on a personal liability of the trustee only because the trustee can compel it to indemnify him: *Railway Co. v. Schmidt*, 8 O. C. C. 355, 4 O. C. D. 535.

A proceeding against an administrator for concealment of assets is appealable, G. C., § 10673, although an application for her removal (G. C., § 10629), which is not appealable, is joined therewith: *Harris v. Westervelt*, 15 O. C. C. 534, 8 O. C. D. 367.

An action by heirs against an executor charging fraudulent settlement of accounts and fraudulent and unnecessary sales of real estate, and charging that on a just settlement over \$6,000 would be in his hands, and asking judgment for \$6,000, is not for money only, but is to set aside fraudulent settlements, and for a just account, and is appealable: *Reed v. Reed*, 25 O. S. 422, III Longsdorf's Notes, 248.

A suit by the distributee to cancel receipts obtained by the administrator by deceit is appealable, though judgment for the proper distributive share is also asked: *Duhme v. Mehner*, 18 O. C. C. 706, 6 O. C. D. 78.

An administrator appealing from the common pleas to the circuit court, properly enters notice of appeal under G. C., § 12226, and should not give written notice under G. C., § 10740, which applies only to appeals from the probate court to the common pleas: *Layer v. Schaber*, 57 O. S. 234, IV Longsdorf's Notes, 713.

A suit against an administrator to compel the allowance of a claim on his refusal to indorse an allowance, is appealable: *Smock v. Bouse*, 12 O. C. C. 46, 5 O. C. D. 293.

Executors under bond not being required to give an appeal bond, and it being the clerk's duty to transmit the papers, the executor's only step is to give notice of appeal: *Sproat v. Cutler*, W. 157, I Longsdorf's Notes, 15.

An action by heirs claiming that an executor's sale had not been according to the will, and asking that the vendee disclose his title and be declared a trustee for the heirs, and that the executor convey to the heirs, is not in effect for ejectment or for

purchase money, but is for specific equitable relief, and appealable: *Elstner v. Fife*, 32 O. S. 358, III Longsdorf's Notes, 638.

Judgment having been rendered in favor of the guardian of an imbecile in an action against the latter, the guardian is a necessary party to a proceeding to reverse the judgment, and where the time has passed in which such proceeding to reverse can be prosecuted, the proceeding can not be brought against the administrator of such ward upon his decease: *Bradstreet v. Wettler*, 12 O. C. D. 808.

Probate court ordered the administrator *de bonis non* to pay indebtedness to his successor. The administrator appealed. It was held that finding the amount due and direction to pay was judgment for money and the appeal bond must be in a sum double the amount of this judgment: *In re Ziegler*, 3 O. N. P. 307, 6 O. D. (N.P.) 54.

On a petition in error to reverse a judgment rendered in the probate court in a summary proceeding against a party embezzling, concealing or conveying away the property or effects of the estate, it was error to order the written examinations taken before the probate court to be stricken from the record, for they are a legitimate part of the proceeding without a bill of exceptions setting them forth: *Howell v. Frye*, 19 O. S. 556, II Longsdorf's Notes, 969.

As a judgment for costs may be rendered against an administrator in some cases, and error is not presumed, the administrator must show the reviewing court that this is not one of those cases: *Kinney v. Lockwood*, W. 340, I Longsdorf's Notes, 28.

Under G. C., § 11209, an executor or administrator who appeals in the interest of his trust, no bond is required, but he shall be allowed an appeal by giving written notice to the court of his intention to appeal, within the time limited for giving bond: *In re Hinton*, 64 O. S. 485, IV Longsdorf's Notes, 876.

A coexecutor is required to give an appeal bond the same as any other party to an appeal: *Downing v. Downing*, 3 O. C. C. (N.S.) 623, 13 O. C. D. 389.

A transcript on appeal from the probate court must be filed in the common pleas by the party appealing, on or before the second day of the term of that court next after the undertaking or notice of intention to appeal is given. The filing within the time is mandatory: *Downing v. Downing*, 3 O. C. C. (N.S.) 623, 13 O. C. D. 389.

When an administrator has an individual interest in the appeal, written notice of his intention to appeal is not required by G. C., § 11209: *In re Arkenberg*, 1 O. N. P. 9, 13 O. D. (N.P.) 656.

For the general discussion of the subject of appeal, see APPEALS.

For the general discussion of the subject of error, see ERROR.

XXVII. PROCEEDINGS BY CREDITOR AGAINST THE HEIRS, DEVISEES, ETC.

A. LIABILITY OF HEIRS AND DEVISEES.

1. Debts for which Liability Exists.

G. C., §§ 10876 and 10877, provide the only cases where an heir is liable, and unless the estate has been settled the liability does not arise: *Arbaugh v. Millett*, 5 O. C. C. 295, 3 O. C. D. 146.

The heir is bound to pay taxes: *Piatt v. St. Clair*, W. 261, I Longsdorf's Notes, 22.

A sale by the heir conveys title, but is subject to creditor's lien: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

A judgment *in personam*, under which no specific lien on real estate was acquired during the lifetime of the judgment debtor, can not be revived and enforced against the heirs: *Miller v. Taylor*, 29 O. S. 257, III Longsdorf's Notes, 464.

A saving, in a repealing statute relating to administration of rights and liabilities accruing under the repealed acts and the remedies provided therein includes inchoate rights; hence, though an action has accrued on a guardian's bond, yet a deceased obligor's heirs may be held liable under the former statutes to the extent of assets received after final settlement by the administrator, though no claim had been presented to him: *Cochran v. Taylor*, 13 O. S. 382, II Longsdorf's Notes, 614.

2. Nature of Liability.

A creditor's lien can be enforced by the administrator only upon the order of the proper court, the operation of which is in the nature of a judgment or decree against the heirs: *Gill v. Pinney*, 12 O. S. 38, II Longsdorf's Notes, 546.

Where an estate has been distributed to the distributees without paying a debt (it had not been presented), the liability of each distributee is only for the amount received by him, where they did not jointly receive the assets, hence they can not be sued jointly by the creditor: *Spicer v. Giselman*, 15 O. 338, I Longsdorf's Notes, 715. See also DESCENT AND DISTRIBUTION.

The right of action, on a guardian's bond, to recover from the heirs of the sureties the amount remaining in his hands, first accrues to the ward, where such amount is ascertained by the probate court on the settlement of the guardian's final account. Mere delay

of the ward, on arriving of age, to compel settlement, does not discharge the sureties: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

In a bill by creditor against heirs, administrator, and purchaser, the court will finally adjust the estate: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

Upon the decease of a debtor, his estate by law stands for the payment of his general creditors alike, and one creditor can not acquire a superior right to such estate: *McDonald v. Aten*, 1 O. S. 293, I Longsdorf's Notes, 981.

The debts of a decedent are a lien upon his real estate; and the purchasers from his heirs take the same *cum onere* and subject to the application of the maxim *caveat emptor*: *Faran v. Robinson*, 17 O. S. 243, II Longsdorf's Notes, 830.

B. PROCEEDINGS.

1. In General.

The creditor must first exhaust his remedy against the personal representative: *Stiver v. Stiver*, 8 O. 217, I Longsdorf's Notes, 426; *Jones v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

Where the estate of surety has passed into the possession of the heir and distributee, although it had not been fully settled, a judgment against the administrator is the proper proceeding, and not judgment against the heir and distributee as provided for in G. C., §§ 10876 and 10877: *McClaskey v. Barr*, 38 Fed. Rep. 165, 10 O. F. D. 69.

Where a cause of action accrues before the expiration of the time in which the executor may be sued, suit can not be maintained against the heirs under G. C., §§ 10876 and 10877: *Bivitt v. Diehl*, 12 O. D. (N.P.) 383.

In foreclosure of a mortgage given by heirs the administrator of the ancestor is a proper party, for it seeks to apply land to their debts when his debt is a paramount claim on the title. Hence he may appeal from a decree shutting him out: *Elstner v. Fisher*, 12 O. C. C. 517, 5 O. C. D. 397. See also MORTGAGES.

2. Jurisdiction.

A bill in chancery by a judgment creditor, against an administrator in another state, can not be sustained against the heirs of decedent in this state upon the judgment alone without other circumstances to give the court jurisdiction: *Haynes v. Colvin*, 19 O. 392, I Longsdorf's Notes, 884.

It has been held "that the heir could not be compelled in equity to satisfy judgment recovered, not against the ancestor, but

against the administrator of the ancestor" in *Haynes v. Colvin*, 19 O. 392, I Longsdorf's Notes, 884, but this applies to the law as it now is, when the judgment against the administrator is not against him in his representative capacity: *Spicer v. Giselman*, 15 O. 338, I Longsdorf's Notes, 715.

3. Defense.

In the action provided for by G. C., § 10876, the same defenses may be made as in an action against the personal representatives: *Camp v. Bostwick*, 20 O. S. 337, II Longsdorf's Notes, 998.

4. Evidence.

The record of a judgment against the administrator, and the return of *nulla bona* by the sheriff to an execution issued thereon, is not evidence to show the want of assets in the hands of the administrator in an action against the heir to subject his real estate to the payment of the ancestor's debts: *Jones v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

For the general discussion of the subject of evidence, see EVIDENCE.

EXECUTORY CONTRACT OF SALE.

See SALES.

EXECUTORY CONTRACTS.

See CONTRACTS.

EXECUTORY DEVISE.

For executory devise, see WILLS, LEGACIES AND DEVISES.

EXECUTORY ESTATES.

See FUTURE INTERESTS.

EXECUTORY SALES.

See SALES.

EXECUTORY TRUSTS.

See TRUSTS.

EXECUTRIX.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

EXEMPLARY DAMAGES.

For exemplary damages, see DAMAGES.

EXEMPLIFICATION OF RECORD.

See EVIDENCE; RECORDS.

EXEMPTION FROM EXECUTION.

See EXECUTION, WRIT OF.

EXEMPTION FROM JURY SERVICE.

See JURY.

EXEMPTION FROM ROAD LABOR.

See ROADS.

EXEMPTION FROM TAXATION.

See TAXATION.

EXEMPTIONS.

For exemptions from executions, see EXECUTION, WRIT OF.

For homestead exemptions, see EXECUTION, WRIT OF.

For exemptions from arrest, see ARREST.

For exemption from attachment, see ATTACHMENT.

For exemptions from service of process, see EXTRADITION; SUMMONS.

For exemption from taxation, see TAXATION.

For exemption from assessment, see ASSESSMENTS.

For inheritance tax, see TAXATION.

The wages of a married man living apart from and not supporting his family, are not exempt from attachment under G. C., §§ 10253 or 11725, and the phrase "head or support" may be read "head and support" (10213): *Barrow v. Williams*, 12 O. N. P. (N.S.) 518, 22 O. D. (N.P.) 355.

An assignor for the benefit of creditors is entitled to an allowance of the value of his exemptions upon application made at any time before distribution: *Assignment of Davies*, 10 O. N. P. (N.S.) 205, 55 Bull. 369.

Evidence offered by the defendant that he is the head and support of a family is ground

for a discharge of an attachment, where not met by evidence of greater weight offered by the plaintiff: *Young v. Clark*, 13 O. C. C. (N.S.) 284, 32 O. C. D. 374.

Alimony can not, either before or after payment thereof, be subjected to the payment of debts of the wife which existed prior to the allowance thereof: *Fickel et al. v. Granger*, 83 O. S. 101.

When one dies intestate leaving a widow, who having separated from him, is permanently residing elsewhere, the property on which he resided is brought to sale for the payment of a mortgage lien thereon and for the payment of his debts, she is not entitled to an allowance out of the proceeds in lieu of homestead, the widow's right in that regard being fixed by G. C., § 11732, which confines the right to "a widow composing a part of the decedent's family at the time of his death": *Nichols v. French*, 83 O. S. 162 [following *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159]. See also EXECUTION, WRIT OF.

The mere fact that a church owns property, whether it derives an income from it or not, does not create the exemption. It must first of all be used; secondly, it must be used exclusively. The mere fact of ownership alone without these other requisites referred to, give no claim to exemption, nor does it make any difference whether the income of the property is applied to religious purposes or otherwise, where the church has leased a portion of its property for secular purposes: *Jerusalem Society v. Richardson*, 10 O. N. P. (N.S.) 214. See also TAXATION.

R. S., § 3836-3 (repealed 99 v. 537, § 49; for analogous section see G. C., § 9650), exempting building and loan associations from the operation of the usury laws of the state, with respect to loans made to members and depositors, is neither violative of Art. II, § 26, of the constitution, which requires all laws of a general nature to have uniform operation throughout the state, nor Art. XIII, § 1, which provides that the general assembly shall pass no special act conferring corporate powers, nor of Art. I, §§ 1 and 2, of the constitution: *Loan Association v. Desnoyers*, 4 O. C. C. (N.S.) 337, 16 O. C. D. 352; *Spies v. Trust Co.*, 4 O. C. C. (N.S.) 103, 14 O. C. D. 40 [not following *Mykrantz v. Loan Association*, 19 O. C. C. 51, 10 O. C. D. 250].

See also BUILDING AND LOAN ASSOCIATIONS.

The law making power may provide adequate laws for the full collection of debts, as it may omit to do so; it has the power within the limits of the constitution to declare what property shall be exempt from force of the collection laws and when that power has been lawfully exercised the effect is to make

the law a part of subsequently executed contracts: *Williams v. Donough*, 65 O. S. 499, IV Longsdorf's Notes, 890. See also CONSTITUTIONAL LAW.

R. S., § 2380 (repealed 96 v. 96; for analogous section see G. C., § 3819), and the exemption of property from the assessment for sewers as therein provided, are applicable where the assessment is levied for the construction of a main sewer in a city of the third grade and first class: *Ford v. Toledo*, 64 O. S. 92, IV Longsdorf's Notes, 866.

The "local drainage" contemplated by R. S., § 2380 (repealed 96 v. 96, for analogous section see G. C., § 3819), is adequate drainage for the necessary and usual purposes of sewerage; and it is not enough to entitle a lot to exemption from assessment that it is provided with sufficient surface drainage, or does not need drainage of that kind: *Ford v. Toledo*, 64 O. S. 92, IV Longsdorf's Notes, 866.

A lot in need of local drainage is not exempt from assessment because it is entirely unimproved, and there is no immediate need for any such drainage. Vacant lots may and usually do receive a present, special, appreciable benefit from the construction of a sewer accessible by them for sewerage purposes, sufficient to sustain an assessment made on the basis of benefits: *Ford v. Toledo*, 64 O. S. 92, IV Longsdorf's Notes, 866. See also ASSESSMENTS.

The real estate belonging to an institution of purely public charity is exempt from taxation only when used exclusively for charitable purposes: *Rose Institute v. Myers*, 89 O. S. —.

The exemption from taxation of institutions of purely public charity provided by § 2, Art. XII, of the constitution of Ohio, is of such institutions as property and not as persons and if such real estate is rented for commercial and residence purposes it is not exempt although the income arising from such use is devoted wholly to the purpose of the charity, and there is no distinction in this respect as between real and personal property: *Rose Institute v. Myers*, 89 O. S. —.

Moneys and credits of such institution of purely public charity used wholly to meet its expenditures are likewise exempt but should the trustee thereof employ such money in business, as for instance, loaning it at interest, the money thus loaned would be liable to taxation as much as any other money at interest no matter who the owner might be: *Rose Institute v. Myers*, 89 O. S. —; *Myers v. Rose Institute*, 89 O. S. —.

EXHAUSTED SECURITY.

See MARSHALLING ASSETS, LIENS AND SECURITIES.

EXHAUSTING OTHER REMEDIES.

See CREDITOR'S BILL.

EXHAUSTING PERSONALTY.

See EXECUTION.

EXHIBITION OF PERSON.

See INDECENT CONDUCT.

EXHIBITS.

For exhibits attached to pleadings, see PLEADINGS.

The fact that an exhibit referred to in a bill of exceptions is not attached thereto nor identified in such a way as to make the exhibit available in the reviewing court, does not require the bill to be stricken from the files where questions other than those involving the exhibit are properly presented for review: *Hammel v. Insurance Co.*, 4 O. C. C. (N.S.) 380, 14 O. C. D. 101.

A map and blue print filed with a bill of exceptions and so described as to leave no doubt of their identity become a part of the bill of exceptions: *Swart v. Dock Co.*, 69 O. S. 574, IV Longsdorf's Notes, 965.

An unattached exhibit belonging to a bill of exceptions should have the number of the case, the title of the case and the name of the court to properly identify it: *Dock Co. v. Swart*, 2 O. C. C. (N.S.) 457, 14 O. C. D. 504.

The identification of an exhibit by marking it "Ex. 1" with the number of the case on trial and the initials of the official stenographer, is not so clear and unmistakable that the exhibit may thereafter be regarded as constructively attached to a bill of exceptions making reference to it: *Dock Co. v. Swart*, 2 O. C. C. (N.S.) 457, 14 O. C. D. 504.

Where a bill of exceptions refers to a policy of insurance as "Exhibit B," a policy of insurance marked "Exhibit A" and not attached to the bill of exceptions, is not properly identified and can not be considered by the reviewing court: *Hammel v. Insurance Co.*, 4 O. C. C. (N.S.) 380, 14 O. C. D. 101.

Plaintiff's counsel has no lien upon exhibits, the property of plaintiff attached to

the petition and filed in court, which plaintiff has detached and carried away, upon his dismissal of the suit, without the consent of his counsel before the decree and a motion will not lie to compel plaintiff to return such exhibits: *Dreidams v. Investment Co.*, 8 O. N. P. 405, 11 O. D. (N.P.) 608.

Failure properly to mark for identification certain depositions which were used at the trial below, or to attach them to the bill of exceptions, does not prevent their being treated as a part of the bill of exceptions, when it is reasonably certain that they are the same depositions which were used in the court below, and that it was intended they should be made a part of the bill of exceptions, but, owing to an inadvertence, they were not attached but filed with the original papers in the appellate court: *Pullman Co. v. Washington*, 10 O. C. C. (N.S.) 105, 20 O. C. D. 17.

It is the better practice for the proper identification of an exhibit introduced in evidence with the intention of attaching it to the bill of exceptions, that the stenographer in his reference to it should add the words, "and the same is hereto attached and made part of the bill of exceptions": *Young v. Young*, 7 O. C. C. (N.S.) 419, 18 O. C. D. 179.

Except where something is to be determined by an inspection of them, or unless the same can not be exhibited by copy so as to fairly present to the reviewing court the question sought to be submitted, the originals of depositions and documents given in evidence on a trial of a cause, need not be attached as exhibits, to a bill of exceptions taken in such cause, but may be incorporated therein by copy: *Accident Co. v. Notter*, 67 O. S. 413.

In a case where no such necessity exists for the production of the originals, if a bill of exceptions signed and allowed by the trial judge and duly filed in the circuit court, has embodied in it as a part of it, copies of depositions and documents given in evidence on the trial, it is error for the circuit court to strike such bill of exceptions from the files, or to disregard and refuse to consider said evidence, merely because the originals of such depositions and documents are not attached thereto and presented therewith: *Accident Co. v. Notter*, 67 O. S. 413, IV Longsdorf's Notes, 932. See also BILL OF EXCEPTIONS.

Identification of X-ray skiograph, claimed to be that of the plaintiff should be properly identified as such before it can properly be admitted as evidence: *Railway v. Hobart*, 13 O. C. C. (N.S.) 592, 22 O. C. D. 154.

The mere fact that exhibits offered in evidence are of considerable bulk or weight does not excuse a failure to attach them to the bill of exceptions or to properly mark

them for identification on review on the weight of the evidence: *State v. Hinkelman*, 13 O. C. C. (N.S.) 321, 22 O. C. D. 1 [affirmed, without opinion, *Hinkelman v. State*, 83 O. S. 446].

In pleading a contract between attorney and client for part of a future judgment it is not necessary to allege whether or not the contract was in writing, or if in writing to attach a copy thereof to the petition, but only to allege the substance of the contract: *Smith v. Railroad Co.*, 11 O. N. P. (N.S.) 65, 21 O. D. (N.P.) 480 [affirmed by circuit court, without opinion, *Smith v. Railroad Co.*, 11 O. N. P. (N.S.) 65, 21 O. D. (N.P.) 480]. See also ATTORNEY AND CLIENT.

EXISTENCE OF REMEDY AT LAW.

See EQUITY and cross references thereunder.

EXISTING CREDITORS.

See FRAUDULENT CONVEYANCES.

EXISTING DEBT.

For existing debt as consideration, see CONTRACTS; FRAUDULENT CONVEYANCES.

EXISTING RIGHTS.

For statutes impairing existing rights, see CONSTITUTIONAL LAW; STATUTES.

EX MALEFICIO TRUSTS.

See TRUSTS.

EX OFFICIO.

See OFFICE.

EXONERATION.

See CONTRIBUTION.

EXONERATION OF REAL OR PERSONAL ESTATE.

For exoneration of property by will, see WILLS, LEGACIES AND DEVISES.

EX PARTE.

For *ex parte* orders, see ATTACHMENT; JUNCTION.

A proceeding where a will is propounded for probate is not adversary, but entirely *ex parte*, and nothing more is required than that a *prima facie* case is made that the testatrix was of full age, of sound mind and memory, and free from restraint; that the paper writing propounded is in writing, and that it is signed at the end thereof by her, and attested and subscribed in her presence by two or more competent witnesses who saw the testatrix subscribe or heard her acknowledge the same: *In re Estate of Nicholson*, 2 O. N. P. (N.S.) 189, 49 Bull. 379. See also **WILLS, LEGACIES AND DEVISES**.

EXPATRIATION.

See **ALIENS**.

EXPECTANCY.

For conveyance of expectancies, see **ASSIGNMENTS; DEEDS; ESTOPPEL; FUTURE INTERESTS**.

For expectancy of life, see **DEATH BY WRONGFUL ACT; EVIDENCE**.

"Expectancy," as applied to property which may be considered in determining a husband's ability to pay alimony, does not include the mere possibility of accession by inheritance from his living parents: *Davis v. Davis*, 12 O. C. C. (N.S.) 29, 21 O. C. D. 136. See also **DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**.

Expectancies or remainders are devisable by will: *Burkhardt v. Decker*, 8 O. N. P. (N.S.) 526, 20 O. D. (N.P.) 106. See also **WILLS, LEGACIES AND DEVISES**.

A mere expectancy or possibility is not assignable at law: *Rodijkeit v. Andrews*, 74 O. S. 104, IV Longsdorf's Notes, 1006 [affirming *Andrews v. Railway Co.*, 7 O. C. C. (N.S.) 161, 17 O. C. D. 814]. See also **ASSIGNMENTS**.

As between private persons, unearned wages constitute a possibility coupled with an interest to which a valid title may be given by assignment; this doctrine is recognized by an unbroken line of authority: *Andrews v. Railway Co.*, 7 O. C. C. (N.S.) 161, 17 O. C. D. 814 [following *Brooks Co. v. Tolman*, 6 O. C. C. (N.S.) 137]; [affirming *Rodijkeit v. Andrews*, 74 O. S. 104, IV Longsdorf's Notes, 1006]. See also **SERVICES**.

EXPECTATION OF IMMUNITY.

See **AIDERS, ABETTERS AND ACCOMPLICES; WITNESSES**.

EXPENDITURE AND APPROPRIATION OF MUNICIPAL CORPORATION.

See **MUNICIPAL CORPORATIONS; PUBLIC CONTRACTS; TAXATION**.

EXPENSES.

For expenses of administrators and executors, see **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES**.

For expenses of county commissioners, see **COUNTIES AND COUNTY COMMISSIONERS**.

Expense is that which is expended, laid out, or consumed; cost, outlay, charge, as expenses of a war: *State v. Craig*, 21 O. C. C. 180, 11 O. C. D. 557.

The word "expenses" as used in G. C., § 11060, relative to the recovery of expenses and attorney's fees upon the abandonment of appropriation proceedings, means something different from "costs," as ordinarily used. It embraces such legitimate and proper expenses as may have been incurred by the defendant during the progress of the trial, including the traveling expenses of a party, a livery bill necessary to facilitate the attendance of witnesses, etc.: *Railway v. Warehouse Co.*, 5 O. L. R. 530, 53 Bull. 13. See also **EMINENT DOMAIN**.

G. C., § 3001, makes no provision for mileage for county commissioners when traveling either within or without their county. The provision for "necessary traveling expenses when traveling outside of the county on official business" is a provision for official as distinguished from personal expenses—for the cost of going and coming, but not for board and personal expenses: *State v. Carlisle*, 2 O. N. P. (N.S.) 637, 15 O. D. (N.P.) 287.

Damages awarded to persons owning property along a street on account of a change of grade affecting their access to their property, are not chargeable against the property owners as a part of the costs and expenses of the improvement of the street: *McGlynn v. Toledo*, 22 O. C. C. 34, 12 O. C. D. 15. See also **ASSESSMENTS**.

A receiver, appointed by a state court to take possession of a fund discovered by a proceeding in aid of execution under G. C., § 11772, acts as the officer of the court, and is entitled to reasonable compensation for his services and expenses as such and for costs in a proceeding instituted by the trustee in bankruptcy of the same debtor's estate upon exception to the allowance of the receiver's claim: *Rodgers v. Forbes*, 3 O. C. C. (N.S.) 528, 13 O. C. D. 438. See also **RECEIVERS**.

A public officer is the agent of the public and he is governed, as to expenses made with good faith, by the same rule that would be applicable to like acts of a private agent or of a guardian or an administrator and is entitled to reimbursement therefor: *Kloeb v. Mercer Co.*, 4 O. C. C. (N.S.) 565, 16 O. C. D. 152. See also OFFICE.

Where in the case of a foreclosure against an oil lease the defendant remains in possession and operates the wells after the sale to the time of the confirmation thereof by the court, he is liable to account to the purchaser for the product during that time, less his actual and necessary expenses in operating the wells: *Murphy v. Hardee*, 22 O. C. C. 511, 12 O. C. D. 837. See also OIL AND GAS.

Funeral expenses and expenses of last sickness are made preferred claims against estates of decedents under G. C., § 10714, and as such should be presented to the executor or administrator for his allowance or rejection, as provided by G. C., § 10717: *Estate of Miller*, 12 O. D. (N.P.) 562.

A county auditor refused to draw a warrant in payment for advertising the rate of taxation, on the ground that if set up in compact form and charged at the rate fixed by G. C., § 6251, it would amount to \$330 instead of \$776, the amount ordered paid by the commissioners. In resisting the payment of the account as allowed by the commissioners, the auditor incurred legal expenses, admitted to have been reasonable in amount, which the commissioners refused to pay. It was held that the auditor was justified in his action, and that the bill for his expenses should have been allowed by the commissioners: *Kloeb v. Commissioners*, 4 O. C. C. (N.S.) 565, 16 O. C. D. 152. See also COUNTIES AND COUNTY COMMISSIONERS.

G. C., § 12008, relating to actions for dower revived in the name of plaintiff's executor or administrator, does not authorize the recovery of council fees in ordinary actions for the assignment of dower. The expenses referred to in this action are expenses attending the assignment of dower by commissioners under G. C., § 12014: *Watson v. Watson*, 21 O. C. C. 249, 11 O. C. D. 463. See also DOWER.

In an action for dower where the court determines the value of the dower interest in a gross sum and charges the amount so assessed as a lien against the lands, the landowner may pay the sum so assessed and on a covenant against incumbrances may recover the expense incurred in defending the action for dower and the value of the dower interest which he was required to extinguish. The

amount found by the court in the action for dower is not necessarily the value of the dower interest to be recovered in the latter action: *Weyer v. Sager*, 21 O. C. C. 710, 12 O. C. D. 193. See also COVENANT, ACTION OF.

The measure of damages on account of the wrecking of a drug store by an explosion of gas, due to the negligence of the gas company, is the loss in value of the goods, fixtures, and appliances by reason of the explosion, to which may be added loss of good will, and expenses incurred in caring for the goods after the explosion: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733]. See also GAS COMPANIES.

Cost of removing and warehousing, incurred by the sheriff, as to property held by him under process, not being provided for by law, can not be recovered in an action against the party who issued the attachment: *Mathers v. Ramsey*, 3 Dec. Rep. 57, 2 Gaz. 334, 13 Dec. Rep. 205, 2 D. 334. See also COSTS.

In an action by an insurance agent against his company for breach of contract of employment, by which he was to be allowed a commission on business secured, without any allowance for expenses, such agent can not prove as part of the damages for the breach, any expenses he was put to in conducting the business: *Jakowenko v. Life Association*, 21 O. C. C. 199, 11 O. C. D. 576. See also SERVICES.

It is error to charge a jury that recovery can be had on account of expenses attendant upon an injury, where there is no evidence before the jury as to the amount of such expenses: *Bucht College v. Martin*, 1 O. C. C. (N.S.) 508, 15 O. C. D. 494. See also CHARGE OF COURT.

The statute of limitations against claims for expenses of last sickness begins to run from the date of account, but against funeral expenses not until after the appointment of an administrator, there being no person to sue or to be sued during the interval between the death of the deceased and the appointment of his personal representative: *Estate of Miller*, 12 O. D. (N.P.) 562.

EXPENSES OF ACTION.

See ATTORNEY AND CLIENT; COSTS.

EXPERIENCE.

See EVIDENCE; WITNESSES.

EXPERIMENTS.

The refusal of the court to allow an experiment to be made outside of the court in the presence of the jury, but without the consent of both parties, is not error: *Railway v. Parker*, 9 O. C. C. (N.S.) 28, 19 O. C. D. 1.

Evidence, in an action for personal injuries, in the nature of the results of an experiment with the same kind of a train at the same place and with a similar crew, is not demonstrative or controlling evidence, particularly where the conditions are not exactly the same. In case at bar, the cases were distinguished by the fact that when the accident occurred the track was wet and slippery and the men were not anticipating the necessity of stopping. In the experiment the track was not in the same condition and the crew anticipated duties to be performed: *Railway Co. v. Hudson*, 22 O. C. C. 586, 12 O. C. D. 661. See also EVIDENCE.

EXPERT AND OPINION EVIDENCE.

See EVIDENCE; WITNESSES.

EXPERTS.

For experts as witnesses, see EVIDENCE; WITNESSES.

Employment to defend a case does not authorize employment of an expert to assist in preparation, the client being accessible and there being no emergency: *Knight v. Buser*, 6 Dec. Rep. 772, 8 Am. L. Rec. 28.

An employer is only bound to use ordinary care in furnishing appliances for his workmen, and this requires only the application of ordinary tests, and does not require the employment of experts or the use of the highest tests: *Speller v. Brewing Co.*, 5 O. N. P. (N.S.) 561, 16 O. D. (N.P.) 520, 1 *Hoses*, 400 [affirming *Speller v. Brewing Co.*, 16 O. D. (N.P.) 281, 3 O. L. R. 378]. See also MASTER AND SERVANT.

EXPIRATION OF TERM OF OFFICE.

See OFFICE.

EXPLANATION.

For evidence in explanation of written contract, see EVIDENCE; CUSTOM AND USAGES; CONTRACTS.

EXPLOSIONS.

For gas explosions, see GAS COMPANIES.

Where a policy excludes loss by explosion, unless fire ensues, but covers loss by lightning, a loss caused by lightning striking a powder house near by owned by a third person, is a loss by explosion, and is not covered: *Insurance Co. v. Roost*, 55 O. S. 581, IV Longsdorf's Notes, 673. See also INSURANCE.

Storage of nitroglycerine on premises being an extraordinary and unusual use of property and not an ordinary use, and a constant menace to other property, renders the owner liable for damage from its explosion, though he violated no statute and was not negligent. The liability is not confined to adjacent property, but extends to any within the circle of danger: *Glycerine Co. v. Manufacturing Co.*, 60 O. S. 560, IV Longsdorf's Notes, 795 [affirming *Manufacturing Co. v. Glycerine Co.*, 14 O. C. C. 522, 7 O. C. D. 582]. See also NUISANCE.

In an action for damages for injuries to plaintiff from being struck while standing on his own premises, by a stone thrown by a blast in a neighboring quarry, evidence of previous instances of stones being thrown upon the land of the plaintiff is competent, where admitted for the single purpose of showing whence the stone came that struck plaintiff and the distance it might be thrown in that way: *Clay Co. v. Chojnicki*, 14 O. C. C. (N.S.) 599, 23 O. C. D. 356 [affirmed, without opinion, *Clay Co. v. Chojnicki*, 83 O. S. 450].

A verdict for damages for injuries resulting from the premature firing of a blast is not supported by sufficient evidence where there is an entire absence of any evidence that the man who pulled the lever which caused the discharge had ever been given any authority so to do, or that it was known on the work either by the master or fellow employees that he was in the habit of so doing: *Carland v. Feller*, 13 O. C. C. (N.S.) 129 [affirmed, without opinion, *Feller v. Carland*, 82 O. S. 444].

EXPLOSIVES.

Scope Note.—Includes definition, the reasonable use and degree of care required; their use under municipal ordinances, and by employees. Excludes explosives used in firearms, and steam explosions.

Cross References.

For explosives, see also DANGEROUS INSTRUMENTALITIES.

For firearms, see FIREARMS.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Reasonable Use.
- III. Municipal Ordinances.
- IV. Employees.
- V. Pleading.

I. DEFINITION.

An explosion may be described generally as a sudden and rapid combustion causing violent expansion of air and accompanied by a report. It is an idea of degrees and the true meaning of the word in each particular case must be settled, not by any fixed standard, but by the common experience and notions of men in matters of that sort: *Insurance Co. v. Foote*, 22 O. S. 340, III Longsdorf's Notes, 80.

II. REASONABLE USE.

The use of explosives for blasting is not negligence *per se*: *Armstrong v. Cincinnati*, 12 O. C. C. (N.S.) 76, 22 O. C. D. 714.

One who uses explosives in blasting is bound to exercise the highest degree of care: *Armstrong v. Cincinnati*, 12 O. C. C. (N.S.) 76.

One who makes a proper use of dynamite exercising reasonable care in its use is not liable, because another person who knows that blasting is being conducted and nevertheless goes within the danger zone, such person being guilty of contributory negligence: *Mercer v. White*, 11 O. C. C. (N.S.) 140, 20 O. C. D. 487.

In an action for injury to a building from explosion of dynamite in street, the question of negligence in the amount of dynamite used and the effects of its explosion upon buildings, and particularly that of plaintiff, should be submitted to the jury: *Morrissey v. City*, 14 O. C. C. (N.S.) 19, 23 O. C. D. 541 [affirmed, without opinion, *Cincinnati v. Morrissey*, 87 O. S. 525].

A railroad company does not have an unquestionable right to store dynamite cartridges wherever and however it pleases on its own property, but such dangerous sub-

stances must be so cared for that they will not injure the property and lives of others: *Railway Co. v. Tafelski*, 13 O. C. C. (N.S.) 260, 21 O. C. D. 643 [affirmed, without opinion, *Railway Co. v. Tafelski*, 83 O. S. 477]. See also DANGEROUS SUBSTANCES.

III. MUNICIPAL ORDINANCES.

A village ordinance against storing or transporting along streets dynamite or nitroglycerine, in quantities over five quarts, is within the powers conferred by R. S., § 1692 (repealed 96 v. 96, for analogous section see G. C., § 3669), and is not inconsistent with R. S., § 6953 (repealed, 99 v. 213, for analogous section see G. C., § 12536, or R. S., § 8853-7), and is valid: *Hays v. St. Marys*, 55 O. S. 197, IV Longsdorf's Notes, 658. See also MUNICIPAL CORPORATIONS.

A municipal corporation may regulate the storage, transportation and use of nitroglycerine and other explosives: *Walter v. Bowling Green*, 5 O. C. C. (N.S.) 516, 16 O. C. D. 756.

The penalty of one hundred dollars for the violation of an ordinance with reference to the transportation, storage and use of explosives is not unreasonable: *Walter v. Bowling Green*, 5 O. C. C. (N.S.) 516, 16 O. C. D. 756.

The only district inspector of workshops and factories authorized to order removal of explosives and alteration of the building is one appointed for this purpose by the chief inspector, and an indictment under G. C., § 985, merely averring an order by a district inspector and inspector of high explosives, is fatally defective. There is no such officer as "inspector of high explosives," though the chief inspector uses the term for convenience: *Corthell v. State*, 18 O. C. C. 598, 8 O. C. D. 49.

On trial for not obeying the order of an inspector to remove explosives, the statutory qualification of the inspector as experienced in explosives is not in issue. The jury are not to inquire into an officer's qualifications before convicting: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

Whether he was an officer or not, or appointed under the repealed statute, is not a question for the jury: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

The general power in act of 90 v. 164 to order changes in factory, storehouse, etc., where explosives are manufactured or stored for the safety of the public gives power to order removal for the safety of those passing along the public highway or attending a public school: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

IV. EMPLOYES.

An employe who, knowing and appreciating the risk, voluntarily places himself in a position of danger with respect to a dynamite magazine located on the premises of his employer, can not recover for personal injuries occasioned by the accidental explosion of said magazine without fault on the part of the employer, although such employe may not have known and realized all the possible consequences of the danger, or the precise extent and character of the injuries he would sustain in the event of an explosion. He will, under such circumstances, be held to have assumed the risk of all injury that might reasonably be expected to result to him as a consequence of such accidental explosion: *Davis v. Somers-Cambridge Co.*, 75 O. S. 215, IV Longsdorf's Notes, 1015.

A railroad company does not have an unquestionable right to store dynamite cartridges wherever and however it pleases on its own property, but such dangerous substances must be so cared for that they will not injure the property and lives of others: *Railway v. Tafelski*, 13 O. C. C. (N.S.) 260, 21 O. C. D. 643.

A verdict for damages for injuries resulting from the premature firing of a blast is not supported by sufficient evidence, where there is an entire absence of any evidence that the man who pulled the lever which caused the discharge had ever been given any authority so to do, or that it was known on the work either by the master or fellow employes that he was in the habit of so doing. No evidence that he was acting within the scope of his employment: *Carland v. Feller*, 13 O. C. C. (N.S.) 129 [affirmed, without opinion, *Feller v. Carland*, 82 O. S. 444].

In an action by an employe for injuries received in the course of his employment, it is error to admit testimony as to the incom-

petency of a fellow employe whose negligence caused the accident, or as to failure of the master to provide any rule for carrying on the dangerous work in which they were engaged, where there is no allegation in the petition to the effect that plaintiff did not know the work was being carried on without any rule for its conduct, and did not know or have equal means with the master of knowing of the alleged incompetence: *Carland v. Feller*, 13 O. C. C. (N.S.) 129 [affirmed, without opinion, *Feller v. Carland*, 82 O. S. 444]. See also MASTER AND SERVANT.

V. PLEADING.

Under a statute prior to G. C., § 12536, against storing explosives "in such close proximity with any residence or dwelling as to cause accident in case of an explosion" an allegation that an explosive was in close proximity to a public highway was not sufficient: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

EXPOSING FOR SALE.

See FISH AND GAME.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW.

EXPOSURE OF PERSON.

See INDECENT CONDUCT.

EXPRESS ADMISSIONS.

See EVIDENCE.

EXPRESS AUTHORITY.

See AGENCY.

EXPRESS COMPANY.

For consideration of express companies as carriers, see CARRIERS.

For taxation of express company, see TAXATION.

An express company is a common carrier, although having no interest in the conveyance by which the goods are carried: *Express Co. v. Backman*, 28 O. S. 144, III Longsdorf's Notes, 394 [affirming *Express Co. v. Backman*, 13 Dec. Rep. 885, 2 C. S. C. R. 251].

An express company's undertaking is to deliver to the consignee personally, unless its usage is otherwise: *Railroad v. O'Donnell*, 49 O. S. 489, IV Longsdorf's Notes, 466.

If an express company is responsible for the negligence of the railroad company over which it carries, yet a delay caused by a bridge of the railroad being carried away by an unusually violent freshet is not such negligence as will make the express company liable for perishable property being spoiled by the delay: *Express Co. v. Smith*, 33 O. S. 511, III Longsdorf's Notes, 686.

A railroad ought not to permit an express company to unload cars where it would be dangerous to passengers. Hence, where a passenger is struck by a bundle thrown from an express car, a charge that the express company and not the railroad company is liable is error, but would be correct if there was a rule forbidding such unloading and an employee of the express company was violating the rule, for the railroad is not liable for violations of rule by strangers: *Ferrell v. Railway*, 9 Dec. Rep. 361, 12 Bull. 234.

The liability of an initial carrier for goods lost in transit is limited to the value of the goods as fixed by the contract of shipment, and where the value of the goods was asked at the time of shipment and was not given, and the contract provides that in such cases the company shall not be held for more than fifty dollars, no greater sum than that can be recovered in the event the goods are lost: *Cohn-Goodman Co. v. Express Co.*, 13 O. C. C. (N.S.) 467, 22 O. C. D. 190.

Delivery to the wrong person renders the carrier liable, although he exercised due care, and although the consignee did not order the goods. Thus, where an imposter, assuming the name of one J, orders jewelry to be shipped to J, and the shipper, believing that J, whose standing was good, to be the buyer, ships them, and the imposter obtains the goods from the carrier who knew that there was a dealer named J, but believed the imposter to be also named J, and to be the one intended, the carrier is liable to the shipper: *Oskamp v. Express Co.*, 61 O. S. 341, IV Longsdorf's Notes, 811 [reversing *Express Co. v. Oskamp*, 14 O. C. C. 176, 7 O. C. D. 417]. See also CARRIERS.

EXPRESS CONTRACTS.

For express contracts, see CONTRACTS.

EXPRESS COVENANTS.

See CONTRACTS; DEEDS.

EXPRESS PROMISE.

See CONTRACTS.

EXPRESS RATIFICATION.

See AGENCY.

EXPRESS REPEAL.

See STATUTES.

EXPRESS TRUSTS.

See TRUSTS.

EXPRESS WAIVER.

See WAIVER.

EXPRESS WARRANTIES.

See DEEDS; SALES.

EXPRESSION OF OPINION.

See FRAUD AND DECEIT.

EXPRESSIONS OF PAIN.

See EVIDENCE.

EXPULSION.

For the expulsion of member of corporation or society, see CORPORATIONS.

For the expulsion of passenger from a car or train, see CARRIERS.

For wrongful or negligent expulsion of trespasser, see ASSAULT AND BATTERY; NEGLIGENCE; RAILROADS.

EXTENDED INSURANCE.

See INSURANCE.

EXTENSION.

For extension of street railroad, see STREET RAILWAYS AND INTERURBAN RAILWAYS.

For extension of time, see EXTENSION OF TIME.

EXTENSION OF LEASE.

See LANDLORD AND TENANT.

EXTENSION OF TIME.

For the effect of extension of time on sureties, etc., see SURETYSHIP.

For extension of time as consideration, see CONTRACTS.

For modification of a contract by extension of time, see CONTRACTS.

Giving time on a note made by a woman and her husband is sufficient consideration

for the assignment by her of security, though the husband is insolvent, and her liability questionable: *Windhorst v. Wilhelms*, 1 O. C. 28, 1 O. C. D. 17.

A promise to forbear suit on a debt is a sufficient consideration for a note for the debt, and the forbearance will be presumed intended to the maturity of the note unless otherwise shown: *Holewirth v. Koch*, 28 O. S. 33, III Longsdorf's Notes, 282.

Giving time to pay a judgment is a sufficient consideration to support a note made by the debtor to the creditor's attorney for his fees in the case: *Brainard v. Harris*, 14 O. 107, I Longsdorf's Notes, 658.

A promise to stay legal proceedings will support a third person's written promise to pay the debt without the creditor discharging the debtor, or relinquishing his securities or liens: *Brownell v. Harsh*, 29 O. S. 631, III Longsdorf's Notes, 505.

After sale of land with warranty the vendor's agreement with surety to remove subsequently discovered incumbrances within six months is supported by sufficient consideration: viz., the forbearance to require a rescission or sue on the warranty: *Manahan v. Smith*, 19 O. S. 384, II Longsdorf's Notes, 953.

A promise by the maker to pay the assignee of a nonnegotiable note if he will give a certain time is on a valuable consideration, and the assignee may sue on it in his own name, though he could not have sued on the note: *Ford v. Rehman*, W. 434, I Longsdorf's Notes, 34.

An extension of time granted to a purchaser of mortgaged property by the mortgagee does not work a release of the mortgagor or of an intervening grantee: *Torrey v. Stevenson*, 2 O. N. P. (N.S.) 445, 14 O. D. (N.P.) 425. See also VENDOR AND PURCHASER.

On the indorsement over a note by the payee two months after maturity it was agreed between all parties that the maker should have an extension of time "to about April 1st." It was held that the indorser waived demand notice: *McMonigal v. Brown*, 45 O. S. 499, IV Longsdorf's Notes, 294. See also NEGOTIABLE INSTRUMENTS.

A memorandum on a note by a third person by which he agreed that it should be paid in two years after maturity, coupled with evidence of forbearance to demand payment until that time, and then of offers by such persons to pay in property, but not denying liability, is sufficient evidence to justify a court in finding that the memorandum was based on a valuable consideration, viz., an agreement to delay for two years: *Reed v. Evans*, 17 O. 128, I Longsdorf's Notes, 800. See also CONTRACTS.

Extension, by agreement, of time of payment of principal and interest of bonds, secured by mortgage, in consideration that no dividend would be declared and certain improvements made, is based on a good consideration, bars suit brought before expiration of time extended: *Knickerbocker v. Athletic Club*, 20 O. C. C. 655, 12 O. C. D. 842. See also BONDS, NEGOTIABLE.

A petition on a guaranty of an overdue note, alleged that it was made in consideration of an extension of time "until next spring," and the agreement proved without objection was of an extension for one year. It was held that not a failure of proof, but a variance, and G. C., § 11556, and not G. C., § 11558, applied, and no prejudice appearing, it was error to order the jury to disregard the evidence: *Banta v. Martin*, 38 O. S. 534, III Longsdorf's Notes, 991. See also PLEADINGS.

EXTENT OF ADVERSE CLAIM.

See LIMITATIONS, STATUTE OF.

EXTENT OF JURISDICTION.

See JURISDICTION.

EXTORTION.

For extortion by public officers, see OFFICERS.

For extortion by menaces and threats by a private person, see BLACKMAIL.

Obtaining money by extortion without reference to the amount due and therefore for the purpose of gain, though no direct threats are used, but merely a suggestion of exposure or accusation, is misconduct warranting disbarment: *In re Burke*, 17 O. C. C. 315, 9 O. C. D. 350. See also ATTORNEY AND CLIENT.

EXTRA BAGGAGE.

See CARRIERS.

EXTRA COMPENSATION.

See CONTRACTS.

EXTRA HAZARDOUS.

See INSURANCE.

EXTRA SERVICES.

See CONTRACTS; SERVICES.

EXTRADITION.

Scope Note.—Includes all questions connected with delivery of fugitives from justice by one state or country to another; circumstances under which extradition may be had; method and procedure by which accomplished; and crimes for which fugitive may be tried.

Cross References.

For general questions, see AFFIDAVIT; AIDERS, ABETTERS AND ACCOMPLICES; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; INFORMATION; JURISDICTION; SENTENCE; VENUE; VERDICT.

For alibi in cases of extradition, see ALIBI.

For habeas corpus in extradition cases, see HABEAS CORPUS.

ANALYTICAL OUTLINE.

- I. Definition, 7697.
- II. Constitutional and Statutory Provisions, 7697.
- III. Fugitive from Justice, 7699.
- IV. Form of Demand, 7700.
 - A. Indictment, 7700.
 - B. Certificate to indictment, 7701.
 - C. Affidavit as to facts, 7701.
 - D. Demand, 7702.
- V. Power of Governor, 7702.
- VI. Warrant of Extradition, 7703.
- VII. Arrest, 7704.
- VIII. Court Procedure, 7704.
 - A. Power of court, 7704.
 - B. Hearing, 7705.
 - C. Review, 7707.
- IX. Crimes for which Fugitive may be Tried, 7707.
 - A. Return by extradition, 7707.
 - B. Voluntary return, 7708.
- X. Immunity from Civil Process, 7708.

I. DEFINITION.

Extradition is the right of one state to demand, and the duty of another state to surrender, fugitives from justice from the former state into the latter: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS.

The right of one state to demand, and the duty of another to award the extradition of fugitives from justice, rests primarily upon Art. IV, § 2, of the federal constitution: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000 [reversing *Thomas v. Evans*, 14 O. D. (N.P.) 336].

The Ohio statutes on the subject of extradition (G. C., §§ 109 to 118, inclusive), are

valid if not inconsistent with the United States statutes on the subject and if in aid thereof: *In re Ammons*, 34 O. S. 518, III Longsdorf's Notes, 733.

G. C., § 109, does not limit extradition to cases of felony; and if it did, it would be unconstitutional: *State v. Hudson*, 2 O. N. P. 1, 2 O. D. (N.P.) 41 [affirmed, without opinion, *Hudson v. State*, 52 O. S. 673].

If in excess of the authority given by the United States, they are invalid: *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

G. C., §§ 109-111, only provides regulations for the governor, and does not confer or limit jurisdiction, and is in no sense mandatory: *In re Polly*, 3 O. N. P. (N.S.) 265, 16 O. D. (N.P.) 427.

The provisions of the extradition treaty of 1842 between the United States and Great

Britain are part of the law of the land, enforceable by the judicial tribunals of this state, in behalf of a person detained and prosecuted for a different crime than the one specified: *State v. Vanderpool*, 39 O. S. 273, III Longsdorf's Notes, 1025.

III. FUGITIVE FROM JUSTICE.

To constitute a fugitive from justice, within the meaning of the constitution and act of congress providing for the surrender of such fugitives it is not required that the person should have fled secretly, or suddenly, with the consciousness of having committed the offense, or hurriedly for the purpose of avoiding apprehended process of the law. It is sufficient that, being within the jurisdiction at the alleged time of the commission of the offense, he has subsequently departed before a reasonable time for prosecution shall have elapsed: *Johnson v. Ammon*, 6 Dec. Rep. 747, 7 Am. L. Rec. 662.

While written representations, mailed in Arizona to parties in Pennsylvania, might constitute a crime in Pennsylvania if falsely made and relied upon, nevertheless as no one can flee from justice from a state where he has not actually been present, constructive presence does not form a basis for extradition proceedings; nor can verbal representation, made eight months after the party claiming to have been defrauded had parted with his property, constitute the basis of a claim that the person making them is a fugitive from justice: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [reversed, *Thomas v. Evans*, 73 O. S. 140].

Whether a prisoner in extradition be a fugitive from justice is a question of fact for the determination of the governor and the judge in the *habeas corpus* proceedings: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N. P.) 579.

The provisions of the constitution of the United States (Art. IV, § 2) and the act of congress (U. S. Rev. Stat., § 5278), which provide for the extradition of those "who shall flee from justice and be found in another state," are confined to persons who are actually, and not merely constructively, present in the demanding state when they commit the acts charged against them, and in a proceeding on *habeas corpus*, for discharge from arrest on a warrant of extradition issued by a governor, in compliance with the requisition of the governor of another state, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding state: *Wilcox v. Nolse*, 34 O. S. 520, III Longsdorf's Notes, 733.

Revised statutes of United States, § 5278, applies only to persons who are actually present in the demanding state and not to those who are only constructively present: *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

The accused must be a fugitive from justice before he can be extradited: *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

IV. FORM OF DEMAND.

A. INDICTMENT.

Under the law of Ohio, with reference to extradition, the facts which constitute the crime must be made to appear, unless the application is based upon an indictment by a grand jury: *In re Fairman*, 3 O. N. P. (N.S.) 485, 50 Bull. 34.

The papers from the demanding state must contain a copy of the indictment: *In re Hampton*, 1 O. N. P. 180, 2 O. D. (N.P.) 579.

A defect in the form of the indictment is immaterial if the substance of a crime is charged: *Jackson v. Archibald*, 12 O. C. C. 155, 5 O. C. D. 533.

Where extradition of an accused person is demanded, the authorities of the state making the demand must offer some proof to the effect that the accused is charged with the commission of a crime in the state making the demand, and also some proof that he is a fugitive from justice; and for want of such evidence presented to the governor, or the court before whom the accused is brought, he must be dismissed: *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

If the indictment does not charge a crime there is no jurisdiction to issue the warrant, and on *habeas corpus* the copy of the indictment can be looked to, but only as to matters of substance and not form: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

An indictment is sufficient which sets up the facts which constitute crime of embezzlement, and, in addition, avers as a conclusion that "so" the accused "did steal, take and carry away": *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

An indictment which charges obtaining property under false pretenses but does not set out the alleged false pretenses, does not aver that they were not true, or that the parties to whom they were made relied upon them and which does not charge that they were in fact false other than such allegation would be implied from one that the pretenses were made with intent to cheat and defraud, is insufficient as a basis for extradition: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [on

error to the supreme court in *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000, it was held that *habeas corpus* could not be brought in the probate court in extradition proceedings].

A party charged by affidavit before a justice of the peace with the crime provided for in G. C., § 13104, who has fled from the jurisdiction of this state, may be extradited, and returned to this jurisdiction, notwithstanding that a formal indictment had not been found against him: *In re Strauss*, 197 U. S. 324.

B. CERTIFICATE TO INDICTMENT.

A certificate by the governor of the demanding state as follows: "Whereas it appears by the annexed papers, duly authenticated according to law that Steven Sheldon stands charged," is insufficient: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

An indictment not certified to by the governor but by the clerk of the court and the judge is insufficient: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

An indictment or affidavit charging the person demanded in extradition with a crime under U. S. R. S., § 5278, G. C., § 15341, must be certified as authentic by the governor making the requisition: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

The certificate of authentication provided for in § 5278 of the United States Revised Statutes (1027) is not required to be in any particular form, and where the language employed by the demanding governor in the requisition shows the copy of an indictment annexed thereto to be authentic, it is sufficient: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

C. AFFIDAVIT AS TO FACTS.

For general questions as to affidavits for arrest, see ARREST.

A warrant in extradition proceedings is properly issued where the affidavit which accompanies the requisition states positively the facts constituting the offense: *In re Polly*, 3 O. N. P. (N.S.) 265, 16 O. D. (N.P.) 427.

The requirement in reference to extradition that the facts constituting the crime must appear, is not satisfied by a formal affidavit charging the offense in the language of the statute, but must be met by facts necessary to make out the crime charged: *In re Fairman*, 3 O. N. P. (N.S.) 485, 50 Bull. 34.

The affidavit from the demanding state need not allege that the prisoner is a fugitive—that is a fact to be determined by the two governors. A great crime in one state, and the person charged being shortly after in

another state, sufficiently shows he has fled: *In re Moore*, 7 Dec. Rep. 272, 2 Bull. 42.

An affidavit on belief, accompanying the requisition and averring that accused is a fugitive from justice makes a *prima facie* case: *Jackson v. Archibald*, 12 O. C. C. 155, 5 O. C. D. 533.

That the affidavit describes the person killed as unknown does not go to the sufficiency of the charge, though ascertainable: *In re Moore*, 7 Dec. Rep. 272, 2 Bull. 42.

D. DEMAND.

The statement in the demand that the accused is a "fugitive from justice" is sufficient to support a warrant issued by the governor of the state to which the accused has fled, without the further averment that he has fled to avoid prosecution: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

V. POWER OF GOVERNOR.

Granting a requisition by the governor is the performance of an executive function and not a ministerial one, and neither the judiciary nor the legislature can interfere with it: *State v. Hudson*, 2 O. N. P. 1, 2 O. D. (N.P.) 41 [affirmed, *State v. Hudson*, 20 O. C. C. 660, 10 O. C. D. 812, 33 Bull. 26].

The governor of this state is without authority to order the arrest and return to another state of an alleged fugitive from justice on an information and affidavits which do not set forth the facts constituting the offense charged, and are not sworn to by some one having actual knowledge thereof: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [reversed, *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000].

The governor has no discretion if the case comes within the statutes, but he may determine whether the case does in fact come within the statutes: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

If the demand for extradition charges the accused with being "a fugitive from justice," the governor may construe such language to charge that the accused has fled to avoid prosecution: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

If the governor determines that the proceedings are brought for ulterior motives, he may revoke a warrant issued by his predecessor, even if the alleged fugitive is in the custody of the agent of the demanding state: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

Accordingly, if he finds that extradition is sought for some ulterior motive, such as compelling the payment of a civil liability, he may refuse to issue a warrant for the

arrest of the alleged fugitive: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

The determination by the governor that a crime has been committed is not binding on the courts: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 579.

The governor may revoke a warrant issued by himself or his predecessor in a case where it should not have been issued: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

Departure from the prescribed forms for making the application, or as to the manner of charging the crime not of the substance, can not be tried either by the governor or the courts: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733 [affirming *Nolze v. Wilcox*, 4 Dec. Rep. 125, 3 Bull. 192, 1 Clev. L. Rep. 51].

VI. WARRANT OF EXTRADITION.

When a warrant of extradition is signed by the governor in blank and is afterward filled out by his secretary writing therein the name of some accused person, it is a nullity, but the governor may issue a valid warrant on the same papers: *In re Going*, 28 Bull. 133.

If a governor signs a blank warrant and in his absence and without his express authority the secretary fills in the name of the accused in the appropriate blank, such warrant is defective and the accused must be discharged, although it is said that the governor may issue a valid warrant upon the same paper: *In re Craig*, 7 O. N. P. (N.S.) 307, 19 O. D. (N.P.) 843; *In re Payne*, 7 Dec. Rep. 288, 2 Bull. 76.

Where it appears from the papers embodied in a bill of exceptions, that the governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the governor, it will be presumed that a warrant of extradition was granted and that the prisoner is held by virtue of such warrant, and refusal of a writ of *habeas corpus* under such circumstances is not erroneous: *Craig v. Hamann*, 11 O. C. C. (N.S.) 457, 21 O. C. D. 108.

If the governor has signed a warrant in blank and subsequently authorizes the issuing of such warrant with the name of the accused inserted, such warrant is valid, even if such authority is given by long distance telephone from New York: *In re Polly*, 3 O. N. P. (N.S.) 265, 16 O. D. (N.P.) 427.

If the governor's name is signed by his secretary merely in pursuance of custom, and general and not special instructions, and

without the governor's knowledge, it is not the warrant of the governor, and the prisoner can not be surrendered on it: *In re Payne*, 7 Dec. Rep. 288, 2 Bull. 76.

The recital in the warrant of our governor that an affidavit certified as authentic had been filed in his office is not overruled by the clerk's certificate that a paper purporting to be an affidavit certified from the demanding state is attached. The authenticity of the affidavit need not be certified on its face: *In re Moore*, 7 Dec. Rep. 272, 2 Bull. 42.

The secretary of state need not countersign the warrant: *In re Going*, 28 Bull. 133.

VII. ARREST.

Where a sheriff receives from the governor a warrant issued to him under favor of G. C., §§ 112, 113, 114, it is his imperative duty to arrest the person named therein as a fugitive from justice, if found within his county, and take him before a judge of the supreme court or of the circuit court, or of the common pleas court, to be examined on the charge named in the warrant: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000 [reversing, see *Thomas v. Evans*, 14 O. D. (N.P.) 336].

Discharge of a prisoner on *habeas corpus* from imprisonment under a defective extradition warrant is no bar to rearrest under another warrant: *Morganfield v. Archibald*, 10 O. C. C. 40, 6 O. C. D. 391, 3 O. D. (N. P.) 50.

An officer may arrest and detain a fugitive from another state for a reasonable time until a requisition can be issued: *Rea v. Smith*, 12 Dec. Rep. 398, 2 H. 193.

A sheriff in a sister state, arresting a fugitive from justice under a warrant and pursuant to a notice from a sheriff in this state, describing such fugitive and indicating the place where he may be found, acts strictly within the line of his duty as an officer, and is entitled only to such reward or compensation as is allowed him by law, and can not recover from county commissions in this state a general reward offered by them for the apprehension of such fugitive under G. C., § 2489: *Brown v. Commissioners*, 2 O. C. C. (N.S.) 381, 14 O. C. D. 481.

For other cases on arrest, see ARREST.

VIII. COURT PROCEDURE.

A. POWER OF COURT.

The power of courts to interfere and examine the grounds upon which extradition of one of its citizens is allowed, is justified by reason and authority: *In re Fairman*, 3 O. N. P. (N.S.) 485, 50 Bull. 34.

The power of the court in a hearing under G. C., § 114, is substantially the same as that of the court in a *habeas corpus* proceeding: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733; *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

The fact that the governor has issued a warrant as a result of his determination that the demanding state was entitled to extradition of the accused does not prevent the court from reviewing the same questions at this hearing: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733; *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

G. C., § 113, supersedes G. C., § 12162; and the probate court has no jurisdiction of proceedings in *habeas corpus* in order to test the validity of extradition proceedings: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000.

In proceedings for extradition of a fugitive from justice under G. C., §§ 109, *et seq.*, the judge before whom such fugitive is brought can not determine the question of the prisoner's guilt or innocence, nor can he investigate the motion of the prosecution: *In re Van Vleck*, 6 Dec. Rep. 636, 7 Am. L. Rec. 275, 3 Bull. 763.

The power of a judge to discharge an alleged fugitive from justice, under the act of G. C., §§ 109, *et seq.*, is essentially the same as under the *habeas corpus* act (G. C., § 12187): *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733 [affirming *Nolze v. Wilcox*, 4 Dec. Rep. 125, 1 Clev. L. Rep. 51, 3 Bull. 192].

A finding by the governor of the state that a crime is sufficiently charged in the information and affidavits accompanying a requisition for an alleged fugitive from justice is not conclusive upon the court, but may be reviewed in *habeas corpus* proceeding: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [reversed, *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000].

The guilt or innocence of the prisoner can not be inquired into: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733 [affirming *Nolze v. Wilcox*, 4 Dec. Rep. 125, 1 Clev. L. Rep. 51, 3 Bull. 192].

The accompanying affidavit, stating that the accused is a fugitive from justice, if construed by the governor as proof that he had fled, the courts can not on *habeas corpus* disregard the warrant before the governor on the ground of want of evidence that the accused was a fugitive: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

B. HEARING.

The inquiry made by the court, under the power to hear and examine, extends to noth-

ing but the execution of the warrant by the sheriff and the identity of the prisoner; it does not extend to the question of guilt nor to the legality of the warrant: *In re Moore*, 6 Dec. Rep. 272, 2 Bull. 42.

The accused must be in fact a fugitive from justice and the demanding state must show this fact: *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587; *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

A printed copy of the laws of the demanding state is admissible to show the law of that state upon the hearing: *In re Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

Extradition has been refused by the trial court on the ground that the accused would probably be lynched if returned to the place at which the crime was committed: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

The trial court has discharged the accused where it appeared that the warrant was signed in blank by the governor and subsequently filled in in his absence: *In re Craig*, 7 O. N. P. (N.S.) 307, 19 O. D. (N.P.) 843.

The accused by parol evidence may show as a defense that he was not in the demanding state at the time of the alleged crime: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733.

The original papers presented to the governor need not be taken before the judge. Copies are sufficient: *In re Van Vleck*, 6 Dec. Rep. 636, 7 Am. L. Rec. 275, 3 Bull. 763; and see *In re Moore*, 6 Dec. Rep. 272, 2 Bull. 42.

An alibi can not be proved on *habeas corpus* nor that the prisoner moved out of the demanding state before any charge was made, and therefore did not flee. He can only show that he was not actually but only constructively present when he committed the crime: *In re Larney*, 4 O. N. P. 304, 7 Bull. 149, 5 O. D. (N.P.) 541 [affirmed, *In re Larney*, 6 Bull. 759, 28 Bull. 133, 38 Bull. 85].

Accused may offer testimony that they were never in demanding state and are not fugitives therefrom: *Jackson v. Archibald*, 12 O. C. C. 155, 5 O. C. D. 533.

The sufficiency of the evidence before the demanding governor can not be considered on the judicial hearing: *Jackson v. Archibald*, 12 O. C. C. 155, 5 O. C. D. 533.

Where it appears from the papers embodied in a bill of exceptions, that the governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the governor, it will be presumed that a warrant of extradition was granted

and that the prisoner is held by virtue of such warrant, and refusal of a writ of *habeas corpus* under such circumstances is not erroneous: *Craig v. Hamann*, 11 O. C. C. (N.S.) 457, 21 O. C. D. 108.

C. REVIEW.

Under the act of March 23, 1875 (72 v. 79), there was no authority for taking a bill of exceptions in a proceeding of this sort; and an order of the trial court could not be reviewed on error, at least if such error could be shown only by a bill of exceptions: *Sheldon v. McKnight*, 34 O. S. 316, III Longsdorf's Notes, 718.

It is held that, since under 93 v. 255, such order can be reviewed on error, *habeas corpus* will not issue for a retrial or rehearing of the question passed at the original proceeding in extradition: *Milford v. Perry*, 18 O. C. C. 76, 9 O. C. D. 492.

Where it appears, from the papers embodied in a bill of exceptions, that the governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the governor, it will be presumed that a warrant of extradition was granted and that the prisoner is held by virtue of such warrant, and refusal of a writ of *habeas corpus* under such circumstances is not erroneous: *Craig v. Hamann*, 11 O. C. C. (N.S.) 457, 21 O. C. D. 108.

IX. CRIMES FOR WHICH FUGITIVE MAY BE TRIED.

A. RETURN BY EXTRADITION.

If a fugitive from justice is extradited from a foreign country, he can not be indicted and tried for a crime in another county until after a reasonable time has elapsed from the end of his detention to give him an opportunity to return to the state from which he was brought: *State v. Vanderpool*, 39 O. S. 273, III Longsdorf's Notes, 1025.

If a fugitive from justice is extradited from another state of the union for one crime, such as forgery, he can not while in custody be indicted and tried for a different crime, such as obtaining property by false pretenses: *In re McKnight*, 48 O. S. 588, IV Longsdorf's Notes, 431.

A prisoner brought here on one charge which is then abandoned, may be held to await the action of the grand jury on other and different charges. The ruling of the Supreme Court of the United States in *Lascelles v. Georgia*, 148 U. S. 537, controls that of this state, and will be followed: *In re Brophy*, 2 O. N. P. 230, 4 O. D. (N.P.) 391.

A person brought here on a warrant signed in blank by our governor and filled out by his clerk should have objected on that ground in the other state. It is too late here, for it makes no difference how he got here; he might even have been kidnapped and brought back: *In re Camp*, 7 O. N. P. 614, 8 O. D. (N.P.) 681, 33 Bull. 49.

Where a convict has been discharged because convicted of a different crime than extradited for, and remains here twelve days, this is reasonable opportunity to have returned to his original state, and, not having done so, a second arrest and conviction is lawful: *In re McKnight*, 3 O. N. P. 255, 4 O. D. (N.P.) 284.

One convicted of an offense other than that upon which he was extradited, may be discharged therefrom by *habeas corpus*, but if the indictment for the offense upon which he was extradited is still pending, he may be remanded for further proceedings thereon: *In re McKnight*, 48 O. S. 588, IV Longsdorf's Notes, 431.

B. VOLUNTARY RETURN.

If the accused is brought back from another state of the union without any demand upon the governor of such state for his extradition, and he comes voluntarily, he may, when he has thus returned, be tried for a different crime from that with which he was charged originally: *In re Donahue*, 4 O. N. P. 296, 6 O. D. (N.P.) 389; *In re Brophy*, 2 O. N. P. 230, 4 O. D. (N.P.) 391; *In re Craig*, 7 O. N. P. (N.S.) 307, 19 O. D. (N.P.) 843.

Accused, who voluntarily came with the arresting officer without requiring extradition papers to answer a charge of illegal voting, after acquittal thereof can be arrested on a charge of fraudulent registration, the officer, not having misled him in any way: *In re Donahue*, 4 O. N. P. 296, 6 O. D. (N.P.) 389.

X. IMMUNITY FROM CIVIL PROCESS.

An extradited prisoner taken from New York to Kentucky can not be served with summons while returning through Ohio. He is not obliged to avoid this state on his route, nor is the privilege waived by a delay from Saturday morning to Monday afternoon to raise money for his fare home: *Deuber Watch Co. v. Dalzell*, 10 Dec. Rep. 227, 19 Bull. 269.

A person who has been extradited from another state in the union for a crime can not be served with summons and an order of arrest in a civil action until a reasonable time has been given to him to return to the state from which he was extradited: *Comp-*

ton v. Wilder, 40 O. S. 130, IV Longsdorf's Notes, 11.

An arrest in a civil proceeding of a person brought into the jurisdiction of the court by extradition proceedings, while such person is returning from court by the order of court, is in violation of the pledge of the state that the return of the accused was sought solely for the criminal prosecution, and is also an abuse of the process of the court, upon which it is the duty of the court to put its seal of condemnation by releasing the defendant and depriving the plaintiff of all that he has gained by the arrest: *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N. P.) 779 [reversing *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376].

Service of civil process upon a person privileged from arrest as provided by G. C., § 11754, is voidable only, and may be waived as any other privilege: *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376 [reversing *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N.P.) 779].

A person indicted and brought into the jurisdiction of the court by extradition enters an appearance and waives his privilege from arrest in a civil action against him as a suitor under G. C., § 11754, by filing motions for bail therein which raise an issue of fact, not only as to his rights for bail, but as to a complete defense to the action. After that it is too late to make the claim of exemption from arrest: *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376 [reversing *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N.P.) 779].

Unless he make a motion or a plea in abatement at the proper time to vacate the service and be released from the court, he is held to have waived the privilege: *White v. Marshall*, 3 O. C. C. (N.S.) 495, 13 O. C. D. 376 [reversing *White v. Marshall*, 8 O. N. P. 662, 11 O. D. (N.P.) 779].

EXTRAORDINARY REMEDIES.

See HABEAS CORPUS; MANDAMUS; QUO WARRANTO; PROCEDENDO.

EXTRAS.

For extras under contract, see CONTRACTS. One who agrees to pay for lumber delivered to a contractor for use upon the promisor's building is liable for extra lumber made necessary by reason of changes in the building authorized by such promisor: *Mills-Carleton Co. v. Huberty*, 84 O. S. 81.

EXTRATERRITORIAL.

See CONFLICT OF LAWS.

EXTRATERRITORIAL JURISDICTION.

See CONFLICT OF LAWS; JURISDICTION.

EXTREME CRUELTY.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

EXTRINSIC CIRCUMSTANCES.

For evidence of extrinsic circumstances as affecting the construction and operation of instrument, see DEEDS; CONTRACTS; WILLS, LEGACIES AND DEVISES; CUSTOM AND USAGES.

EYE-WITNESSES.

See EVIDENCE.

F

FABRICATED EVIDENCE.

See EVIDENCE; PERJURY; WITNESSES.

FACTORIES.

See WORKSHOPS AND FACTORIES, and cross references thereunder.

FACTORS AND BROKERS.

Scope Note.—Includes definitions of broker; rights, powers, duties and liabilities of persons engaged in the business of receiving and selling goods entrusted to them as factors or brokers for sale, in relation to their principals or consignors; and criminal liability of factors and brokers. Excludes agency; particular kinds of factors and brokers; and sales in general.

Cross References.

For consignor's rights in case of insolvency of brokers, see BANKS AND BANKING.
 For real estate broker, see REAL ESTATE AGENTS.
 For ticket broker, see CARRIERS.
 For the general discussion of the subject of agents, see AGENCY.
 For the subject of sales, see SALES.

ANALYTICAL OUTLINE.

- I. Definitions, 7711.
- II. What Constitutes, 7712.
- III. License and Regulation, 7712.
- IV. Rights Between Parties, 7714.
 - A. Rights as between principal and factor or broker, 7714.
 - B. Rights as between principal and third person, 7716.
 - C. Rights as between factor or broker and third person, 7718.
- V. Deposits, 7719.
- VI. Lien, 7720.
- VII. Commissions, 7720.
- VIII. Remedies, 7721.
- IX. Crimes, 7721.

I. DEFINITIONS.

A broker is one who acts for others in the negotiation of contracts relating to property of which they do not have the custody: *French v. City*, 81 O. S. 160.

A broker is one who acts as an agent to sell goods of which he has not possession: *Crosby v. Hill*, 39 O. S. 100, III Longsdorf's Notes. 1010.

A broker is one who is engaged for another in the negotiation of contracts relative to property with the custody of which he has no concern: *Brooks v. Van Nes*, 38 Bull. 262.

For a comparison of the banking business and the brokerage business, see *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 617, 19 O. D. (N.P.) 670.

II. WHAT CONSTITUTES.

Where the ultimate selling price is fixed by the company and the compensation for selling is a "commission," the fact that a partnership doing business with a coal company under a contract designating it as "selling agents" guarantees the sales, insures and pays other expenses incidental to selling does not place it in the relation of a purchaser, but of a factor under a *del credere* commission as agent: *Coal & Coke Co. v. Pocahontas Co.*, 17 O. D. (N.P.) 151, 1 Hosea, 75.

III. LICENSE AND REGULATION.

The state may, in the exercise of the police power, license and regulate chattel mort-

gage and salary loan brokers, and it may delegate authority to do so to municipal corporations: *Sanning v. Cincinnati*, 81 O. S. 142, IV Longsdorf's Notes, 1056.

G. C., § 3670, authorizing municipal corporations to license and regulate chattel mortgage and salary loan brokers, does not authorize the exaction of a license from persons engaged, otherwise than as brokers, in the business of loaning money upon loans secured by mortgages on personal property: *French v. Toledo*, 81 O. S. 160.

G. C., § 6346-1, requiring a license to be procured by persons in the business of making loans on chattels or salaries, is not unconstitutional by reason of its excepting banks and building associations, because precautions are not necessary for the latter, and hence the classification is not unreasonable: *Cain v. Loan Co.*, 15 O. C. C. (N.S.) 173, 24 O. C. D. 115 [affirming *Loan Co. v. State*, 12 O. N. P. (N.S.) 441, 22 O. D. (N.P.) 377; and affirmed, without opinion, *Cain v. Loan Co.*, 88 O. S. —]. See also LICENSE, FROM STATE.

G. C., § 6346-4, relating to lenders on chattels and salaries is not void by reason of its restricting a married man's right to borrow without his wife joining; for her interest in his means of supporting the family is such that justifies protection against improvident disposition of them: *Cain v. Loan Co.*, 12 O. N. P. (N.S.) 441, 22 O. D. (N.P.) 377 [affirmed, *Loan Co. v. State*, 15 O. C. C. (N.S.) 173, 24 O. C. D. 115; and affirmed, without opinion, *Cain v. Loan Co.*, 88 O. S. —].

An ordinance under the power conferred by G. C., § 3670, to regulate and license chattel mortgage and salary loan brokers, requiring every person engaged in such business to file with the auditor of the city weekly, a detailed record of every loan made during the week preceding, to remain there as a permanent record open to the inspection of the mayor and chief of police, is not violative of § 14 of the bill of rights, providing for immunity from unreasonable searches, seizures, etc., and is not unreasonable: *Sanning v. Cincinnati*, 81 O. S. 142, IV Longsdorf's Notes, 1056.

An ordinance requiring brokers engaged in making chattel mortgage or salary loans to secure a license as a condition precedent to doing business within the municipality, is not invalid because the license fee is fixed at as high a figure as \$250, or because said brokers are required to keep records of the name of each pledgor, the amount of the loan, the rate of interest charged, the date when the loan is payable, and a description of the articles pledged, which record shall be filed in the office of the city auditor and be

open to inspection by the mayor and chief of police, but a provision requiring that if the pledgor is a married man, his wife must sign the application for the loan is of no effect: *Chambers v. Cincinnati*, 11 O. C. C. (N.S.) 273, 21 O. C. D. 8. See also MUNICIPAL CORPORATIONS.

IV. RIGHTS BETWEEN PARTIES.

A. RIGHTS AS BETWEEN PRINCIPAL AND FACTOR OR BROKER.

If the factor has neither advanced nor engaged anything for his principal, the principal can take back his goods at will, whether they have reached the factor or are *in transitu*: *Jordan v. James*, 5 O. 88, I Longsdorf's Notes, 250.

A consignee is subject to his consignor's orders as to time and terms of sale. The authority to the latter is revocable unless founded on consideration. Advances may constitute a consideration for an agreement, express or implied from the circumstances. The mere fact of advances does not create by law a right to sell. If there is an irrevocable right to sell to meet advances, contrary to instructions, the consignee must show that he pursued the agreement: *Bean v. Adams*, 12 Dec. Rep. 688, 1 D. 388.

A factor's right to employ assistance does not extend to authorize him to ship the goods to another port for sale, thus assigning his personal trust to a stranger: *Grieff v. Cowguill*, 13 Dec. Rep. 37, 2 D. 58.

If a factor at New Orleans ships the goods to another port for sale, without authority, the damages is the market value at New Orleans at the time: *Grieff v. Cowguill*, 13 Dec. Rep. 37, 2 D. 58.

The act of a commission merchant in taking a note in his own name from a purchaser for his commissions and a past balance due him from the owner, and remitting only the rest, is not legal and no custom to do so is valid. Such notice is payment and if the buyer fails without paying it the factor can not recover from the owner: *Indianapolis Rolling Mill v. Addy*, 6 Am. L. Rec. 764, 3 Bull. 293.

A consignment to be sold on arrival does not require an immediate sale by the consignee if there was no market, but only as soon as he reasonably could without manifest sacrifice. The length of time depends on the circumstances and is for the jury: *Burnard v. Voss*, 8 Dec. Rep. 221, 6 Bull. 339.

Where a customer had a deposit of \$1,600 with his brokers, being gains on stock speculations, and ordered a sale which would have increased it to \$2,100, but the brokers disobeyed, they are liable for \$2,100. They then agreed that if he would not draw out

the money, they would work the account and repay him the money. It was held that working the account was at their risk, and having lost it all, they must repay: *Hollingshead v. Green*, 13 Dec. Rep. 565, 1 C. S. C. R. 305.

As long as the goods are on hand unsold the factor is not liable. If he has exchanged them for other goods with the plaintiff's assent, he is not liable until the latter are disposed of: *Grover v. Clark*, W. 350, 1 Longsdorf's Notes, 27.

A ratification of sales results if the principal receives the accounts thereof without objection and draws for the balances; though the sales were for less than the principal's limit: *Woodward v. Suydam*, 11 O. 360, 1 Longsdorf's Notes, 566.

If a commission merchant sell contrary to instructions his principal may treat him as a purchaser, and, hence, recover on the common counts as for goods sold: *Woodward v. Suydam*, 11 O. 360, 1 Longsdorf's Notes, 566. See also CONVERSION.

Where a broker, in effecting an exchange of real estate, has promised to secure the cancellation of a mortgage upon the piece received by his employers, if they, knowing he has not performed the promise, give him their absolute notes for his commission, his unperformed promise is not a defense to these later written promises: *Wade v. Bishop*, 5 O. D. (N.P.) 625.

It is not essential, where delivery of grain received by a railroad company is to be at an elevator, that the owners of the grain, the commission merchants, should have possession or control of the elevator in order to be bound by the action of those in charge of such elevator. Where the delivery was to be at the elevator, and the receipt of the grain was to be by whoever might be in charge, the commission merchants or owners of the grain would be bound by the conduct of the persons in charge of the elevator: *Paddock v. Railway Co.*, 21 O. C. C. 626, 11 O. C. D. 789. See also CARRIERS.

Under a contract between an elevator company and a firm of commission merchants, whereby the elevator company, for the purpose of obtaining a fixed income from the elevator, not dependent upon varying crop conditions, agreed to furnish, supply and provide the commission merchants, for a period of five years, at an annual rental, with the full capacity of the elevator for storage of grain, saving such parts thereof as might be required for other customers, and to account monthly to the commission merchants as to all sums received from such sources, with further provisions that the elevator company should employ and discharge operatives, except the secretary of the elevator

company, as the commission merchants might direct, that the commission merchants, in addition to the stipulated rental, should pay all operating expenses, including salaries of elevator employees, including the secretary, and all taxes and assessments, the commission merchants are substantially in possession and control of the elevator and the employees are employees of the commission merchants, and the latter, so far as an employer may be bound by an employee, are bound by the action of the elevator employee: *Paddock v. Railway Co.*, 21 O. C. C. 626, 11 O. C. D. 789. See also MASTER AND SERVANT.

On a count for money had and received, defendant having received goods to sell and pay plaintiff, sale of goods can be inferred, without direct proof, from lapse of time and omission of defendant to show that the goods remain on hand: *Spencer v. Brooks*, W. 178, 1 Longsdorf's Notes, 16.

A bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of a bank, thereby becomes the agent of said customer and can not thereafter himself become the purchaser of said stock without full disclosure of that fact to his principal and the latter's assent thereto: *Telling v. Sullivan*, 14 O. C. C. (N.S.) 1, 32 O. C. D. 312. See also AGENCY.

The purchase from a client by a broker individually of stock which is held in pledge is not an act of bad faith, when done without concealment: *Ashbrooke v. Bank*, 6 O. N. P. (N.S.) 415, 18 O. D. (N.P.) 529.

Where the evidence shows that there was no active market for stock, and a client knew of no one who would give more for it than the quoted price, and the broker offered to take it at that price, and the sale was thereupon consummated, the client will be held to have known that he was selling to and not through the broker, and the sale will not be set aside and an accounting ordered on the ground of fraud: *Ashbrooke v. Bank* 6 O. N. P. (N.S.) 415, 18 O. D. (N.P.) 529. See also FRAUD AND DECEIT.

A broker for distillers who contracts in his own name to sell and deliver on the cars barrelled spirits in bond for export, impliedly warrants that the barrels shall be fit and filled for transportation, and is liable, independent of negligence, for leakage due to improper barrelling or latent defect in the wood, and there is no duty or opportunity for the buyer to inspect: *Stevens v. Pincoffs*, 9 Dec. Rep. 479, 14 Bull. 110. See also SALES.

B. RIGHTS AS BETWEEN PRINCIPAL AND THIRD PERSON.

Whether a factor's unauthorized sale will convey title or not depends on the law of

the place where the sale was made: *Frank v. Jenkins*, 22 O. S. 597, III Longsdorf's Notes, 105.

§ 5 of the Kentucky factor's act does not prevent the person issuing a warehouse receipt or other paper representing property from retaining vendor's lien: *Ensel v. Levy*, 11 Bull. 163 [see *Ensel v. Levy*, 46 O. S. 255, IV Longsdorf's Notes, 322].

The factor's act (G. C., §§ 8358, *et seq.*), will not protect persons dealing with factors out of the ordinary course, as securing an antecedent debt, knowing their true character and restricted authority: *Cleveland v. Shoeman*, 40 O. S. 176, IV Longsdorf's Notes, 16.

A factor held a warehouse receipt for goods consigned to him to sell on commission and pledged it as collateral to a bank for a loan and not to secure an antecedent debt. It was held that if the bank made the loan and took the receipt in good faith, on the faith that the factor owned the merchandise, it is entitled to hold the goods as security: *Cleveland v. Shoeman*, 40 O. S. 176, IV Longsdorf's Notes, 16.

Stolen goods are not included in the factor's act (G. C., § 8358), providing that shippers shall be deemed the true owners so far as to protect advances to him by the consignee. Accordingly, the factor sued for conversion by the true owner can not set off his remittances of proceeds to the shipper thief who had stolen them: *Miller v. Laws*, 7 Am. L. Rec. 606, 4 Bull. 123.

A produce commission firm sent out a traveling agent to solicit a consignment of peaches on a strictly commission basis; being unable to obtain fruit at a certain town without guaranteeing it should net the shipper a certain price, he gave such guarantee and fruit was shipped thereunder, but without notice thereof to the consignee and without inquiry on the part of the shipper as to the agent's authority to make the guarantee; in the absence of any evidence showing a usage or custom of the produce commission business to make such guarantees, it was held that the guarantee was not within the scope of the agent's authority, and his principal was not bound by it: *Produce Co. v. Myers*, 4 O. C. C. (N.S.) 264, 16 O. C. D. 165.

Payment to an agent to sell, who, not having possession, sells in his own name without authority, and the owner ships to the buyer, without knowledge that the broker has sold in his own name, does not bar recovery by the owner: *Crosby v. Hill*, 39 O. S. 100, III Longsdorf's Notes, 1010 [affirming *Crosby v. Hill*, 8 Dec. Rep. 663, 9 Bull. 156]. See also AGENCY.

C. RIGHTS AS BETWEEN FACTOR OR BROKER AND THIRD PERSON.

A broker, who buys shares of stock for an undisclosed principal, becomes personally liable to the seller upon default of his principal: *Sullivan v. Frank*, 13 O. N. P. (N.S.) 505.

If a broker has bought stock for an undisclosed principal and the principal makes default, upon default of the principal, the seller may rescind the contract, retain the stock, and recover from the broker the difference between the contract price and the market price at the time of the default: *Sullivan v. Frank*, 13 O. N. P. (N.S.) 505.

A broker, who buys shares of stock for an undisclosed principal, is not relieved from such liability by making it known that he is buying for a third person, unless he names his principal or discloses his identity so that the seller knows to whom he is selling: *Sullivan v. Frank*, 13 O. N. P. (N.S.) 505.

An agent, though known to be such, who sells without disclosing his principal is personally liable, as where a bill broker so sells a note which afterwards turns out to be forged: *Wheeler v. Miller*, 12 Dec. Rep. 375, 2 H. 149.

Persons dealing together are presumed to be principals, and to relieve themselves must show the contrary. An agent, a broker, selling forged bonds, is not relieved from responsibility merely because he is known to be a broker, and states that he got the bonds from another. He must disclose his principal, and in such a way as to show that he is not dealing in his own name, and that credit is to be given to the principal and not to him: *Soutter v. Stoeckle*, 10 Am. L. Rec. 23, 6 Bull. 182.

If an agent—a broker—*bona fide* sells forged bonds, stating that he is but an agent, and not disclosing his principal because no inquiry is made, he is not personally liable: *Soutter v. Stoeckle*, 7 Dec. Rep. 511, 3 Bull. 575.

A custom of brokers to look to each other personally, though known to be acting for others not named, is good. So held where a broker sold forged bonds to plaintiff through another broker. If evidence of such custom is not contradicted, and yet is ignored by the jury, a new trial must be granted: *Soutter v. Stoeckle*, 7 Dec. Rep. 511, 3 Bull. 575.

An auctioneer or factor selling stolen goods is liable for conversion. He is not like a carrier for the thief or mere go-between not concerned with the title: *Miller v. Laws*, 7 Am. L. Rec. 606, 4 Bull. 123. See also CONVERSION.

Where a broker and a member of the stock exchange, holding stock indorsed in

blank with instructions to sell for the best price obtainable, offers it on the exchange and it is bid off by another broker and member who pays for it with his own check, stating that he is buying for another, but not disclosing his principal's name, and then delivers the stock to his principal, the purchasing broker is not at any time the legal or equitable owner of such stock, nor subject to a stockholder's statutory liability thereon: *Joecken v. Banking Co.*, 1 O. C. C. (N.S.) 342, 14 O. C. D. 605 [for opinion in lower case, see *Joecken v. Banking Co.*, 13 O. D. (N.P.) 652]. See also CORPORATIONS.

V. DEPOSITS.

In an action for recovery of the proceeds of sales made by factors and deposited in the defendant bank, the burden is on the plaintiff owners of the property sold to prove that the proceeds from the sales in question were deposited on that particular day and remained in possession of the bank: *Smith v. Bank*, 13 O. C. C. (N.S.) 122, 32 O. C. D. 342.

Although a bank may be held to have known that the greater portion of deposits made by factors was derived from sales made for their customers, it can not be held to have had knowledge of the ownership of the deposits made on a particular day or to be liable for the payment in good faith of checks drawn against such deposits: *Smith v. Bank*, 13 O. C. C. (N.S.) 122, 22 O. C. D. 342.

Where money is deposited to the credit of a broker by a customer after hopeless insolvency on his part has intervened, the fraud avoids the implied contract between the parties by which the relation of debtor would ordinarily arise and prevents the deposit becoming the property of the broker: *In re Bultman*, 7 O. L. R. 587.

Checks drawn by factors and held by their customers, but not accepted by the bank, have no preference against the fund on deposit over the claims of general creditors: *Smith v. Bank*, 13 O. C. C. (N.S.) 122, 22 O. C. D. 342.

Where money is deposited to the credit of a broker by a customer after hopeless insolvency on his part has intervened, an equitable trust in the deposit results, and the customer will not be required to trace the identical money deposited, but an order will be made for payment to him of the amount of his deposit, less the amount of his indebtedness to the broker on the day the broker was compelled to close out all pending trade: *In re Bultman Co.*, 7 O. L. R. 587.

VI. LIEN.

Factors have liens for charges incident to the goods, and for their general balances, and for outstanding debts of the principal on which they are security: *Jordan v. James*, 5 O. 88, 1 Longsdorf's Notes, 250.

A commission merchant has a lien on consignments for his advances, and may sell the goods at market prices to reimburse himself, though a minimum price had been agreed on if the consignor fail, after a reasonable notice, to pay the advances: *Landis v. Gooch*, 12 Dec. Rep. 559, 1 D. 176.

A factor has a lien for general balance, and does not lose it except by his own consent. Hence, if a factor is ordered to ship back the goods, does so, he may require his agent not to redeliver to the owner until such balance is paid, and can sell, if not paid, but the agent's commission can not be added to their own for the same act: *Grieff v. Cowguill*, 13 Dec. Rep. 37, 2 D. 58.

A factor under a *del credere* agency has a special property in the goods by virtue of his lien for advances and commissions. He may insure in his own name, sell in his own name, sue in his own name for the selling price, but the title to the goods remains in the consignor until sold: *Louisville Coal & C. Co. v. Pocahontas Co.*, 17 O. D. (N.P.) 151, 1 Hosea, 75.

VII. COMMISSIONS.

To entitle a real estate broker to recover commissions he must show that the purchaser was induced to apply to the owner through means employed by the broker. It is not indispensable, however, that the purchaser be introduced to the owner by the broker, or that the broker be personally acquainted with the purchaser, or that the broker at the time have knowledge of the negotiations between the owner and the purchaser: *Lippert v. Page*, 13 O. C. C. (N.S.) 105, 22 O. C. D. 38.

Where a broker brings a contract to his principal, which the principal declines to accept for the reason that there would be no profit on the sale after payment of a commission, but afterward the principal accepted the same contract direct from the customer, he is liable to the broker for his commission: *Haskins v. Lewis*, 11 O. C. C. (N.S.) 231, 20 O. C. D. 603 [affirmed, without opinion, *Haskins v. Lewis*, 82 O. S. 408].

A broker is not entitled to a commission on a sale which he claims to have made unless the purchaser and his employer, the vendor, entered into a valid, binding and enforceable contract: *Holmyard v. Iron Co.*, 8 O. L. R. 592.

The rule which entitles a broker to his commission when he has brought the vendor a purchaser, who is ready and willing and able to buy, does not in the absence of a written contract of purchase entitle him to a commission where the willingness to buy was only temporary, and the offer was withdrawn before the owner had consummated the sale, and while neither the vendor nor the broker are under obligations to the other to secure a written contract to purchase, yet each assumes the risk of loss of the sale by failing to secure such a contract: *Brooks v. Wortendyke*, 18 O. D. (N.P.) 789, 6 O. L. R. 46.

Fiduciary debt does not include one due as factor or commission merchant, which is therefore dissolved by discharge: *Kceeler v. Snodgrass*, 8 Dec. Rep. 490, 8 Bull. 219 [overruling *Gay v. Farran*, 13 Dec. Rep. 989, 2 C. S. C. R. 426]. See also BANKRUPTCY.

Where a firm of real estate brokers had the exclusive right to sell certain lots, a sale of a lot to one of the partners at a reduced price in consideration that his firm would not charge a commission thereon is not a fraud on the firm as diverting an asset to his personal use, for the firm had not earned a commission at the time of the contract, and hence there was no credit: *Harper v. McKinnis*, 53 O. S. 434, IV Longsdorf's Notes, 609. See also PARTNERSHIP.

VIII. REMEDIES.

The relation of principal and factor always warrants an accounting: *Root v. Nye*, 12 Dec. Rep. 417, 2 H. 229.

IX. CRIMES.

When a memorandum kept by a broker for the purpose of showing the transactions in a particular stock and the balance long or short on a given date, shows a sale short by the broker of a number of shares less than the balance long on that date and more than the number of shares bought for a customer, which have not been delivered to him, it is not a proper inference from such memorandum, when not supported by other evidence, that such shares of the customer were converted or sold; but from the nature of a sale short the presumption would be that such sale did not include a sale of the customer's stock and therefore such memorandum does not in itself prove or imply a fraudulent conversion: *Lamprecht v. State*, 84 O. S. 32.

Where a broker buys stock on the exchange upon the order of a customer, the latter is the owner of the stock from the time of the purchase, whether purchased in his name or not, and he has the right to the possession

thereof on demand, subject to payment to the broker for advances, if any, and commissions, as to which the customer is the debtor of the broker; in other words, the legal relation of the customer and broker is that of pledgor and pledgee. Upon such demand, the broker need not deliver the identical stock purchased for the customer, but it is sufficient to deliver the same number of shares of the same kind and value, and a failure to do so on demand may amount to a conversion of the stock and under some circumstances to a fraudulent conversion: *Lamprecht v. State*, 84 O. S. 32.

A sale of stock "short" by a broker on his own account does not *per se* imply a conversion or use by the broker of stock previously purchased for a customer, or held in trust for the latter, because a sale short means a sale of that which the vendor does not possess at the time, but which he expects to acquire subsequently for delivery at a lower price: *Lamprecht v. State*, 84 O. S. 32.

A sale "short" of stock means a sale of stock which the vendor does not possess at the time, but which he expects to acquire subsequently for delivery under his contract: *Lamprecht v. State*, 84 O. S. 32.

When a customer orders his broker to buy for him certain stock, to be actually delivered to him and to be paid for at a future date, and the broker complies with the order and notice thereof, together with the amount advanced and commission, is given to the customer, and the cost thereof is charged to the account of the broker, leaving a large balance in the broker's favor, the customer is the owner of the stock so purchased and is the debtor of the broker for the amount advanced and the commission; and when the customer subsequently pays such demand against him by a check on his banker which is accepted by the broker, deposited in a bank where the account of the broker was overdrawn, and the check was afterwards paid, and the broker promises to deliver the stock later, which was never done, and the broker failed and made an assignment for the benefit of creditors, such facts do not constitute an embezzlement of the check: *Lamprecht v. State*, 84 O. S. 32.

Where a broker holds as collateral shares of stock belonging to a client, the relation between them is not that of principal and agent, but of debtor and creditor, and the conversion of the stock by the broker to his own use does not constitute embezzlement: *Buddeke v. State*, 12 O. C. C. (N.S.) 454 [affirmed, without opinion, *State v. Buddeke*, 83 O. S. 451].

In a criminal prosecution for embezzlement of a stock certificate, if the evidence shows that the stock broker, George O. Lamprecht,

purchased from his correspondent in New York, Laidlaw & Co., the number of shares ordered by his customer, Ellsworth, and subsequently Ellsworth gave his check to Lamprecht for such stock, but such stock was never delivered, is was error for the court of common pleas to charge the jury, as it did, as follows: "It is material in this case what Ellsworth's redress or rights may be as against Laidlaw & Co., the correspondents of George O. Lamprecht in New York—it is a question here as to the guilt or innocence of this defendant—whether or not this evidence proves to your satisfaction beyond a reasonable doubt that he is guilty, that is the question": *Lamprecht v. State*, 84 O. S. 32.

Where an agreement between a railway company and brokers handling the bonds of the company provides that the right of the brokers to retain the bonds should accrue contemporaneously with actual payment therefor, an indictment for embezzlement lies for the pledging of the bonds by the brokers for loans and the conversion of the proceeds of the loans by the brokers prior to a call for funds by the company: *Hayes v. State*, 14 O. C. C. (N.S.) 497 [affirmed, without opinion, *Hayes v. State*, 83 O. S. 490].

In a criminal prosecution for embezzling certain bonds, evidence is competent which tends to show that the pledging of the bonds and the use of the proceeds therefrom by the brokers was not due to an honest misunderstanding by the brokers of their rights in the matter: *Hayes v. State*, 14 O. C. C. (N.S.) 497 [affirming, without opinion, *Hayes v. State*, 83 O. S. 490].

FACTORY.

See WORKSHOPS AND FACTORIES.

An inclosed building called an "ashery," used for the deposit of ashes and converting them into potash, is a factory within the burglary act: *Blackford v. State*, 11 O. S. 327, II Longsdorf's Notes, 505. See also BURGLARY AND OTHER BREAKINGS.

A large dry goods store falls under G. C., § 4658, relating to exits from factories, workshops, etc., and where the access to fire escapes is obstructed by display cabinets, and no instruction as to their use is given to employees, a finding of negligence as the proximate cause of injury to an employee who jumped from a window is not against the weight of evidence: *Hagedorn v. Windhorst Co.*, 21 O. D. (N.P.) 364, 9 O. L. R. 120. See also FIRE-ESCAPES.

FACTS.

For agreed statement of facts, see AGREED STATEMENT OF FACTS.

For findings of facts by master, referee, etc., see REFERENCE—SUBMISSION OF QUESTIONS.

For question of fact for court or jury, see TRIAL.

For evidence, see EVIDENCE.

For charge of court, see CHARGE OF COURT.

For witnesses, see WITNESSES.

Whether a nuisance exists or not in a particular case, justifying the exercise of the power of abatement by the municipal authorities, is a question of fact to be determined from the nature of the nuisance and the evidence: *Deming v. Cleveland*, 22 O. C. C. 1, 12 O. C. D. 198.

An allegation of "necessaries, to-wit, groceries," follows the language of the statute, and is a sufficient description to withstand an attack on the form of the affidavit. Whether the goods were sold for the actual necessities of the family, or for the purpose of resale and profit, is a question of fact to be determined by the weight of the evidence: *McLane v. Colburn*, 2 O. N. P. (N.S.) 257, 15 O. D. (N.P.) 153.

Whether the necessities of a railroad company require exclusive occupancy of its right of way, and what use of the property by an abutting owner is an interference therewith, are questions of fact, and not of law: *Smith v. Railway Co.*, 5 O. C. C. (N.S.) 194, 16 O. C. D. 44 [affirmed, without opinion, *Smith v. Railway Co.*, 73 O. S. 391]. See also LIMITATIONS, STATUTE OF.

The doctrine of *de facto* corporations and officers is based upon principles of public policy, and a person availing himself of the doctrine must have dealt with such corporation or officers in good faith. The question of good faith is one of fact to be determined by the evidence, and is not one of law: *Beck v. Rocky River*, 14 O. D. (N.P.) 312. See also DE FACTO.

Where it appears that the relation between a man and a woman was in its inception meretricious and not accompanied by any evidence of marriage, but subsequently their relation to each other assume a matrimonial character by being surrounded by evidence of a valid marriage, a question of fact is presented for the determination of the jury or court trying the issue of marriage or no marriage between the parties: *Umbenhour v. Umbenhour*, 12 O. C. C. (N.S.) 289, 21 O. C. D. 317 [affirmed *Umbenhour v. Labus*, 85 O. S. 238]. See also MARRIAGE.

Whether or not there is a partnership is a mixed question of law and fact: *Baker v. Brennan*, 22 O. C. C. 241, 12 O. C. D. 211; *Rodgers v. Edmund*, 21 O. C. C. 675, 12 O. C. D. 291. See also PARTNERSHIP.

The admission of partnership relations involves the admission of facts, as well as law: *Baker v. Brennan*, 22 O. C. C. 241, 12 O. C. D. 211.

Whether or not automobile is a dangerous agency, is a question of law, and not of fact: *Rawson v. Olds Motor Works*, 12 O. N. P. (N.S.) 145, 22 O. D. (N.P.) 188.

Ordinarily an issue as to the reasonableness or unreasonableness of anything, is a mixed question of law and fact; but where the facts are clear and undisputed it is purely a question of law: *Kroll v. Olose*, 82 O. S. 190, IV Longsdorf's Notes, 1059. See also EVIDENCE.

In pleading negligence, it is necessary to plead facts and not conclusions, and whether or not it is necessary to negative contributory negligence, it is proper for plaintiff to plead such facts where they tend to establish negligence of the defendant: *Insurance Co. v. Railway Co.*, 4 O. N. P. (N.S.) 373, 17 O. D. (N.P.) 113. See also NEGLIGENCE.

Questions of fact can not be determined on general demurrer: *Jones v. Commissioners*, 2 O. C. C. (N.S.) 14, 15 O. C. D. 510. See also PLEADINGS.

A demurrer does not admit the truth of a mere conclusion: *Insurance Co. v. McFarland*, 12 O. C. D. 591 [affirmed, without opinion, *Insurance Co. v. McFarland*, 60 O. S. 617].

When by the admissions of the parties and the finding of the court all the material facts are conclusively established, the court should apply the law to such facts and render the judgment which it requires: *Reiff v. Mullholland*, 65 O. S. 178, IV Longsdorf's Notes, 883. See also ERROR.

The filing of a motion for a new trial and the entering of exceptions to its overruling, is indispensable to a review of findings of fact on a petition in error: *Railway Co. v. Kellsall*, 6 O. N. P. (N.S.) 487, 18 O. D. (N.P.) 557. See also NEW TRIAL.

The reviewing court will not reverse on a question of fact in attachment proceedings unless clearly erroneous: *Harrison v. King*, 9 O. S. 388, II Longsdorf's Notes, 383; *Bancroft v. Talbott*, 29 O. S. 538, III Longsdorf's Notes, 495.

The patterns and castings evolved and perfected in a tube mill by the combined skill, knowledge and experience of employes during several years, are the property of the concern, but, though there may be a certain individuality in their construction and some care taken to keep them from the public, if such articles are in general use in tube mills, if artisans in that line of business have full knowledge of the character of the machinery and patterns used, and can readily approximately reproduce them, they are not trade

secrets, the use of which by another can be restrained by injunction: *Tube Co. v. Tube Co.*, 3 O. C. C. (N.S.) 459, 13 O. C. D. 468 [affirming *Tube Co. v. Tube Co.*, 12 O. D. (N.P.) 100]. See also TRADE-MARKS AND TRADE NAMES.

A statement as to the value of property made to the other directors by an acting director of the corporation, who was also the owner of such property and a promoter of such corporation, is not a mere opinion, but is a statement of fact, and if false, furnishes ground for attachment in an action by the corporation against such director for fraud; and it is immaterial that the other director of the corporation knew or could have ascertained by reasonable diligence the falsity of such statements as to the value of the property purchased: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198. See also ATTACHMENT.

The circuit court in an error case, has no power to make a finding of facts which calls for a review by the supreme court, or conclusively binds the court of common pleas, nor to render final judgment except in case of a finding of controlling facts by the trial court, or where they are conceded: *Gilson v. Carrel*, 79 O. S. 433; *Jones v. Fronsfield*, 79 O. S. 435.

FACTS IN ISSUE AND RELEVANT TO ISSUE.

See EVIDENCE; PLEADINGS.

FACTS PUTTING ON INQUIRY.

See FRAUD AND DECEIT; NEGOTIABLE INSTRUMENTS; NOTICE AND KNOWLEDGE.

FAILURE OF CONSIDERATION.

See CONTRACTS.

FAILURE OF ISSUE.

See DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES.

FAILURE OF PROOF.

For failure of proof, see EVIDENCE; TRIAL; CHARGE OF COURT.

FAILURE OF TITLE.

See DEEDS; VENDOR AND PURCHASER.

FAILURE TO ANSWER.

See JUDGMENT; PLEADINGS.

FAILURE TO DEMUR.

See PLEADINGS.

FAILURE TO EXPLAIN.

A failure by a passenger seeking to ride on a transfer not good upon the line, to make a statement or explanation before he is put off the car, will not of itself defeat his right to recover; but such fact is admissible as part of the *res gestae* as bearing upon the question of the plaintiff's good faith in accepting and using the erroneous transfer and as affecting the amount of damages: *Railway Co. v. Conner*, 74 O. S. 225, IV Longsdorf's Notes, 1009. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

FAILURE TO INSTRUCT.

See CHARGE OF COURT.

FAILURE TO MAKE RETURN.

See OFFICE and cross references thereunder; ATTACHMENT; SUMMONS; TAXATION.

FAILURE TO PAY.

See CONTRACTS; PAYMENT.

FAILURE TO PROSECUTE.

See ACCUSED; MALICIOUS PROSECUTIONS AND ACTIONS.

FAILURE TO PROVIDE.

For failure to provide, see PARENT AND CHILD.

FAILURE TO QUALIFY.

See OFFICE and cross references thereunder.

FAILURE TO REPLY.

See PLEADINGS.

FAILURE TO SUPPORT.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN; PARENT AND CHILD.

FAILURE TO TESTIFY.

See ACCUSED; DEPOSITIONS; EVIDENCE; WITNESSES.

FAILURE TO TRANSMIT TELEGRAM.

See TELEGRAMS AND TELEGRAPH COMPANIES.

FAIR.

For fair, see AGRICULTURAL SOCIETIES.

FAIR ASSOCIATIONS.

See AGRICULTURAL SOCIETIES.

FAIR CRITICISM.

See ATTORNEY AND CLIENTS; COURTS.

FAIR GROUNDS.

See AGRICULTURAL SOCIETIES.

FAIR TRIAL.

See CONSTITUTIONAL LAW; TRIAL.

FAITH AND CREDIT.

For the effect of the full faith and credit clause of the constitution of the United States, see AUTHENTICATION; EXTRADITION; JUDGMENT.

FAITHFUL PERFORMANCE.

Under the general rule that forfeitures are not favored, a deposit made or bond given to secure the faithful performance of an obligation will be regarded as a penalty, and held to be a security for such performance or to secure damages arising from a breach which the party may suffer and prove, rather than liquidated damages or a forfeit to be lost absolutely in case of a violation of the contract; but where the circumstances are such and the contract secured is of such a character that proof of damages in case of a breach would be practically impossible, it will be held to be liquidated damages and the contract strictly enforced: *Hattersly v. Waterville*, 4 O. C. C. (N.S.) 242, 16 O. C. D. 226. See also DAMAGES.

A certified check deposited as required by resolution of the council and the advertise-

ment for bids by a street railway company with a municipal corporation as a guaranty of its good faith and as security for a bid for a franchise in the streets for the purpose of constructing and operating a railroad, which check was to be kept on deposit as a security that the company will carry out all the conditions of the franchise and complete the road within eleven months, and it is provided by the franchise ordinance which was accepted by the company, that the check should become the property of the municipality unless the conditions of the franchise were complied with, will be held to be liquidated damages and not in the nature of a penalty, and will be forfeited absolutely to the municipality if the company fails to commence the road within eleven months or carry out any of the terms of the franchise, but entirely abandons the enterprise: *Hattersly v. Waterville*, 4 O. C. C. (N.S.) 242, 16 O. C. D. 226.

The deposit of a certified check by a railway company with a municipal corporation as a guaranty of its good faith and as a condition required by the municipality to secure a bid made by it for the construction of a street railway through the streets, is not without consideration, in that the municipality gave nothing to the railway company and the company agreed to carry passengers within the municipality free of charge, when it appears that the company desiring a franchise through the municipality, in order to complete its road from terminus to terminus, applied for a franchise and in consequence thereof the municipality advertised for bids to construct a street railroad through it, agreeing to grant a franchise to the lowest bidder, that the company submitted its bid, which being the lowest, was accepted and the franchise granted, whereby it was given eleven months within which to build its road, which franchise was accepted by the company: *Hattersly v. Waterville*, 4 O. C. C.

(N.S.) 242, 16 O. C. D. 226. See also STREET RAILWAYS AND INTERURBAN RAILWAYS; BONDS, SURETY.

FALLEN BUILDING CLAUSE.

See INSURANCE.

FALSA DEMONSTRATIO NON NOCET.

See CONTRACTS; DEEDS.

FALSE ACKNOWLEDG- MENT.

See ACKNOWLEDGMENT.

FALSE AFFIDAVIT.

See AFFIDAVIT; PERJURY.

FALSE ANSWERS.

See PLEADINGS; EVIDENCE; FRAUD AND DECEIT; INSURANCE; MISREPRESENTATION; PERJURY; WITNESSES.

FALSE BILL OF LADING.

See CARRIERS.

FALSE CLAIMS.

For false claims, see OFFICE.

FALSE COIN.

See COUNTERFEITING.

FALSE EVIDENCE.

See EVIDENCE; PERJURY; WITNESSES.

FALSE IMPRISONMENT.

Scope Note.—Includes restraint of the person without sufficient authority; excuse and justification for such restraint and liabilities and remedies therefor. Excludes arrest generally; and malicious prosecution.

Cross References.

For false imprisonment, see also ARREST; MALICIOUS PROSECUTIONS AND ACTIONS.

For writ or process as a defense to an action for false imprisonment, see TRESPASS.

ANALYTICAL OUTLINE.

I. Definition.

II. What Constitutes.

A. In general.

B. Arrest under defective warrant.

- C. Arrest without warrant.
- D. Arrest under void ordinance.
- E. Arrest on void order.
- F. Arrest on irregular process.
- G. Trespass ab initio.

III. Who are Liable.

- A. Court.
- B. Officer.
- C. Individual.
- D. Corporation.

IV. Damages.

V. Pleading.

VI. Evidence.

VII. Venue.

I. DEFINITION.

False imprisonment consists of an unlawful detention of one person by another. It is a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without legal authority: *Tracy v. Coffey*, 8 O. C. C. (N.S.) 88, 18 O. C. D. 579.

II. WHAT CONSTITUTES.

A. IN GENERAL.

False imprisonment is an injury to personal liberty, while malicious prosecution is an infringement of one's right to reputation: *Langrueter v. Iroquois Co.*, 10 O. N. P. (N.S.) 81, 20 O. D. (N.P.) 292.

A cause of action for false imprisonment and one for malicious prosecution though having common elements are based upon different theories, each may be subject to different defenses, and the alleged liability of different parties involved may rest upon different grounds: *Langrueter v. Iroquois Co.*, 10 O. N. P. (N.S.) 81, 20 O. D. (N.P.) 292.

An action for false imprisonment can not be maintained where the wrong complained of is imprisonment in accordance with the judgment or order of a court unless it appear that such judgment or order is void: *Spice v. Steinruck*, 14 O. S. 213, II Longsdorf's Notes, 646; *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

The motive which induced suing out irregular process is immaterial in an action for false imprisonment; if done maliciously the action is case, not trespass: *Pickard v. Bills*, W. 344, I Longsdorf's Notes, 27.

Charges to the jury in an action to recover damages for a false imprisonment, from which the jury may fairly infer an arrest by merely accosting or detaining plaintiff by a police officer for the purpose

only of making inquiry as to the ownership of an article in her possession, which she is supposed to have stolen, without regard to whether or not the detention was with her consent, or from which an arrest may also be inferred from any detention, whatever it was, unless it was the voluntary act of the plaintiff suggested by herself, are both improper: *Hopper v. Mabley Co.*, 14 O. D. (N.P.) 236.

B. ARREST UNDER DEFECTIVE WARRANT.

In the event that the party under arrest is bound over to the grand jury under a warrant which upon proceedings in error was declared to be defective, the arresting officer is not liable for false imprisonment, unless he detained his prisoner an unreasonable length of time and in an improper manner: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

A warrant is illegal on its face where it contains no name or description and is no defense in an action for false imprisonment: *Dougherty v. Gilbert*, T. 6.

C. ARREST WITHOUT WARRANT.

An arrest of a supposed deserter from the U. S. army without a warrant renders a police officer liable for false imprisonment. It is not justified by G. C., §§ 4386 or 13492, for the person is not in the act of committing an offense; nor by G. C., § 13493, because desertion is not a felony, and \$100 damages is not excessive though he was on the lookout for a deserter and thought plaintiff was he: *Kendall v. Sheve*, 3 O. C. C. 526, 2 O. C. D. 303. See also ARREST.

Where an arrest is made without a warrant, the arresting officer should within a reasonable time secure a warrant, and during the interval should use only such means and methods for detaining the party under arrest

as are reasonable and necessary under the circumstances; and in an action for damages for false arrest and imprisonment, the question whether the arresting officer so acted is one of fact for determination by the jury: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

The order of a superior is no defense, nor is the fact that the prisoner was on arrest immediately delivered to another custodian; the arresting officer must see that a warrant is procured in order to legalize an arrest without a warrant: *Leger v. Warren*, 62 O. S. 500, IV Longsdorf's Notes, 840. See also ARREST.

D. ARREST UNDER VOID ORDINANCE.

That an ordinance was subsequently declared to be invalid does not render a judicial officer (a mayor) causing an arrest under it, nor the person who filed the affidavit, liable for false imprisonment. Their acts were within their then jurisdiction: *Wheeler v. Gavin*, 5 O. C. C. 246, 3 O. C. D. 123.

E. ARREST ON VOID ORDER.

An injunction is not operative unless a bond is given, G. C., § 11882, hence an imprisonment for a contempt in disobeying such injunction is void, and the party causing the arrest may be liable for false imprisonment without averment of malice or want of probable cause: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

Trial by the mayor of the village of one arrested for violating a village ordinance, but out on bail, where he fails to be present is without jurisdiction, and the sentence is void and imprisonment thereunder is actionable. Inferior tribunals must at their peril keep within their jurisdiction: *Truman v. Walton*, 59 O. S. 517, IV Longsdorf's Notes, 770. See also MUNICIPAL CORPORATIONS.

F. ARREST ON IRREGULAR PROCESS.

Irregular process, until set aside, affords protection to those that use it: *Pickard v. Bills*, W. 344, I Longsdorf's Notes, 27.

G. TRESPASS AB INITIO.

A longer detention than is reasonably necessary to procure a warrant is a trespass *ab initio*, and an action for false imprisonment lies against the arresting officers and their sureties, and the superior officer under whose orders the tort was committed: *Leger v. Warren*, 62 O. S. 500, IV Longsdorf's Notes, 840. See also ARREST.

III. WHO ARE LIABLE.

A. COURT.

Where a justice of the peace, without authority of law, issues a warrant of arrest, both he and the person at whose instance he so acts are liable in an action for false imprisonment at the suit of the party illegally arrested by virtue of such warrant: *Truesdell v. Combs*, 33 O. S. 186, III Longsdorf's Notes, 665.

A justice who, instead of binding defendant in bastardy over to appear in the common pleas, requires him to give bond for support to the overseers of the poor and commits him for refusal, exceeds his jurisdiction and is liable for false imprisonment: *Masters v. Johnson*, T. 206. See also BASTARDY.

If a justice binding one over has been imposed on to receive insufficient bail, he may arrest again, and hold to better bail without liability for false imprisonment: *Carothers v. Scott*, T. 195. See also ARREST.

B. OFFICER.

A mayor of a city is equally liable with the chief of police and the keeper of the city prison for false imprisonment, where the mayor, contrary to G. C., § 13507, orders the accused to be confined in the city prison for more than four days without designating said prison as the place of confinement in a written order, and the chief of police orders the keeper of the city prison to carry out said order, and the latter confines the accused pursuant to said unlawful order: *Washer v. Iler*, 9 O. C. C. (N.S.) 271, 19 O. C. D. 319 [affirmed, without opinion, *Washer v. Iler*, 75 O. S. 638].

A superintendent of police is not liable for a false arrest by his police officers unless ordered by him without probable cause: *Reidy v. Deitsch*, 7 O. N. P. 620, 10 O. D. (N.P.) 382, 43 Bull. 425.

A deputy sheriff or other person authorized by law to make arrests may, on view, arrest persons found violating G. C., § 12525, of the fish and game act and not be liable for false arrest, notwithstanding the provision that prosecutions may be instituted only upon complaint of the owner or agent of the owner of the lands, or rights in lands or waters, where the trespass was committed: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

Inasmuch as the legislature is presumed to have passed only constitutional laws, an arresting officer is not liable for false arrest or imprisonment where he acted properly and within prescribed limits, under an act which was subsequently declared unconstitutional:

Williams v. Morris, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

An examining magistrate hearing a complaint of felony and adjourning the case for cause until the next day may require a necessary witness against the accused to give bond for his appearance or be committed; hence a constable holding a witness on such commitment is not liable for false imprisonment: *Fawcett v. Linthecum*, 7 O. C. C. 141, 3 O. C. D. 700. See also *Arrest*.

C. INDIVIDUAL.

If a storekeeper under a claim of theft unlawfully detains a purchaser in his store until the police come, even at the purchaser's request to be searched, such unlawful detention is the efficient cause of the arrest and renders the storekeeper liable: *Simper v. Carroll*, 12 O. C. C. (N.S.) 140, 21 O. C. D. 386.

One who swears to the affidavit charging a crime and goes with the constable and points out the wrong person to be arrested, which is done, is liable for false imprisonment. The act of the constable is his act, and a petition charging him with the imprisonment is valid: *Drinkwater v. Jones*, 13 O. C. C. 489, 7 O. C. D. 173.

The expression to a police officer of a suspicion, by the owner of property which has been stolen, as to who it was who committed the theft, is privileged and can not be made the basis of an action for damages for slander or false arrest: *Parker v. Roddy*, 14 O. C. C. (N.S.) 288, 24 O. C. D. 89.

Under the act exempting females from arrest for debt on contract, one called to assist in arresting a female for nonpayment of a judgment, when sued by her for false imprisonment, may justify under the call. It is not a case of process without jurisdiction: *O'Boyle v. Brown*, W. 465, I Longsdorf's Notes, 37.

D. CORPORATION.

A railway company may be liable for false imprisonment: *Nichols v. Railway Co.*, 4 Dec. Rep. 306, 1 Clev. L. Rep. 268.

IV. DAMAGES.

One causing an arrest to be made is liable for the natural and probable consequences of such arrest: *Simper v. Carroll*, 12 O. C. C. (N.S.) 140, 21 O. C. D. 386.

The plaintiff's apparent situation and character, and that he was a guest of defendant, who had him arrested on a false charge, may be considered: *Dougherty v. Gilbert*, T. 6.

An action against a justice of the peace to recover damages for committing the plaintiff to jail without a plea of guilty, thus exceeding his jurisdiction, injury to reputation being specially alleged as one ground of recovery, it is competent for the defendant to prove plaintiff's bad repute for honesty the effect of the evidence being limited to the purpose of defeating or reducing a recovery on that particular ground: *Drummond v. Henderson*, 62 O. S. 136, IV Longsdorf's Notes, 827.

Counsel fees can not be allowed to a plaintiff in an action for damages for false arrest and imprisonment, unless the evidence is such as would justify an allowance of exemplary or punitive damages: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

Where the arrest was not illegal and there was no false imprisonment, it is error to instruct a jury that they may allow as compensatory damages an attorney's fee for services incurred in setting aside the proceedings of a justice of the peace had on a defective warrant: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

The allowance of counsel fees as damages, in an action for false imprisonment, is optional with the jury; and a charge of the court which either makes their allowance obligatory, or denies the right of the jury to allow them is improper: *Paxton v. Boze*, 14 O. D. (N.P.) 543.

V. PLEADING.

Where an action proceeds upon the theory of malicious prosecution, to which the defense of advice of counsel if interposed and fully established by proof, an amendment seeking to change the theory of the case to that of false imprisonment should not be permitted when the evidence fails to show that the defendant took part, authorized or encouraged the arrest, all that he did being to file an affidavit upon the advice of his counsel: *Langrueter v. Iroquois Co.*, 10 O. N. P. (N.S.) 81, 20 O. D. (N.P.) 292 [distinguishing *Spice v. Steinruck*, 14 O. S. 213, II Longsdorf's Notes, 646].

In an action for false imprisonment it is unnecessary to allege either malice or want of probable cause: *Sachs v. Skeen*, 15 O. D. (N.P.) 612, 2 O. L. R. 527.

The petition for false imprisonment on a charge of felony need not aver that no felony had in fact been committed, because the detention is presumed unlawful, and because plaintiff should not be required to aver and prove a negative: *Burch v. Franklin*, 7 O. N. P. 155, 7 O. D. (N.P.) 519.

In false imprisonment for violation of an act exempting females from arrest for debt

on contract (see G. C., § 11754), the declaration or reply must show the plaintiff to be female—perhaps her name, and the pronoun “she” is sufficient for this—and must show the judgment was on contract, for the debt might be for a penalty, a trespass, etc., so as to bring the case within the statute: *O’Boyle v. Brown*, W. 465, I Longsdorf’s Notes, 37.

In an action for damages for false imprisonment, a petition alleging that defendant unlawfully and with force imprisoned plaintiff, for a certain length of time, and caused him to be deprived of his liberty, is good on demurrer: *Gerdes v. Garrett*, 11 O. D. (N.P.) 814, 35 Bull. 326.

In an action against a village and others for damages for false arrest it is necessary to aver not only that those who made or caused the arrest were officers of the village, but also that they were acting at the time in their official capacity: *Shank v. St. Louisville*, 5 O. N. P. (N.S.) 510, 17 O. D. (N.P.) 145.

Each day’s continuance of a false imprisonment may be treated as a new trespass and the bar of the statute of limitations is not good as to that portion of the imprisonment subsequent to the running of the statute: *State v. Beecher*, 16 O. 358, I Longsdorf’s Notes, 769.

Where an action for damages is founded on a false affidavit for arrest, the action is one for malicious prosecution, and not false arrest and imprisonment, and it is necessary to allege that the charge in the affidavit was made falsely, maliciously and without reasonable cause: *Ballew v. Coney*, 10 O. N. P. (N.S.) 679.

Suit was brought in the United States circuit court against two corporations, one a nonresident; judgment on demurrer was given in favor of said nonresident, and the resident company, by amendment, pleaded lack of jurisdiction of the controversy; a motion to dismiss was sustained because the court had no jurisdiction of the parties or subject-matter. It was held that this proceeding was the commencement of an action within G. C., § 11233; that the plaintiff failed otherwise than upon the merits and was entitled to commence a new action within one year: *Railway Co. v. Bemis*, 64 O. S. 26, IV Longsdorf’s Notes, 864. See also LIMITATIONS, STATUTE OF.

VI. EVIDENCE.

It is competent for a plaintiff in an action for false arrest to testify as to the effect of the arrest upon her mental and nervous condition: *Simper v. Carroll*, 12 O. C. C. (N.S.) 140, 21 O. C. D. 386.

If the plaintiff’s case assumes and proves that defendant acted as a magistrate, the defendant need not show it, and if the act was within the jurisdiction, plaintiff will be nonsuited: *Carothers v. Scott*, T. 195.

In an action for damages on account of false arrest and imprisonment, the burden is on the arresting officer to show that such a state of facts existed as justified him in making the arrest: *Tracy v. Coffey*, 8 O. C. C. (N.S.) 88, 18 O. C. D. 579.

VII. VENUE.

G. C., § 11271, which provides that an action against a public officer for an act done by him by virtue of or under color of his office must be brought in the county where the cause of action arose, does not apply to an action for malicious imprisonment brought by a resident of another state against a public officer of another state for acts done in another state: *Wilson v. Helmbold*, 13 O. N. P. (N.S.) 222, 22 O. D. (N.P.) 335.

A trial court may in its discretion refuse to entertain an action for false imprisonment brought against a public officer of another state to recover damages for an act done by him under color of his official duty even though he has served in the territorial jurisdiction of such court: *Wilson v. Helmbold*, 13 O. N. P. (N.S.) 222, 22 O. D. (N.P.) 335.

FALSE LABEL OR BRAND.

See FOODS AND DRUGS; LABELS.

FALSE NAME.

See FICTITIOUS NAME.

FALSE OATH.

See PERJURY; EVIDENCE; WITNESSES.

FALSE PLEAS.

See PLEADINGS.

FALSE PRETENSES.

Scope Note.—Includes obtaining by one by false pretenses from another anything of value, or the making or indorsement by him of any writing by false pretenses, or disposes of such writing knowing the signature to have been obtained by false pretenses; nature and extent of the criminal liability therefor and grounds of defense; prosecution of such acts as crimes. Excludes larceny by trick; false personation; forgery; counterfeiting; and fraudulently obtaining boarding and lodging from innkeepers.

Cross References.

For false pretenses, see also CONVEYANCE WITHOUT TITLE; COUNTERFEITING; FORGERY; FRAUD AND DECEIT; LARCENY; MISREPRESENTATION.

For general questions, see AIDERS, ABETTERS AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; JURISDICTION; SENTENCE; VENUE; VERDICT.

For meaning of "anything of value," see ANYTHING OF VALUE.

For civil remedy, see DECEIT.

For extradition in case of obtaining money by false pretenses, see EXTRADITION.

For fraudulently obtaining board and lodging, see INNKEEPERS.

For obtaining money by false claims by an officer, see OFFICERS.

For obtaining money by tricks, see LARCENY.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For sending fraudulent instruments, see FRAUDULENT INSTRUMENTS.

For rescission of sale for false pretenses, see RESCISSION; SALES.

For questions concerning counterfeiting, see COUNTERFEITING.

For the subject of forgery, see FORGERY.

ANALYTICAL OUTLINE.

- I. Definition, 7741.
- II. The Pretense, 7741.
 - A. Existing fact, 7741.
 - B. Opinion, 7741.
 - C. Intention, 7742.
 - D. Must be deceptive, 7742.
- III. Obtaining or Procuring Title, 7743.
- IV. Subjects of False Pretenses, 7743.
- V. Intent to Defraud, 7744.
- VI. Defenses, 7744.
- VII. Jurisdiction, 7744.
- VIII. Indictment, 7745.
 - A. In general, 7745.
 - B. The pretense, 7746.
 - C. Procuring signature, 7746.
 - D. Description of property, 7747.
 - E. Falsifying averments, 7748.
 - F. Intent to defraud, 7748.
- IX. Evidence, 7749.
 - A. Other frauds, 7749.
 - B. Variance, 7749.
- X. Verdict, 7750.

I. DEFINITION.

For statutory definition, see G. C., § 13104.

The essentials of the crime of obtaining property under false pretenses are: (1) There must be a false representation as to an existing fact or a past event. (2) There must be an intent to defraud. (3) There must be a reliance upon such fraudulent representation. (4) Something of value must be obtained thereby: *State v. Williams*, 6 O. N. P. (N.S.) 406 [affirmed, *Williams v. State*, 77 O. S. 468].

II. THE PRETENSE.

A. EXISTING FACT.

A false pretense, within the meaning of the statute, must relate to a past event or an existing fact. Any representation or assurance in relation to a future transaction, is not included: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184; *Winnett v. State*, 18 O. C. C. 515, 10 O. C. D. 245 [affirmed, without opinion, *State v. Winnett*, 62 O. S. 650].

False representation by the defendant that she was collecting money and funds for the relief of certain children is a representation as to an existing fact: *Ex parte, Fitzpatrick*, 21 O. C. C. 519, 11 O. C. D. 695.

The representation for payment of a check or draft, payable on demand, to one other than the drawee, considered alone, imparts a representation that the drawer had funds to meet it: *Semler v. State*, 6 O. C. C. (N. S.) 393, 17 O. C. D. 581.

When one makes a representation of value as an existing fact, knowing it to be false and intending it to influence another to part with money or property, and the other party relying upon such representation is thereby induced to part with money or property to the one making the false representation of value, such facts are sufficient to sustain a conviction for obtaining money or property by false pretense: *Williams v. State*, 77 O. S. 468, IV Longsdorf's Notes, 1034 [affirming *State v. Williams*, 6 O. N. P. (N.S.) 406, 18 O. D. (N.P.) 794].

B. OPINION.

A representation as to the value of land may be a mere opinion or a statement of existing fact, and where it is the latter, an indictment for obtaining property by false pretenses may be predicated thereon: *Williams v. State*, 77 O. S. 468, IV Longsdorf's Notes, 1034.

An indictment for false pretenses can not be based upon the charge that the accused stated he was doing a big business, and

thereby obtained credit for goods, because such talk is mere trade talk, and "big business" is a relative term, and the denial of its truth is a denial of a mere conclusion, and puts nothing definite in issue: *State v. Mina*, 3 O. L. R. 31, 15 O. D. (N.P.) 487.

A mere expression of opinion as to the value of merchandise, however false and fraudulent, is not a representation as to the value thereof, and not such a false pretense as furnishes a basis for indictment: *Doe v. State*, 4 O. L. R. 29, 16 O. D. (N.P.) 528.

Whether a representation as to value is one of existing fact or of opinion only is a question of fact to be determined by the jury: *Williams v. State*, 77 O. S. 468, IV Longsdorf's Notes, 1034.

C. INTENTION.

Where A procured the signature of B to a promissory note by false representations that he wanted to show the note to C in order to show C that he had a good standing in his community and friends who had confidence in him, and promised that afterwards he would destroy it, he is not indictable for obtaining the note by false pretenses since B was deceived by A's false statement of intention and not by a misrepresentation as to existing facts: *Winnet v. State*, 18 O. C. C. 515, 10 O. C. D. 245.

D. MUST BE DECEPTIVE.

The representations must be such as, either with or without co-operation of either causes, had decisive influence upon the mind of the party defrauded, so that without its weight he would not have parted with his property: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184.

Any improbable lie or absurd or irrational statement made to a person of ordinary sagacity or understanding would not be a false pretense: *In re False Pretenses*, 9 O. D. (N.P.) 825.

That the pretense is absurd or irrational or fanciful and should not have deceived any one, is not necessarily outside the criminal law, for the weak or unwary have equal rights with the strong: *Horton v. State*, 85 O. S. 13.

Where the evidence shows that one who had been accustomed to deal with a bank secured the cashing of drafts, accompanying the same with the statement that the payment of them had been arranged, such evidence justifies the conclusion that such representation was relied upon by the bank cashier rather than the representation arising from a long course of similar dealings: *Semler v. State*, 6 O. C. C. (N.S.) 393, 17 O. C. D. 581.

III. OBTAINING OR PROCURING TITLE.

Where A is induced by the fraudulent representations of B to transfer to B the title to certain bank bills, without any expectation that the same bills will be returned in payment, B is guilty of obtaining the money by false pretenses, but is not guilty of larceny since that is not a tortious taking of the property: *Kellogg v. State*, 26 O. S. 15, III Longsdorf's Notes, 281.

Where A by means of false representations as to the speed, pedigree, breeding, etc., of two horses, obtained from B a check therefor, A may be indicted for "obtaining" the check by means of false pretenses: *Tarbox v. State*, 38 O. S. 581, III Longsdorf's Notes, 995.

One who, by means of fraudulent representations that she is collecting money for a charitable object, receives money from another, obtains it within the meaning of G. C., § 13104: *Ex parte Fitzpatrick*, 21 O. C. C. 519, 11 O. C. D. 695.

Where one was induced to deposit money in a bank of which the accused was a director, the money so deposited was "obtained" by the accused within the meaning of G. C., § 13104, although it was not received by him personally: *State v. Perrin*, 9 O. N. P. (N.S.) 97, 19 O. D. (N.P.) 416.

Inducing an owner to deposit money in a bank in which the accused was a director, by means of false pretenses, is not an "obtaining", within the meaning of G. C., § 13104, since the money must be obtained by the accused personally: *State v. Perrin*, 9 O. N. P. (N.S.) 97, 19 O. D. (N.P.) 416; criticised and not followed, *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1 [affirmed, without opinion, *State v. Gibbs*, 82 O. S. 456].

Where a county auditor issued a fraudulent order on the treasurer payable to A, who he knew had no claim, and by representing it to be valid, and that he was authorized by A to collect it, procured payment by a check for the amount from the treasurer, he has not committed a crime, under G. C., § 13104, for he did not obtain the check by false pretenses, but procured payment, to which the check was a mere incident; no intention to procure the check being averred. Nor did he procure the treasurer's signature to the check with intent to defraud, for the check was not the object asked for: *Kennedy v. State*, 34 O. S. 310, III Longsdorf's Notes, 718.

IV. SUBJECTS OF FALSE PRETENSES.

"Anything of value" is defined by G. C., § 12369. See title "ANYTHING OF VALUE."

The title to real estate situated in this state is the subject of false pretenses: *State v. Toney*, 81 O. S. 130.

Unpaid interest can not be the subject of a charge of obtaining money by false pretenses: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1. See *State v. Gibbs*, 82 O. S. 457, 82 O. S. 462.

A pamphlet which is a mere advertisement or commendatory circular, while not an "instrument" in the legal and technical meaning of that word, yet falls within that term as used in G. C., § 13144, making unlawful the sending of any "letter, telegram or other instrument": *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1. See *State v. Gibbs*, 82 O. S. 457, and *State v. Gibbs*, 82 O. S. 462.

To procure the signature of a person notoriously insolvent to a promissory note, as the maker, by false pretenses, is indictable under G. C., § 13104, although the note is of no real value: *Ellars v. State*, 25 O. S. 385, III Longsdorf's Notes, 246.

V. INTENT TO DEFRAUD.

See also *Infra*, VIII, F.

An intent to defraud is an essential element of the crime of procuring a signature by means of false pretenses: *Coblentz v. State*, 84 O. S. 235.

VI. DEFENSES.

If the thing sold is not what it is represented, the mere fact that it has some value is not a defense: *Barlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was so obtained was unlawful: *Horton v. State*, 85 O. S. 13.

Contra: Two persons being engaged in a criminal design, and one obtains money from the other by false pretenses in pursuance of the design, the offense is not indictable. (Highland C. P.): *Anonymous*, 10 Dec. Rep. 649, 22 Bull. 371.

VII. JURISDICTION.

The police court of Cincinnati has jurisdiction to try cases of prosecution for obtaining money or goods by false pretenses: *Dillingham v. State*, 5 O. S. 280, [approved, *Ex parte Scott*, 19 O. S. 581, II Longsdorf's Notes, 972]; *Barlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

Where by false pretenses contained in a letter sent by mail, the accused procures the owner of goods to deliver them to a designated common carrier in one county con-

signed to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county and the offense must be prosecuted therein: *Norris v. State*, 25 O. S. 217, III Longsdorf's Notes, 221.

When one actually present in this state obtains, by false pretenses, through either a guilty or an innocent agent, goods from a person in another state, there can be no question that the offender should be punished: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733.

VIII. INDICTMENT.

A. IN GENERAL.

G. C., § 13594, provides that an indictment for larceny may contain counts for false pretenses, embezzlement and receiving stolen property. The indictment must aver all the material facts of a crime with such reasonable certainty as to advise the accused as to what he may expect to meet on the trial: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184.

An indictment which apprises the party charged of the charge against him so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime and the person charged and is not void for uncertainty: *State v. Toney*, 81 O. S. 130.

An indictment under G. C., § 13104, for obtaining money by false pretenses must set forth the alleged false pretenses with such certainty and precision as will reasonably apprise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible and must allege that the pretenses were in fact false and made with intent to defraud: *Horton v. State*, 85 O. S. 13.

An indictment must clearly state and charge the following essential facts against the accused: (1) The making of some false pretense. (2) The obtaining thereby from another person some item of money, goods, merchandise, or effects. (3) That the same was obtained with the intent to cheat and defraud the person from whom so obtained of the same: *Schleisinger v. State*, 11 O. S. 669, II Longsdorf's Notes, 540.

An indictment charging false pretenses, must specify the pretenses relied on, and allege a sufficient part thereof; the intent to defraud; that the false pretense was relied on; must specify the property obtained and its ownership and value; must give the names of the persons defrauded; connect the pretense with the accomplished fraud; and

negative the pretenses and allege that the defendants had knowledge of their falsity: *State v. Williams*, 6 O. N. P. (N.S.) 406, 18 O. D. (N.P.) 794 [affirmed, *State v. Williams*, 77 O. S. 468, IV Longsdorf's Notes, 1034].

An indictment under G. C., § 13104, for procuring a signature to a note, etc., must allege that it was secured, not only by false pretenses, but with intent to defraud, and must cover all the material facts necessary to be proven, with such reasonable certainty as to advise defendant what he must meet: *Coblentz v. State*, 84 O. S. 235.

B. THE PRETENSE.

An information charging the obtaining of property under false pretenses alleging only that the said pretenses were made with the intent to cheat and defraud is not sufficient. Charging information should set out the false pretenses, should aver that they are not true, that the parties to whom they were made believed and relied upon them: *Thomas v. Evans*, 14 O. D. (N.P.) 336.

A charge that the defendant falsely represented that he was buying goods exclusively from a certain firm, does not sufficiently advise him of the nature and cause of the accusation; but the indictment should further state the names of other persons from whom he was then and there buying, with the nature of the transaction, the dates thereof, and approximately the amounts: *State v. Mina*, 3 O. L. R. 31, 15 O. D. (N.P.) 487.

An indictment averring that certain officers of a banking company obtained money from another corporation in which they were interested by false representations as to the financial status of the latter, but not stating by allegation, *innuendo* or explanatory matter how the banking company was induced to part with its money states no *nexus* between any of the three parties: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N. P.) 1.

In an indictment charging false pretenses, it is sufficient to state the fact of the pretense correctly; the very words used need not be stated: *State v. Williams*, 6 O. N. P. (N.S.) 406, 18 O. D. (N.P.) 794 [case affirmed, see 77 O. S. 468, IV Longsdorf's Notes, 1034].

C. PROCURING SIGNATURE.

In an indictment for procuring the signature of another to a promissory note the words "as maker" is a material part of the description of the offense and must be averred: *Ellars v. State*, 25 O. S. 385, III Longsdorf's Notes, 246.

An indictment charging that the prisoner, by false pretenses, procured A B to indorse a forged check, which was of "no value", and that "upon the indorsement", the prisoner obtained seventy-five dollars, the money of A B, with intent to defraud him "of the same", is not a good indictment for the offense of procuring a person, by false pretenses, and with intent to defraud, to indorse a check: *Baker v. State*, 31 O. S. 314, III Longsdorf's Notes, 586.

An indictment, containing the averment that an order issued by the county auditor on the county treasurer, in favor of A, was presented to the treasurer by B, and that by reason of B's false pretense that the order was properly issued on a valid claim, and that he (B) was authorized to receive payment, the treasurer paid the order by delivering to B a check, is not a sufficient averment that B obtained the check by false pretenses: *Kennedy v. State*, 34 O. S. 310, III Longsdorf's Notes, 718.

D. DESCRIPTION OF PROPERTY.

For description of instruments in an indictment, see G. C., § 13586.

The description of the property in an indictment for false pretenses must be intelligible to ordinary minds or sufficiently particular to make it possible to identify the property with certainty: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1.

Where, in an indictment for obtaining goods by false pretenses, the only description of the property is "a certain lot of dry-goods", the description is insufficient: *Redmond v. State*, 35 O. S. 81, III Longsdorf's Notes, 758.

An indictment charged that A, by false pretenses and false representations, made to C & D, respecting certain wares of A, then and there sold to them by A, at a price of \$45, fraudulently obtained from C & D, "certain bank notes of the personal goods and chattels" of C & D, "of the value of thirty-seven dollars, which said sum was and is part of the sum of forty-five dollars then and there paid by said C & D, to A" for said wares. It was held that the indictment did not charge the offense of obtaining, by false pretenses, from another, "money", or "goods", or "merchandise", or "effects": *Schleisinger v. State*, 11 O. S. 669, II Longsdorf's Notes, 540.

Where a copy of promissory notes is inserted in the indictment for unlawfully offering such notes for sale knowing them to have been procured by false pretenses, it is not necessary to allege that the notes are of any value: *Umbenhauer v. State*, 4 O. C. C. 378, 2 O. C. D. 606 [motion to file petition

overruled, *Umbenhauer v. State*, 23 Bull. 176].

Where an indictment charges that by reason of false pretenses on the part of the defendant money was deposited in a bank, it will be held to have been *prima facie* a general deposit, the title to which passed to the bank: *State v. Perrin*, 9 O. N. P. (N. S.) 97, 19 O. D. (N.P.) 416.

E. FALSIFYING AVERMENTS.

Where the pretenses consisted of representations by the defendant as to the value of several stocks of goods, the amount of his indebtedness, and the amount he was worth, negative averments in the indictment merely denying the representations to be literally true, but which do not negative their substantial truth are bad: *Redmond v. State*, 35 O. S. 81, III Longsdorf's Notes, 758.

Where A induced another to buy real estate by reason of certain representations as to the quantity, ownership and freedom from incumbrance of said land, averments "that said real estate was incumbered by debts and liens, and that all of said real estate was not in the name of said A, and that he was not then the owner of said real estate", do not amount to substantial denials. Allegations that A "did owe and was indebted to divers persons to the amount of more than one thousand dollars" is indefinite, in that it does not name the persons to whom A is indebted and the approximate amounts to each, in order that he might intelligently prepare his defense: *State v. Trisler*, 49 O. S. 583, IV Longsdorf's Notes, 471.

Charging A with procuring the signature of B to a note by false pretenses, and attempting afterwards to sell the note knowing it was thus obtained, sufficiently avers knowledge of the falsity of the representations: *Umbenhauer v. State*, 4 O. C. C. 378, 2 O. C. D. 606 [motion to file petition overruled, *Umbenhauer v. State*, 23 Bull. 176].

F. INTENT TO DEFRAUD.

For sufficient allegation of intent to defraud, see G. C., § 13590.

An indictment for obtaining goods by false pretenses is sufficient if it allege that the goods were obtained by the defendant by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon and was induced thereby to part with the goods: *Norris v. State*, 25 O. S. 217.

An indictment for procuring a signature to a bond, note, etc., must allege that the signature was obtained not only by false pretenses but with intent to defraud, and must aver all the material facts with such

reasonable certainty as to advise the defendant what he may expect to meet at the trial: *Coblentz v. State*, 84 O. S. 235, III Longsdorf's Notes, 221.

IX. EVIDENCE.

A. OTHER FRAUDS.

On the trial of an indictment under G. C., § 13104, evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible, but as to transactions occurring subsequent to that on which the indictment is based evidence is not admissible: *Coblentz v. State*, 84 O. S. 235.

The decisions are uniform to the effect that where scienter is an element of the crime charged, previous offenses necessarily involving such guilty knowledge are admissible: *Tarbox v. State*, 38 O. S. 581, III Longsdorf's Notes, 995.

Conspiracy shortly after the time of the alleged crime to commit crimes of a like nature is competent: *Jackson v. State*, 38 O. S. 585, III Longsdorf's Notes, 995.

Similar fraudulent representations may be introduced in evidence to show the fraudulent intent of the defendant: *State v. Finney*, 7 Dec. Rep. 22, 1 Bull. 30.

B. VARIANCE.

For variance in general, see title Variance.

Where the indictment charged that A falsely represented that he had money on deposit in a bank, and that B was induced thereby to cash a draft for A, and the evidence discloses that the draft was cashed by B on A's assurance that he had "arranged for" its payment, the variance is fatal and a judgment of conviction will be reversed: *Semler v. State*, 6 O. C. C. (N.S.) 393, 17 O. C. D. 581.

An averment in an indictment, that the prisoner by false pretenses obtained money from A B, is not sustained by proof that the prisoner by false pretenses procured A B to indorse a forged check, and then sold the check for money, and that A B afterward paid the amount of the check to the purchaser: *Baker v. State*, 31 O. S. 314, III Longsdorf's Notes, 586.

The charge in an indictment against officers of a bank that they have been guilty of false pretenses, in that with intent to cheat and defraud they induced and procured persons to deposit in the bank by falsely representing that "we never speculate in stocks; we loan money on real estate; it is solid rock security; we require income producing property," does not bear the meaning

ascribed by *innuendo*, that the bank did not invest its money in stocks and loaned its money only on security of income producing real estate, nor does it follow from such statement that the bank loaned all its money on real estate, nor does it appear whether the statement applied to the bank or to the accused individually: *State v. Gibbs*, 7 O. N. P. (N.S.) 371, 18 O. D. (N.P.) 694 [see *State v. Gibbs*, 82 O. S. 457 and *State v. Gibbs*, 82 O. S. 462].

X. VERDICT.

G. C., § 13691, provides that the jury on conviction shall ascertain and declare in their verdict the value of the property obtained by false pretenses. In a prosecution for procuring the signature of a person to a promissory note, it is not necessary that the value of the note be found by the verdict to the jury, the amount of the note, and not its value, being the basis upon which the grade of the offense, and the punishment on conviction are to be determined: *Ellars v. State*, 25 O. S. 385, III Longsdorf's Notes, 246.

FALSE PROOF OF LOSS.

See INSURANCE.

FALSE REGISTRATION.

See ELECTIONS, POLITICAL.

FALSE REPORTS.

See FRAUD AND DECEIT.

FALSE REPRESENTATIONS.

For false representations, see FRAUD AND DECEIT; MISREPRESENTATION.

FALSE RETURN.

See OFFICE; SUMMONS; ATTACHMENT; TAXATION.

FALSE SWEARING.

See PERJURY.

FALSE TESTIMONY.

See EVIDENCE; PERJURY; WITNESSES.

FALSE TOKEN.

See FALSE PRETENSES.

FALSE WARRANTY.

See FRAUD AND DECEIT; DEEDS; SALES.

FALSE WEIGHTS AND MEASURES.

See WEIGHTS AND MEASURES.

FALSE WRITINGS.

See FORGERY; CONTRACTS; NEGOTIABLE INSTRUMENTS; COUNTERFEITING.

FALSIFYING ACCOUNTS.

See ACCOUNT.

FALSIFYING RECORDS.

See RECORDS.

FALSUS IN UNO, FALSUS IN OMNIBUS.

See EVIDENCE; WITNESSES.

FAMILIARITY.

For effect of evidence of familiarity, see DIVORCE, ALIMONY AND CUSTODY OF CHILDREN; BREACH OF PROMISE; SEDUCTION.

FAMILY.

For compensation for services rendered by members of the same family, see QUASI CONTRACTS; SERVICES.

FAMILY ARRANGEMENTS.

For family arrangements, see also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

For family arrangements partitioning real estate, see PARTITION.

A family arrangement for the benefit of an infant's estate will be supported, though it alters the distribution on his death: *White v. Turpin*, 16 O. S. 270, II Longsdorf's Notes, 773.

Whether family arrangements are for the benefit of an infant will be determined by the effect on the estate of the living infant, not upon the distribution of his estate when dead: *White v. Turpin*, 16 O. S. 270, II Longsdorf's Notes, 773.

That partners are father and sons, and the partnership a family arrangement, will be considered in the absence of articles as of weight in determining intention of acts, as whether the father put in real estate as assets, or only its use: *Goepper v. Kinsinger*, 39 O. S. 429, III Longsdorf's Notes, 1040.

Where a mother, in order to make an equitable division, makes an absolute deed to two of her children under an agreement in which all join, and on a parol trust for all, but the deed is imperfectly executed, it may be perfected and enforced according to the agreement: *Uebbing v. Koester*, 14 O. C. C. (N.S.) 553, 33 O. C. D. 140.

Under a mortgage conditioned to support the mortgagee, silent as to place of performance, he is not compelled to receive the support at the mortgagor's home, but may select any reasonable place or places to live: *Tuttle v. Burgett*, 53 O. S. 498, IV Longsdorf's Notes, 611.

If the mortgagor knowing such selection fails to furnish the support and declares he will not, nor pay others who furnish it, the condition is broken without demand and foreclosure by others lies for the value of support furnished by them: *Tuttle v. Burgett*, 53 O. S. 498, IV Longsdorf's Notes, 611. See also CONTRACTS.

Receipting without a collection for a fund by a guardian to enable the ward's mother as administratrix, in pursuance of a family arrangement, to close up her administration, which arrangement the ward perfected on coming of age by conveyance to his mother of real estate, but subsequently sought to charge the guardian's bond, was held not to preclude the guardian from showing that he never received the amount, and it not having been lost by his act he was not chargeable with it: *In re Estate of Mehner*, Goebel 212. See also GUARDIAN AND WARD.

A contract for the settlement of an estate made between all the beneficiaries and executors of a solvent estate, and not inconsistent with the will, whereby the claim of a legatee, who is also a large creditor, is to be adjusted in a particular way, he being fully aware of the condition of the estate, is binding, and he can not afterwards object to it. The law favors settlements of difficulties by heirs in settling estates where the object is to adjust claims: *In re Estate of Worthington*, 5 O. N. P. 63, 5 O. D. (N.P.) 524. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

Where a will requires the executors to hold the property in trust for all the children, including themselves, and to divide it whenever a majority should consent, and after all debts have been paid, the children by contract, though without deeds, set off

to one of the trustees his share in severalty, and the residue to the other children jointly, each agreeing to execute any necessary papers, this contract must be deemed as distributing the property and terminating the trust: *Culver v. Culver*, 58 O. S. 172, IV Longsdorf's Notes, 735. See also TRUSTS.

Where the evidence is conflicting, whether S had agreed to give his sister T a home for life if she would act as his housekeeper, or only so long as they could agree, S may show that T was of a disagreeable temper, and that none of her relatives could live with her, and that he knew these facts as tending to support the latter contract: *Tompkins v. Starr*, 41 O. S. 305, IV Longsdorf's Notes, 63. See also EVIDENCE.

FAMILY RECORD.

See EVIDENCE.

FAMILY RELICS.

For injunction against sale of heirlooms, see INJUNCTION.

FAMILY RESIDENCE.

See DOMICILE.

For the right of the widow to occupy the family residence, see EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

FAMILY STANDING.

The standing of the plaintiff's family may be proved by him when suing for the seduction of his daughter, to enhance damages: *Keplinger v. Sherrick*, W. 103, I Longsdorf's Notes, 8. See also SERVICES.

FARES.

See CARRIERS; RAILROADS.

FARM LEASES.

For farm leases, see LANDLORD AND TENANT.

FARM PRODUCTS.

See EMBLEMENTS.

FARMING ON SHARES.

See LANDLORD AND TENANT.

FATHER.

See PARENT AND CHILD.

FAULT.

See NEGLIGENCE.

FAULTY PLEADING.

See PLEADINGS.

FAVORABLE ERROR.

See ERROR.

FAVORING CONSTITUTIONALITY.

See CONSTITUTIONAL LAW; STATUTES.

FAVORING INSURED.

See INSURANCE.

FAVORING GRANTEE.

See DEEDS; VENDOR AND PURCHASER.

FAVORING PROSPECTIVE OPERATION.

See STATUTES.

FAVORING VALIDITY.

See CONTRACTS; STATUTES.

FEDERAL AGENCIES.

For taxation of federal agencies, see TAXATION.

FEDERAL CONSTITUTION.

See CONSTITUTIONAL LAW.

FEDERAL COURTS.

See COURTS.

FEDERAL EMPLOYERS'

LIABILITY ACT.

See MASTER AND SERVANT; NEGLIGENCE.

FEDERAL JUDGMENT.

See JUDGMENT; EXECUTION.

FEDERAL PRACTICE.

Scope Note.—Includes equity rules; court of appeals; and the effect of dismissal after removal to the U. S. courts. Excludes removal to the U. S. courts; bankruptcy proceedings; federal questions.

Cross References.

For bankruptcy proceedings, see **BANKRUPTCY**.

For removal of causes from state to the U. S. courts, see **REMOVAL OF CAUSES**.

For federal questions, see **CONSTITUTIONAL LAW**; **FEDERAL QUESTION**.

ANALYTICAL OUTLINE.

- I. Equity.
- II. Court of Appeals.
- III. Effect of Dismissal After Removal to the U. S. Courts.

I. EQUITY.

Equity rule 94 of the United States supreme court, providing that stockholders who institute actions in the federal courts against corporations shall state the time when they secured their stock, so as to disclose whether or not the stock was procured before or after the acts complained of, applies only to suits to enforce a right of the corporation, and not to suits to enforce individual rights of the stockholder: *Manington v. Railway*, 9 O. N. P. (N.S.) 641, 20 O. D. (N. P.) 468.

After a directed verdict, overruling a motion to withdraw a juror and for leave to file a bill on the equity side of the court is within the discretion of the trial court and is not reviewable on error: *Huntington v. Railway*, 8 O. L. R. 531 (C. C. A.), 16 O. F. D. 546.

II. COURT OF APPEALS.

Under rule 11 of the court of appeals it is incumbent on counsel, when evidence is rejected, to make the record show that he stated to the court what answer he expected would be given by the witness: *Publishing Co. v. Asphalt Co.*, 8 O. L. R. 582 (C. C. A.).

The discretion exercised by the trial judge in requiring one of the parties to go to trial in the absence of one of its attorneys is not reviewable on a writ of error: *Publishing Co. v. Asphalt Co.*, 8 O. L. R. 582 (C. C. A.).

In the court of appeals only errors in law can be considered, and in order to raise the question of the correctness of rulings an exception must be taken thereto and must appear in the bill of exceptions: *Publishing Co. v. Asphalt Co.*, 8 O. L. R. 582 (C. C. A.).

The fact that the verdict was against the weight of the evidence can not be assigned as error in the appellate courts of the United States: *Publishing Co. v. Asphalt Co.*, 8 O. L. R. 582 (C. C. A.).

III. EFFECT OF DISMISSAL AFTER REMOVAL TO THE UNITED STATES COURTS.

Where a suit commenced in a state court has been removed on the motion of the defendant to a United States court having concurrent jurisdiction of the cause of action, and has by such court, on application of plaintiff, been dismissed without prejudice to plaintiff's right to bring a new action, there is no merger of the cause of action, and a new suit may be brought thereon within proper time in any court of competent jurisdiction as though no previous suit had been brought: *Railway v. Larwill*, 83 O. S. 108 [overruling *Railway v. Fulton*, 59 O. S. 575, IV Longsdorf's Notes, 771]. See also **REMOVAL OF CAUSES**.

Upon the filing in a state court of the requisite petition and bond for the removal of the suit to a federal court, the state court is divested of jurisdiction; but a party who procures the withdrawal of the petition and bond, by the party who filed it, before any action in the federal court, and then dismisses his action in the state court as to the party who filed the petition for removal, and by agreement with the remaining parties prosecutes the suit in the state court, can not be heard, after judgment against him, to assert that the jurisdiction of the state court has not been restored: *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043 [affirming *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267; and affirmed on question of jurisdiction in *Anderson v. Realty Co.*, 222 U. S. 164].

FEDERAL QUESTION.

The manner in which a state shall regulate its internal tax system is not a federal question, and so long as shares in a national

bank are not taxed at a higher rate than other moneyed capital, the federal courts can not interfere, even though they think the state system unjust and oppressive. So long as the injustice and oppression rests equally on national bank shares and other moneyed capital, the remedy must rest with the state: *Hull v. Alexander*, 69 O. S. 75, IV Longsdorf's Notes, 953.

The question as to whether debts are required by the federal statute as to national banks, to be deducted from the valuation of shares in a national bank for taxation is a federal question: *Hull v. Alexander*, 69 O. S. 75, IV Longsdorf's Notes, 953. See also TAXATION.

A prayer for the cancellation of certain writings, alleged to have been fraudulently obtained by the receiver of a railroad company appointed by a federal court, evidential in their nature and material to the issue in hand, does not raise a federal question: *Monnett v. Railway Co.*, 4 O. C. C. (N.S.) 369, 16 O. C. D. 469.

A claim against a railroad company of title to property held by its receiver appointed by a federal court does not raise a federal question; and the controversy would not be separable as to the defendant receiver even should it be assumed that a federal question was involved: *Monnett v. Railway Co.*, 4 O. C. C. (N.S.) 369, 16 O. C. D. 469.

FEE.

See FEES; FEE SIMPLE; FEE TAIL.

FEE (INTEREST IN REAL ESTATE).

For a discussion of the subject of fees in real estate, see FEE SIMPLE; FEE TAIL; REAL PROPERTY.

For the conveyance of a fee, see DEEDS; DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES.

For the ownership of a fee in highways by an abutting owner, see ROADS; STREETS.

FEE BILL.

See FEES; COSTS.

FEEBLE MINDED YOUTH.

For questions concerning feeble minded youth, see INSANE, IMBECILES AND IDIOTS; INSTITUTION FOR FEEBLE MINDED; CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

FEE COMMISSION.

The finding of the fee commission as to the amount of fees due to the auditor and treasurer of Hamilton county is not binding on said auditor and treasurer, but they are entitled to fees according to the tax collections of December 20, 1906, their salaries beginning January 1, 1907: *State v. Richardson*, 7 O. L. R. 269. See also COUNTIES AND COUNTY COMMISSIONERS; OFFICE.

FEE FUND.

See OFFICE.

FEELINGS.

A person is not entitled to recover damages for injuries to his feelings and for his disappointment or disgrace in the community as a result of having been induced to buy worthless mining stock by false representations, made knowingly or recklessly, that the property was unencumbered: *Cable v. Boultus*, 21 O. C. C. 53, 11 O. C. D. 526. See also DAMAGES; NEGLIGENCE.

FEE OF STREETS.

See STREETS; DEDICATION; EMINENT DOMAIN.

FEES (COMPENSATION).

Scope Note—Includes general discussion of nature of fees; constitutional and statutory provisions; right to demand prepayment of fees; fees of specific officers. Excludes detailed discussion of the fees of specific officers; license fees and attorney's fees.

Cross References.

For a detailed discussion of fees, see OFFICE.

For fees as compensation, see OFFICE.

For fees in criminal cases, see SHERIFF.

For fees of officers, see OFFICE and cross references thereunder.

For license fees, see LICENSES FROM STATE; MUNICIPAL CORPORATIONS.

For the question of costs, see COSTS.

For attorney fees, see ATTORNEY AND CLIENT.

ANALYTICAL OUTLINE.

- I. Nature, 7759.
- II. Constitutional and Statutory Provisions, 7759
 - A. Necessity, 7759.
 - B. Construction, 7759.
- III. Prepayment of Fees, 7761.
- IV. Fees of Specific Officers, 7761.
 - A. Sheriff, 7761.
 - B. Clerk of court, 7761.
 - C. County recorder, 7762.
 - D. Probate judge, 7762.
 - E. Mayor, 7763.

I. NATURE.

Fees, costs and the like collected by a county officer are public funds within the meaning of G. C., § 2977: *State v. Pierson*, 83 O. S. 241.

The system of compensation by fees has little to commend it as far as the public is concerned and is demoralizing to the officer: *Tuall v. Commissioners*, 3 O. N. P. 112, 4 O. D. (N.P.) 318. See also OFFICE.

The word "fees" in a trust instrument will not be regarded as referring in any way to an agreement as to fees, entered into between the *cestui que trust* and her attorney prior to the creation of the trust and without the knowledge of the grantor, but in such a case the attorney for the *cestui que trust* will be allowed to recover as fees out of the trust funds only the fair value of the services rendered: *Dolle v. Roberts*, 14 O. C. C. (N. S.) 337. See also ATTORNEY AND CLIENT.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS.

A. NECESSITY.

An officer whose fees are regulated by statute can charge fees only for those services for which compensation is fixed by law. Fees are not allowed by implication and there are no constructive fees: *State v. Lewis*, 22 O. C. C. 618, 12 O. C. D. 597 [affirmed, *Lewis v. State*, 57 O. S. 189, IV Longsdorf's Notes, 711]. See also OFFICE.

An office bears no fees except such as are prescribed by statute or ordinance; if none, he can get none, though the services are at the request of a superior: *Halpin v. Cincinnati*, 3 Dec. Rep. 58, 2 Gaz. 386.

B. CONSTRUCTION.

A city ordinance that the mayor shall receive a dollar for every license, and in another section fixing his salary at \$2,000 and forbidding all perquisites and fees, means

that the license money is paid him for the city and must be turned into its treasury: *Hatch v. Cincinnati*, 17 O. S. 48, II Longsdorf's Notes, 812.

That a statute limiting the compensation of certain officers may leave a surplus of fees to the general county fund does not make the act invalid as one for general revenue. The fees charged need not inure to the personal benefit of the officers, for they are but agents of the state, and it is immaterial to those receiving the services where the payments go. The officer rendering the service may be required to collect the fees: *State, ex rel., v. Judges*, 21 O. S. 1, III Longsdorf's Notes, 1.

The constitution, Art. II, § 20, in protecting salaries from changes during a term did not forbid the legislature from reducing fees or percentages. Salary means a periodical payment: *State, ex rel., v. Phillips*, 12 O. S. 617, II Longsdorf's Notes, 586.

If the fees of an officer are regulated by statute he can not charge for other services. No fees are allowed by implication. Accordingly, if a statute abolish the office of a township treasurer in Hamilton county, or devolve its duties on the county treasurer without mentioning the compensation, he can not charge the fees allowed to township treasurers: *Debolt v. Trustees*, 7 O. S. 237, II Longsdorf's Notes, 295.

G. C., § 1746, compensating justices "for each writing or record," 15 cents per 100 words, construed *noscitur a sociis*, does not apply to making abstracts of election returns, for they act as a board and not as justices. Accordingly, as the statute has not provided for compensation, the county commissioners have no power to allow any: *State v. Commissioners*, 10 Dec. Rep. 467, 21 Bull. 228. See also OFFICE.

The year referred to in G. C., §§ 2977, *et seq.*, to fix the salaries of certain county officers, is the calendar year beginning January first, and the end of each quarter, referred to in § 6 of that act (now G. C., § 2983),

requiring the payment into the county treasury of all fees, etc., collected during said quarter, means the end of each quarter of three months, after January first of each year: *State v. Van Gunten*, 84 O. S. 172.

III. PREPAYMENT OF FEES.

The matter of the taxation of costs in civil actions, of requiring payment of, or security for costs, is under legislative control; and while the legislature has power to provide for prepayment of fees for issuing summons, it has not done so, and therefore such prepayment can not rightfully be demanded: *State v. Coates*, 8 O. N. P. 682, 11 O. D. (N.P.) 670.

The jural relation between a ministerial officer and one who, by virtue of circumstances, is entitled to his official services, is a relation that arises *ex lege*, and not *ex contractu*, and it therefore excludes the right of the officer to demand prepayment of fees, unless such right is conferred by statute: *State v. Coates*, 8 O. N. P. 682, 11 O. D. (N.P.) 670. See also OFFICE.

The sheriff can not refuse to serve a writ on the ground that his fees have not been paid to him in advance of the service of such writ, and had not been secured to him in any way: *Whitley v. Long*, 9 Dec. Rep. 731, 17 Bull. 86.

A constable has no right to demand his fees in advance for summoning a jury: *Moriarity v. Devine*, 1 O. C. C. 82, 1 O. C. D. 49. See also COURTS.

IV. FEES OF SPECIFIC OFFICERS.

A. SHERIFF.

An apportionment of current fees between the old and new sheriff may be made by the common pleas, but this will not disturb past settlements, and, accordingly, no amount can be withheld to equalize them: *Ruffin v. Avery*, W. 258, 1 Longsdorf's Notes, 22. See also SHERIFF.

B. CLERK OF COURT.

In counties where the clerk of courts is compensated by fees, payable by the person for whom he renders official services the rendition of services makes the recipient his debtor; but this is not so in Cuyahoga county, where, under the local salary law, the earnings of all the county officers are turned into the public treasury, to the credit of a fee fund, from which the several officers are paid a fixed annual salary: *State v. Coates*, 8 O. N. P. 682, 11 O. D. (N.P.) 670.

Each figure, under G. C., § 2900, relating to clerk's fees, should be counted as a word.

Thus the figure "4" should be counted as though spelled out and the figures "1894" should be counted as four words: *Corzeliuss v. Buckholts*, 11 O. D. (N.P.) 798. See also CLERK OF COURT.

A county officer who pays into the treasury of the county the fees of his office in excess of the salary affixed thereto by an unconstitutional act, may, after the act is adjudged to be unconstitutional, receive and retain fees accruing before, but not paid until after, such adjudication: *State, ex rel., v. Vail*, 84 O. S. 399.

A county clerk, having entered into a contract to release a guardian and his wards from payment of costs in certain suits, should such parties be unsuccessful, and having permitted the litigants to prosecute the suit to final determination without renouncing the contract, can not recover his costs therein after such suit has been finally determined adversely to the guardian and the estate has been settled with the wards, for he has no right to be placed in a better condition than that for which he contracted: *Stocker v. Henne*, 8 O. N. P. 514, 11 O. D. (N.P.) 733.

A contract with a clerk of courts, who is a ministerial officer, which encourages litigation by releasing costs, etc., is open to abuse, as it affords him, by reason of his position, many ways to aid and encourage unjust and improper verdicts and interferes with the fair and impartial administration of justice. Such contracts, are, therefore, inimical to public policy and void: *Stocker v. Henne*, 8 O. N. P. 514, 11 O. D. (N.P.) 733. See also CONTRACTS.

C. COUNTY RECORDER.

For filing a chattel mortgage made to a partnership in the name of A & B, the recorder may charge for each name capable of being indexed. The right to charge for searching a paper only means in looking for or showing it on request, and not for examining a paper offered for filing: *State, ex rel., v. Anderson*, 9 Dec. Rep. 691, 16 Bull. 356. See also CHATTEL MORTGAGES.

D. PROBATE JUDGE.

The certificate of a medical witness and the findings in cases of inquests held by the probate judge are part of the record in the proceedings, and he is entitled under G. C., § 1601, to receive 8 cents per one hundred words for copies of the same, but is not entitled to be paid for the certificates in addition: *State v. Adams*, 8 O. C. C. (N.S.) 513, 18 O. C. D. 643.

Under G. C., § 1601, probate judges are entitled to receive 6 cents for each one hun-

dred words of orders entered on the journal: *State v. Adams*, 8 O. C. C. (N.S.) 513, 18 O. C. D. 643. See also **COURTS**.

Fees can not be legally allowed to a probate judge for services rendered by him in connection with examinations of the county treasury under his direction in the absence of specific statutory provision: *Millard v. Commissioners*, 5 O. C. C. (N.S.) 145, 16 O. C. D. 445.

E. MAYOR.

Mayors are not authorized to collect fees from defendants in cases of conviction for the violation of ordinances, unless the council

shall have first fixed such fees by ordinance as prescribed by G. C., § 4556: *Bellefontaine v. Haviland*, 3 O. N. P. (N.S.) 99, 15 O. D. (N.P.) 482.

G. C., § 4213, requiring official fees to be paid into the city treasury does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities was questioned but not decided: *Portsmouth v. Milstead*, 8 O. C. C. (N.S.) 114, 18 O. C. D. 384 [affirmed, without opinion, *Portsmouth v. Milstead*, 76 O. S. 597. See also **MUNICIPAL CORPORATIONS**.

FEE SIMPLE.

Scope Note.—Includes definition and nature of the estate; words which create a fee simple at law and in equity as used in both deeds and wills; conditional, base or qualified fee; and permanent leaseholds. Excludes title acquired by dedication, eminent domain, and adverse possession; estate in fee tail and life estates.

Cross References.

- For a fee simple acquired by adverse possession, see **LIMITATIONS, STATUTE OF**.
- For fee taken by eminent domain, see **EMINENT DOMAIN**.
- For estates tail, see **FEE TAIL**.
- For life estates, see **LIFE ESTATES**.
- For estates for years, see **LANDLORD AND TENANT**.
- For acquisition of title, see **DEEDS; DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES**.
- For other topics, see **REAL PROPERTY** and cross references thereunder.
- For the estate conveyed by dedication, see **DEDICATION**.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 7765.
- II. Words which Create Fee Simple, 7767.
 - A. Deed, 7767.
 1. At law, 7767.
 - a. Natural person as grantee, 7767.
 - b. Corporation aggregate as grantee, 7767.
 - c. Words of perpetuity not in granting clause, 7768.
 - d. Statement of purpose of conveyance, 7768.
 - e. Words cutting down fee, 7769.
 2. In equity, 7769.
 - B. Will, 7771.
 1. At law, 7771.
 - a. At common law, 7771.
 - b. Under modern statute, 7773.
 - c. Words cutting down fee, 7778.
 - d. Effect of grant of power, 7779.
 2. In equity, 7786.
 - C. Rule in Shelley's case, 7787.
 1. Original rule, 7787.
 2. Statutory rule, 7789.
 - D. Dedication, 7790.
 - E. Eminent domain, 7790.
- III. Conditional, Base, or Qualified Fee, 7790.
- IV. Permanent Leaseholds, 7792.

I. DEFINITION AND NATURE.

An estate in fee simple is one which may endure forever; one on which there is no limitation prescribed for the duration of the grant: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

A fee simple is said to be property in its largest degree. It is the largest estate possible, without any restriction or limitation as to its disposition or the duration of the time of its holding and without any incumbrance as to lease or right of way: *Turnpike Co. v. Cincinnati*, 6 O. N. P. 233, 9 O. D. (N.P.) 259.

A municipal corporation may appropriate for a slope to afford lateral support for a street fill. The owner still retains his dominion, and can use the property for any purpose, subject to the easement for support. If the slope has been made without appropriation, the owner is entitled to compensation, but this is not the value in fee simple, if he still retain substantial rights: *Dodson v. Cincinnati*, 34 O. S. 276, III Longsdorf's Notes, 714 [affirming *Cincinnati v. Dodson*, 7 Dec. Rep. 504, 3 Bull. 560].

It is generally said that a municipal corporation holds the fee of the streets therein in trust for the public for street purposes, at least if such streets have been acquired by statutory dedication: *Railway v. Cummins*, 14 O. S. 523, II Longsdorf's Notes, 682; *Columbus v. Agler*, 44 O. S. 485, IV Longsdorf's Notes, 225; *Callen v. Electric Light Co.*, 66 O. S. 166, IV Longsdorf's Notes, 901; *Traction Co. v. Parish*, 67 O. S. 181, IV Longsdorf's Notes, 927; *Butler v. Cincinnati*, 2 O. C. C. (N.S.) 376, 15 O. C. D. 772; *Weneel v. Railway*, 14 O. D. (N.P.) 126; *Reese v. Cleveland*, 5 O. N. P. (N.S.) 193, 18 O. D. (N.P.) 12. See also *Hoyt v. Gleason*, 65 Fed. 685, 7 O. F. D. 239.

It is said in *Reese v. Cleveland*, 5 O. N. P. (N.S.) 193, 18 O. D. (N.P.) 12, that if a municipal corporation extends its territory so as to include county roads, it acquires an easement on such roads; but that if it acquires land for street purposes by dedication or by appropriation, it acquires a fee therein, in trust for the public.

Streets and highways belong to the state and are under its control; but the state has seen fit to place the streets of a municipal corporation under the control of the municipal authorities thereof, as agents of the state, in preserving the public rights in such streets; and the municipal corporation holds the fee, subject to the right of the state to direct the method wherein such trust shall be administered, and subject to the

duty of keeping the streets in repair and free from nuisances: *Raynolds v. Cleveland*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215 [affirmed, without opinion, *Cleveland v. Raynolds*, 76 O. S. 619; for decision of the common pleas court, see *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125].

It has been said that if a municipal corporation annexes territory and thus takes into the limits of the municipal corporation county roads which thereby become city streets, the municipal corporation thereby acquires the fee therein: *Rapid Transit Co. v. Railway*, 7 O. C. C. (N.S.) 199, 18 O. C. D. 36.

On the other hand, it is said that a municipal corporation has full control of the use and occupation of the streets; but the abutting property owners are vested with the fee of the land extending from the center of the earth, upward between the lines of their lots produced to the center of the street: *Henry v. Cincinnati*, 1 O. C. C. (N.S.) 289, 15 O. C. D. 178.

In *Manufacturing Co. v. Beatty*, 65 O. S. 264, IV Longsdorf's Notes, 885, it was held that where a street or alley is vacated by a municipal corporation, the vacated portion reverts to the abutting lot owners, subject, however, to such rights as other property owners on the street or alley may have therein, as a necessary means of access to their property.

That a municipal corporation does not acquire a fee but merely an easement for street purposes, see *Newton v. Railway*, 115 Fed. 781, 53 C. C. A. 599, 14 O. F. D. 156.

Under a statute in 1872, similar to G. C., § 3714, a city appropriated land for park purposes. It was held they did not take the fee, and upon lease of such land for wharf purposes the reversioners are entitled to additional compensation: *White v. Cleveland*, 21 O. D. (N.P.) 311, 56 Bull. 181.

The term "fee" has been used to indicate the ownership of the ground itself as distinguished from an easement therein: *Turnpike Co. v. Cincinnati*, 6 O. N. P. 233, 9 O. D. (N.P.) 259.

Where there was a devise of a certain farm to testator's two sons, upon condition "that they shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son Charles, arrives at full age, except to one another, nor shall they mortgage or incumber the same," was held to give the devisees a vested estate in fee simple. The restraint attempted to be imposed was against public policy: *Anderson v. Cary*, 36 O. S. 506, III Longsdorf's Notes, 873.

II. WORDS WHICH CREATE FEE SIMPLE.

A. DEED.

1. At Law.

(a) Natural Person as Grantee.

The word "heirs" is indispensable to the creation by deed of an estate tail or in fee simple; though it is otherwise in respect to a will: *Ford v. Johnson*, 41 O. S. 366, IV Longsdorf's Notes, 85.

A deed containing apt words to convey an estate in fee, must be held to have that effect, in the absence of other words showing clearly and unequivocally a different intention: *Edwards v. McClurg*, 39 O. S. 41, III Longsdorf's Notes, 1006.

A deed to A and his wife jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns, gives the survivor the entire estate in fee and not the half in common with the deceased's heirs: *Lewis v. Baldwin*, 11 O. 352, I Longsdorf's Notes, 565.

The words "forever" or "to one and his assigns forever" add no force to a grant of an estate in lands: *Wollam v. Van Vleck*, 12 O. C. C. (N.S.) 517, 20 O. C. D. 743.

The words "right, title, claim, interest, or property" in a conveyance are words of a most comprehensive meaning and will include legal and equitable interests and a naked legal title: *Barton v. Morris*, 15 O. 408, I Longsdorf's Notes, 717.

A deed granting a life estate to a daughter of a grantor and her husband with a covenant that the premises after the death of the life tenants "shall vest in and become the legal property of the heirs" of the grantor's son, in the absence of words of perpetuity is a conveyance of a fee simple estate in the remainder to the children of the grantor; and the children of the son of the grantor; if any interest in the property was conveyed to them, took a life estate only, and are not entitled to an injunction against operations under an oil lease executed by the daughter of the grantor and her husband: *Wollam v. Van Vleck*, 12 O. C. C. (N.S.) 517, 20 O. C. D. 743.

(b) Corporation Aggregate as Grantee.

The word successors or other words of perpetuity in a grant to a corporation aggregate are not necessary to a perpetuity of right, or a fee simple: *Railway v. Bosworth*, 46 O. S. 81, IV Longsdorf's Notes, 313 [af-

firming *Bosworth v. Railway*, 1 O. C. C. 69, 1 O. C. D. 42].

(c) Words of Perpetuity not in Granting Clause.

A conveyance to J "and his children after him" with *habendum* to J "and his heirs forever" is a conveyance to J in fee simple, the granting clause and the *habendum* not being irreconcilably repugnant: *Martin v. Jones*, 62 O. S. 519, IV Longsdorf's Notes, 840.

It was questioned but not decided whether words of perpetuity in the warranty clauses, but not in the granting clause, will extend the latter to a fee: *Williams v. Presbyterian Society*, 1 O. S. 478, I Longsdorf's Notes, 999.

Words of perpetuity are necessary to a fee. Thus, a deed to "said C and his lawful issue" *habendum* "to the only proper use of said C and his lawful issue forever." It was held that C took a life estate, and the estate then reverted to the grantor: *Ford v. Johnson*, 41 O. S. 366, IV Longsdorf's Notes, 65.

Though words of perpetuity are necessary to convey a fee, yet if the language, recitals, and condition of a mortgage show an intention to pledge the entire estate of the mortgagor, and the instrument can not be otherwise carried into effect, a fee will pass without formal words of perpetuity: *Brown v. Bank*, 44 O. S. 269, IV Longsdorf's Notes, 209.

A deed upon an adequate valuable consideration to grantee, "to her and her children and assigns forever," with warranty "to her and her children, heirs and assigns," conveys an estate in common in fee simple to grantee and her children living at the time of the conveyance: *Sheets v. Mouat*, 5 O. N. P. (N.S.) 22, 18 O. D. (N.P.) 121.

(d) Statement of Purpose of Conveyance.

Where a church purchased land by a warranty deed which conveys to it "for the use of said society" its title is a fee simple and it can be authorized to sell the land: *Hedges v. Taylor*, 33 Bull. 5.

A deed containing recitals of a purpose for which it is made, but without special purpose or words of condition or trust in either the granting or *habendum* clauses, and no words of re-entry or forfeiture, conveys a title in fee simple: *Gamble v. M. E. Church*, 11 O. D. (N.P.) 815 [affirmed, *Church v. Gamble*, 4 O. C. C. (N.S.) 45, 16 O. C. D. 295, and affirmed, without opinion, *Church v. Gamble*, 74 O. S. 433].

(e) *Words Cutting Down Fee.*

Operative words of conveyance are required either to engraft a reservation of a fee in reversion upon a grant of a fee simple, or to convey a remainder in fee, in such wise as to reduce a fee simple granted to an estate for life or anything less than a fee simple: *Lee v. Scott*, 5 O. C. C. (N.S.) 369, 16 O. C. D. 799.

Where by deed an estate in fee simple is granted, the same can not be reduced to a life estate by another instrument executed concurrently with such deed, purporting to reserve a fee to the grantor in the deed or to convey a fee to another to vest upon the death of the grantor in the deed, unless such other instrument shall contain appropriate operative words of conveyance of such remainder or reversion: *Lee v. Scott*, 5 O. C. C. (N.S.) 369, 16 O. C. D. 799.

2. *In Equity.*

A deed to persons and their successors as trustees of an unincorporated society conveyed only a life estate until the statute invested the trustees with a larger estate, and such statute may constitutionally be retroactive: *Morgan v. Leslie*, W. 144, 1 Longsdorf's Notes, 14.

A conveyance to trustees and their successors is said to be void as to the successors and to pass a life estate to the trustees: *Miles v. Fisher*, 10 O. 1, 1 Longsdorf's Notes, 481.

A grant to trustees without words of perpetuity, but on trusts of perpetual duration, will probably convey a fee: *Williams v. Society*, 1 O. S. 478, 1 Longsdorf's Notes, 999 [doubting *Miles v. Fisher*, 10 O. 1, 1 Longsdorf's Notes, 481].

Wherever the legal title goes on the trustee's death, it remains charged with the trust. If a grant is with general warranty with words of perpetuity, estoppel will give a perpetual estate to the *cestui que trust*: *Williams v. Society*, 1 O. S. 478, 1 Longsdorf's Notes, 999.

A trust deed to use of *cestui que trust* for life, with power of appointment by deed or will, and in default of appointment to use of his heirs forever, the net income in all events to go to *cestui que trust*, with power to collect and without any discretionary control in the trustee, conveys to the *cestui que trust* an equitable estate which, under the rule in Shelley's case, is an equitable fee subject to power of appointment, which is practically merged in the power of alienation: *Bates v. Coal Co.*, 4 O. N. P. (N. S.) 265, 15 O. D. (N.P.) 533, 1 Hosea 225 [affirmed, without opinion, *Coal Co. v. Bates*, 74 O. S. 517].

A trust deed in the nature of a testamentary disposition is to be construed like a will according to intention. M, in order to provide for his son S, and for the six minor children of S, conveyed land to G in trust, to pay the rents to S, and to convey one sixth to each child on coming of age, and if any one died, his share to vest in the "other heirs" of S. S married again and had four more children. It was held that "other heirs" means other children, and on death of one of the six the conveyance by the trustee is to be to the others, including the last four, and children of a deceased child take the parent's share: *Hoagland v. Marsh*, 4 O. C. C. 31, 2 O. C. D. 402.

By a well established general rule, the use of the word "heirs" or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee simple estate; but this is not an inflexible rule admitting of no exceptions or qualifications: *Brown v. Bank*, 44 O. S. 269, IV Longsdorf's Notes, 209.

Where the language employed in, and the recitals and conditions of a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument can not otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" or other formal word of perpetuity is not employed: *Brown v. Bank*, 44 O. S. 269, IV Longsdorf's Notes, 209.

Where a mortgage on Ohio lands was made in Indiana, where the words "mortgage and warrants" will pass a fee without words of succession or perpetuity, and provided that on default the notes are to be collected by foreclosure, such mortgage will authorize a sale in fee on foreclosure here: *Brown v. Bank*, 44 O. S. 269, IV Longsdorf's Notes, 209.

Where a husband mortgaged land, part of which was his wife's by apt words of perpetuity, and she joined by a separate clause in which she "forever quitclaim unto the said grantee all my right by way of dower or otherwise," she thereby conveys a fee: *Stern v. Pratt*, 24 Bull. 346.

A mortgage without the word "heirs" was made to an administrator, "his successors and assigns forever," and was in renewal of a former mortgage in fee and conveyed all the right, title and interest of the mortgagor. It was held that it conveyed a fee, and not merely a life estate: *Stambach v. Fox*, 16 O. C. C. 427, 8 O. C. D. 625.

The word "heirs" is necessary to convey a fee except in conveyances in trust. A deed to A and B, executors of C, their successors and assigns forever, the word "heirs" no-

where occurring, conveys only a life estate; and this is not a deed in trust, for the grantors are not affected by the trust relation of the grantees to others: *Stephenson v. Sedam*, 12 O. C. C. 408, 5 O. C. D. 609.

B. WILL.

1. At Law.

(a) At Common Law.

Words of perpetuity such as "heirs," are not necessary to carry a fee by will independent of the statute to that effect. Any words which showed testator's intention to pass a fee, such as, "I give my land," were sufficient: *Smith v. Berry*, 8 O. 365, I Longsdorf's Notes, 440; *Thompson v. Hoop*, 6 O. S. 480, II Longsdorf's Notes, 251; *Niles v. Gray*, 12 O. S. 320, II Longsdorf's Notes, 566; *Piatt v. Sinton*, 37 O. S. 353, III Longsdorf's Notes, 918.

A devise of all one's property, of every description, whether real, personal, or mixed, after paying all just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise: *Piatt v. Sinton*, 37 O. S. 353, III Longsdorf's Notes, 918.

A devise in remainder of the entire beneficial interest carries a fee, and a devise in fee is not to be fettered with a trust unless such intention is plainly shown: *Flickinger v. Saum*, 40 O. S. 591, IV Longsdorf's Notes, 43.

A devise to the wife and the heirs of her body, to be divided equally between them, where the only child died before the testator, and the wife never had children thereafter, gives her a fee simple and not a fee tail or life estate and remainder. Heirs here, means children, and she and they take as a class, and as she is the only one of the class she takes in fee simple: *Moore v. Lewis*, 4 O. C. C. 284, 2 O. C. D. 548 [affirmed, without opinion, *Lewis v. Moore*, 51 O. S. 576, 31 Bull. 80].

A devise to A as hereafter pointed out with a clause "if A shall have an heir of his own body then all the title and interest in said real estate with power to convey shall vest in him," gives A a fee simple on the birth of issue; heir here means issue, and the last word "him," refers to A and not to the issue. Hence, A's grantees hold as against A's heir: *Moore v. Feig*, 17 O. C. C. 27, 9 O. C. D. 660.

A having nine children devised all her property to one son, who was to support three sickly daughters as long as they lived single and on the farm, and at their death or marriage the property was to be divided among all the then living children "or their

legal representatives." It was held that the last words are words of limitation equivalent to heirs. That a remainder vested in the children at the death of M, and that a mortgagee of one child who died with issue, which survived the last of the three daughters, thereby took a fee in his one-ninth: *Hill v. Everson*, 2 O. N. P. 42, 3 O. D. (N.P.) 133.

That the gift is immediate is sufficient to show an intention not to use the words "legal representatives" as words of limitation, but not if the gift is to take effect after a life estate: *Hill v. Everson*, 2 O. N. P. 42, 3 O. D. (N.P.) 133.

A devise of fifty acres of land to the testator's widow to have and to hold for her benefit and support, gives the widow a fee: *Chase v. Isherwood*, 1 O. N. P. 31, 5 O. D. (N.P.) 1 [affirmed *Isherwood v. Isherwood*, 16 O. C. C. 279, 8 O. C. D. 409; which was affirmed, without opinion, *Isherwood v. Isherwood*, 57 O. S. 660, 38 Bull. 280].

A devise to testator's wife of "all the proceeds of his real estate," not the real estate itself, but the proceeds thereof, is equivalent to a devise of the corpus of the real estate itself: *Isherwood v. Isherwood*, 16 O. C. C. 279, 8 O. C. D. 409 [affirmed, without opinion, *Isherwood v. Isherwood*, 57 O. S. 660, 38 Bull. 280].

A devise to a daughter of a farm of 208 acres "and also" a tract of 83 acres for life means a life estate in the former as well as in the latter tract. The words "and also" couple the two as one devise, equivalent to "in like manner": *Noble v. Ayers*, 61 O. S. 491, IV Longsdorf's Notes, 815.

Devise of all property, real and personal, "to the use of my widow so long as she shall remain unmarried and my widow, but upon her remarriage the residue or part then on hand after allowing her dower I give to the following persons," gives the widow not a fee, but a life estate defeasible by marriage. there is no intestacy on her death unmarried. She is entitled to possession without giving bond: *Davis v. Coffman*, 39 Bull. 307 [without opinion in the supreme court].

Where a will gives to children real estate in equal shares subject to widow's dower, each takes the fee, and in case of death of one, leaving no children, the husband takes her share for life, remainder to her brother and sister, subject to testator's widow's life estate, she still surviving: *Doppler v. Clou-watter*, 20 O. C. C. 701, 11 O. C. D. 374.

Property bequeathed direct to devisees, but possession and control for a term of years in executor for benefit of devisees, devises an immediate vested interest, see *Swerer v. Trustees*, 6 O. C. C. (N.S.) 185, 17 O. C. D. 144.

The bequest by John Randolph, of Virginia, for the purchase of lands in a free state, upon which his emancipated slaves were to be settled, was an absolute devise, and is capable of enforcement by a suit in equity, unless the right so to do has been lost through laches or the running of the statute of limitations: *Moton v. Dewell*, 13 O. C. C. (N.S.) 81, 22 O. C. D. 31.

A devise or bequest of the "issues and profits" or "use and benefit" of a body of real estate or of a sum of money without a devise or bequest over, conveys an absolute interest in the corpus of the gift: *Gillis v. Long*, 8 O. N. P. (N.S.) 1, 19 O. D. (N.P.) 253.

(b) *Under Modern Statute.*

G. C., § 10580, is by its terms a rule of construction only, not of property, to be employed when it aids in the ascertainment of the intention of the testator, and to be disregarded when its observance is plainly subversive thereof: *Gillis v. Long*, 8 O. N. P. (N.S.) 1, 19 O. D. (N.P.) 253.

Words of perpetuity were never necessary in Ohio in a will to carry a fee, and now G. C., § 10580, goes further and passes a fee unless restrictive language expressly denies it: *Patterson v. Earhart*, 6 O. D. (N.P.) 16, 29 Bull. 313.

No words of perpetuity are essential in a will to pass an estate of inheritance; therefore, if the language used, as descriptive of the estate, is general, and sufficient to comprehend the property, without any words of limitation or provision in the will qualifying the interest devised, a fee in the land will pass: *Thompson v. Hoop*, 6 O. S. 480, II Longsdorf's Notes, 251.

A devise "to my wife, Mary Ellison," which, at common law, imported a mere life estate, would, by G. C., § 10580, pass a fee, unless the contrary intention appeared in the will: *Stableton v. Ellison*, 21 O. S. 527, III Longsdorf's Notes, 42.

Where a devise was to A, provided he would take upon himself the care and support of B, which A did, it was held that a transfer of the estate by A to C was good, and that C held it absolutely, and could not be charged with the support of B: *Huey v. Thomas*, 23 O. S. 645, III Longsdorf's Notes, 154.

A devise of land to the testator's daughter providing that, in the event of her death, "leaving no legal heirs," the property so willed "is to descend to her brothers and sisters," passes to the daughter the entire estate in the lands devised: *Darlington v. Compton*, 20 O. C. C. 242, 11 O. C. D. 97.

Where, in a will, there is a devise to a son, and if he dies without lineal descend-

ants, living at the time of his decease, then over, these words are not by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease, his fee becomes absolute and such descendants have no interest under the will as against his grantee: *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043 [affirming *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267; and affirmed on question of jurisdiction, in *Anderson v. Realty Co.*, 222 U. S. 164].

The term "children" is usually a word of purchase and not of limitation. But when used as synonymous with heirs, it is a word of limitation: *Moreshead v. Rodetsky*, 5 O. N. P. 256, 7 O. D. (N.P.) 225.

G. C., § 10580, proceeds upon the theory that the testator is presumed to have intended to complete the testamentary undertaking upon which he entered. When that presumption is plainly inapplicable, this statute does not govern. So it can not avail to compel the courts to correct a false description of land: *Gillis v. Long*, 8 O. N. P. (N.S.) 1, 19 O. D. (N.P.) 253.

A devise in absolute terms to A, and in a later clause of the will a limitation over in case of A's death without issue, is not a life estate and remainder, but a fee and an executory devise and the first devisee may have partition: *Patterson v. Earhart*, 6 O. D. (N.P.) 16, 29 Bull. 313.

A provision that specific real property be sold, and the proceeds divided equally between testator's brothers and sisters and their heirs, "the children of any that may be dead to have the shares of their deceased parents," was held to mean that the proceeds of the sale should be divided equally between the brothers and sisters living and the issue of those dead. Heirs was not used in a technical sense: *Richey v. Johnson*, 30 O. S. 288, III Longsdorf's Notes, 530.

Where a testator made a devise to his son, John, "through his natural life and then to his heirs," and in another part of the will used the word "heirs" in the sense of "children," it was held that the son took a life estate only, with remainder to his children or issue, and not to his heirs generally, and that upon his death, without issue, the devise in remainder failed, and the estate reverted to the heirs of the testator: *Bunnell v. Evans*, 26 O. S. 409, III Longsdorf's Notes, 316.

If the language of a will, in a residuary clause, will admit of a limited application,

as well as one of a more general character, it will be given that construction which is most favorable to the heir at law: *Bane v. Wick*, 19 O. 328, I Longsdorf's Notes, 879; see also *Smith v. Berry*, 8 O. 365, I Longsdorf's Notes, 440; and *Reynolds v. Shirley*, 7 O. (pt. 2) 39, I Longsdorf's Notes, 385.

A devise to A, coupled with a bequest to B, of a sum of money, to be invested in land by A for B's benefit, upon B's attaining a certain age, many years elapsing between the time of the devise and the date it was to be executed, confers a title in fee to A, and reposes in him a special trust the abuse of which will not affect the title of his vendees: *Coonrod v. Coonrod*, 6 O. 114, I Longsdorf's Notes, 326.

A devise to a child or children, but if they die before twenty-one or without issue, then over to the widow, is to be construed as if "or" was "and," and the estate does not go over unless both contingencies happen: *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

A testator devised his real estate to his wife and daughter, and directed that on the death of either, the survivor should have the whole estate, and that if both should die without issue, it should be given to his wife's brother. The widow of the testator died, leaving issue by a second marriage. Afterward the daughter died without issue, leaving the issue of such second marriage of the widow, and her brother named in the will, surviving her. It was held that the surviving issue of the wife of the testator is entitled to the estate under the will to the exclusion of the brothers and sisters of the testator as his heirs at law and his wife's brother named in the will: *Shaw v. Hoard*, 18 O. S. 227, II Longsdorf's Notes, 884.

A devised to his daughter, B, certain real estate for her life, remainder to her children, and remainder over to her brothers and sisters in the event she should die without issue surviving her, with like remainder over if she should die leaving issue, and such issue should die under the age of twenty-one years without issue. B still survives at the age of sixty, and has children living, each of whom is over twenty-one years of age, but none of them has issue. It was held that the effect of the devise over to the brothers and sisters of B in the event of her death without surviving issue, was to make the devise to the children of B contingent upon her death leaving issue surviving her, and a deed of conveyance by B, and her children would not pass an absolute estate in fee simple to the grantee: *Bates v. Zinsmeister*, 26 O. S. 461, III Longsdorf's Notes, 320.

A bequest in trust for daughters to be "set off" to them on arrival at age, but still to

be held in trust after coming of age, and said partition, the rents and profits only to be paid to them during life with the fee simple to their "heirs," gives them a life estate only: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

G. C., § 10580, does not require each item of the will to show testator's intention, if the intent as to the several items can be derived from the whole will: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

Words of inheritance are not necessary to transmit real property by will under G. C., § 10580. Accordingly, the omission of words of limitation in a devise of land will not defeat the fee therein in the devisees named: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504 [affirmed, without opinion, *Halley v. Hengstler*, 70 O. S. 452].

The words, in a will, "out of which I direct that no debt, legacy or other charge herein provided for shall be paid or taken" clearly indicate a distinction between the devisees; and, under G. C., § 10580, providing that all the estate which testator possesses shall pass unless it clearly appears that he intended to convey a less estate, it can not be said that testatrix in this case clearly intended to convey less than a fee simple: *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218 [distinguishing *Noble v. Ayers*, 61 O. S. 491, IV Longsdorf's Notes, 815].

A devise "I give and devise to my beloved husband * * * my real property," (describing it) "out of which I direct that no debt, legacy or other charge herein provided for shall be paid or taken and the rest and residue of my real property to have and to hold during the term of his natural life" conveys an estate in fee simple in the property first mentioned and a life estate in the balance: *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218 [distinguishing *Noble v. Ayers*, 61 O. S. 491, IV Longsdorf's Notes, 815].

The word "and" as used in a devise above quoted, is not necessarily equivalent to "and also": *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218 [distinguishing *Noble v. Ayers*, 61 O. S. 491, IV Longsdorf's Notes, 815].

A will giving testator's children land in fee simple, coupled with a provision that in case of death without issue the bequests should pass to testator's surviving heirs and by other provisions imposing upon devisees the burden of making large payments of money to his executors, to be used in the payment of legacies to other children, and for the payment of the debts of the testator, will not be considered as indicating an intention of the testator to give a fee simple

title to the land devised subject only to the charges imposed. This rule only applies to cases where the devise is so indefinite that the intention of the testator can not easily be ascertained, and not where the estate is by appropriate language devised in fee simple, with the further provision that if he shall die without issue, or leaving no issue, that it shall pass to other persons: *Walker v. Walker*, 20 O. C. C. 409, 11 O. C. D. 291.

A clause in a will which gives the wife, her heirs and assigns the whole estate, the wife to use, enjoy and dispose of the property as she deemed best, the remainder at her death to be divided between the children, gives the wife only a life estate without testamentary power of disposition: *Greene v. Greene*, 38 Bull. 205 [without opinion in the supreme court].

Where there is a devise in fee to A, but if he "die without heirs," or "without children" or "without issue," then to B in fee, the words "if he die without issue," or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of A unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes, and if A have no children or issue living at the time he dies, B takes under such devise: *Parish v. Ferris*, 6 O. S. 563, II Longsdorf's Notes, 258 [followed and approved, *Niles v. Gray*, 12 O. S. 320, II Longsdorf's Notes, 566].

A bequest of testator's whole estate to his widow with power to sell as she saw fit, but if anything remained at her death, it should be distributed to certain other persons, gave to the widow power to convey the fee and the deed, good as against the widow was good against the second devisees: *Widows' Home v. Lippardt*, 70 O. S. 261, IV Longsdorf's Notes, 973.

A devise of all property to wife with full power of disposition but a remainder over of any part not consumed by her, gives her a life estate only: *Johnson v. Johnson*, 51 O. S. 446, IV Longsdorf's Notes, 550.

A devise to two children with provision that in case either die without heirs capable of inheriting, its share should go to the survivor, vests an estate in fee in each contingent upon death without children. And if one child does so die without children, the husband of that child will not take in preference to the surviving child: *Durfee v. MacNeil*, 58 O. S. 238, IV Longsdorf's Notes, 738.

Where C devised land to his wife for life, and provided that "if my wife die before all my children become of lawful age, then all the children that have not left home be-

fore they were of lawful age, and have submitted themselves to the control and direction of their mother, shall be entitled to an equal portion of said estate when the youngest child becomes of lawful age," it was held that the children took a remainder in fee contingent upon the widow dying before the youngest child became of age, and that the widow, having survived the coming of age of the youngest child, the children of testator took a fee in the land as heirs, and not as devisees: *Chambers v. Forsythe*, 1 O. C. C. 282, 1 O. C. D. 155.

A devise of lands to A for and during the term of his natural life, "with a gift over upon his dying under twenty-one," will not be construed by implication as a fee simple in A": *Hulse v. Hulse*, 1 O. C. C. 362, 1 O. C. D. 202.

A testator, by his will provided for the disposition of the rents and profits of his estate "until the last one of my aforesaid children shall have deceased, at which time I give and bequeath all of my aforesaid real estate to my grandchildren, to be equally divided among them all, share and share alike." It was held that subject to the estate during the lives of the children, the remainder became vested in the grandchildren at the death of the testator, subject to be opened up to let in afterborn grandchildren: *Dennis v. Mullane*, 1 O. C. C. 399, 1 O. C. D. 223.

Where it is clearly the intention of the testator to limit the estate given to his wife, in certain real property, to a life estate, and no disposition is made of the remainder, it passes, under the statutes of descent to the heirs at law; and, though reference is made to the residue of the estate that might remain after payment of debts, as if he contemplated a disposition of it, yet the whole will is to be taken together, and if it appears that only a life estate is devised, and no person named to take the remainder, it must receive such construction: *Colston v. Bishop*, 1 O. C. C. 460, 1 O. C. D. 257.

(c) Words Cutting Down Fee.

An estate in lands created by will or deed which, by the granting clause, would be an estate in fee simple may be limited by the *habendum* clause to an estate tail: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

If, where the word "heir" is used, there be superadded words of limitation, establishing a new succession, the first donee or devisee would take but a life interest: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N. P.) 279.

Under a will devising one-third of testator's property to his wife, the remaining two-thirds to be equally apportioned between his daughters, not turned over to them, but invested for their benefit, the annual income to be subject to their control and each to have full power to devise her portion, with the further provision that if either child die without leaving a will, her portion shall be divided among her surviving children, and if none, then among testator's then surviving children, creates a life estate in the daughters with a trust to protect remainders: *Robbins v. Smith*, 12 O. D. (N.P.) 164.

A will devising property to a trustee to be held in trust for the benefit of testator's two daughters, to be "set off" to them or either of them by the trustees on their arrival at age, but to be still held in trust after their arrival at age, "and said partition between them," the rents and profits only to be paid them or either of them, according to their respective shares, during their lives, with the fee simple to the heirs of said daughters "to be divided equally as above," gives to the daughter a life estate only and not a fee simple: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

Where a will provided that the residue of testator's estate should be held in trust for his daughters, to be "set off" to them by trustees on their arrival at age, but to be still held in trust after their arrival at age, and "partition" between them, the words "set off" and "partition," as against the provisions referred to in a preceding paragraph, are not to be construed to mean a division of a fee simple or inheritable estate: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

The words "set off" and "partition" when the respective devisees arrive at age, used in a will, do not necessarily mean a division of the fee simple or inheritable estate between such devisees, if it appears, taking the whole will together, that such was not the intention of the testator: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

A devise to a wife of one-half of all the testator's real estate, is a devise in fee; but such devise is controlled, and the interest reduced to an estate determinable when the youngest child arrives at full age, if the will contains a subsequent clause providing that at that time the property shall be disposed of and divided equally among the children: *Howe v. Fuller*, 19 O. 51, I Longsdorf's Notes, 886.

(d) *Effect of Grant of Power.*

A devise to A for life with power to bequeath the land to whom she pleases gives

her no interest chargeable with her debts beyond her life estate, and her devisees takes free of her debts: *Donley v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

A devise of the estate to the wife "allowing" her to distribute it among the children is irreconcilable with a fee and she takes only a life estate: *Stableton v. Ellison*, 21 O. S. 527, III Longsdorf's Notes, 42.

Power of disposition does not enlarge an express life estate into a fee. A will giving all the property to A for life, with power to dispose of the same as she deems advisable, and at her death devising all property to B and C equally, and if either die before A his portion, "that is, one-half of my estate," shall go to his children. It was held that the power of disposition did not enlarge A's estate to a fee but the remainder vested immediately in B and C in fee, subject to the power to sell. This power was only to sell for money and not to convey on mere equitable or moral considerations, and a conveyance on such considerations was wholly void, though on the face of the deed accompanied by a pecuniary consideration. The power was not one beneficial to A but executorial in its nature: *Helferich v. Helferich*, 11 Dec. Rep. 234, 25 Bull. 313, 11 Dec. Rep. 303, 26 Bull. 83.

A power of sale does not enlarge a devise for life into a fee unless such intention appears and it does not appear if the power is not for the devisee's benefit, but for reinvestment, and is to be exercised in conjunction with the executors and not by the devisee alone: *Stokes v. Stokes*, 9 Dec. Rep. 309, 12 Bull. 135.

A devise of all property to the widow for life to be used for her support, and that of the children, is not made a fee by a power to dispose "for the purpose aforesaid as to her shall seem just," and her conveyance in fee will not prevail against the children's remainder: *Bashore v. Mackenzie*, 8 O. C. C. 679, 4 O. C. D. 387.

"The residue I give to my wife to be expended for her support and to be disposed of by her in any way else she may think proper," with a remainder in any unexpended balance, gives her not a life estate, but an absolute title with power of disposition: *Clark v. Seminary*, 3 O. C. C. 152, 2 O. C. D. 87.

A devise of all property to the widow, she not to divide it until the youngest child is twenty-five, and then can sell a designated piece and divide the proceeds among them equally and keep the rest for life, or if she does not wish to divide, can keep all for life. It was held that (1) gives her the personalty absolutely, for the clauses after the first only limit it as to realty; (2) she

is entitled to the income, though not mentioned, not only of the piece she could sell, but also of all until division: *Spreen v. Sandman*, 2 O. C. C. 441, 1 O. C. D. 577.

A devise of all property to the widow "to be solely under her care in trust for the benefit of her and the children, she may distribute it at any time and in any manner she thinks proper" gives her the use of it for herself, but she is responsible for the principal to the children and equally, and can not discriminate. If she attempts an unequal distribution a child need not await her death, but may compel her to make a statement and give bond, and in default the court may appoint a trustee and may also provide for a return from a child receiving an excess: *Cassidy v. Hynton*, 44 O. S. 530, IV Longsdorf's Notes, 230.

A residuary devise to the widow and her assigns in general terms of all property with full power to dispose of the same as she may think proper, any unconsumed part thereof at her death to go to testator's brothers and sisters, gives her only a life estate with power of disposition for support, remainder in the unconsumed part. The widow is a quasi trustee of the unconsumed part, and can not destroy the remainder by giving away the property. And a third person obtaining the property by gift, fraud, or collusion holds it as trustee for the remainder, and is liable to account to them: *Johnson v. Johnson*, 51 O. S. 446, IV Longsdorf's Notes, 550.

A bequest of all property to the widow, to be held by her for life, with power to dispose of it in any way she deems best for herself and the heirs, and after her death anything left is to be divided equally among the children, does not give her a fee simple nor an absolute right in the personality. Such limited power of disposition does not so enlarge the life estate nor authorize her to dispose of the property by discriminating between the children for the mere purpose of defeating the intended equality: *Huston v. Craighead*, 23 O. S. 198, III Longsdorf's Notes, 120.

Where one B devised all his property to his wife, with full power of disposition, and in another clause makes devises in remainder, the wife takes only a life estate and the remainders are valid: *Baxter v. Bowyer*, 19 O. S. 490, II Longsdorf's Notes, 961.

A devise to a wife of all my property "to do with as she pleases and at her death what remains shall go to my niece," gives the wife a fee simple: *In re Will*, 7 O. N. P. 574, 5 O. D. (N.P.) 584.

Under a devise to a woman of all property, real and personal, with power to use and enjoy and sell or dispose of it, but if

she dies before her husband, then the property remaining undisposed of shall go to named persons, it was held that on the authority of *Johnson v. Johnson*, 51 O. S. 446, IV Longsdorf's Notes, 550, the woman's husband is not entitled to dower therein: *Enyart v. Keever*, 32 Bull. 401 [without opinion in the supreme court].

When a life estate is given in real and personal property, and then the words "to dispose of as she sees fit" are used, the life estate is enlarged into a fee: *Lepley v. Smith*, 13 O. C. C. 189, 7 O. C. D. 264.

If there is no remainder or devise over a power of disposition given to the life tenant converts her life estate into a fee (see also G. C., § 10580): *Lepley v. Smith*, 13 O. C. C. 189, 7 O. C. D. 264.

A devise to the executor in trust of the rents and profits of a farm to go to A for life, and the farm at his death to go as he should appoint by will; the income of the rest of the estate to go to A, B and C, but no part of the estate to go under any contingency to the children of C. A having survived all the others, devised the estate to his heirs, among whom was a daughter of C. It was held that A did not take a fee, and the power to appoint was subject to the limitation that no part should be given to C's children: *Thurston v. Bissel*, 13 O. C. C. 293, 7 O. C. D. 235.

Testator devised all property to the wife to manage during life at discretion with power to rent or lease real estate and apply the proceeds as her judgment deems proper and with power at her death to devise the same as she deems right, reposing confidence in her fidelity towards my children, and trusting to her judgment to provide for them to the best advantage. The widow married again and had another set of children and devised to all of the children equally. The second set claim a share under her will. It was held that she only took a life estate in trust for herself and testator's children, and her power to devise was limited to testator's issue, and she could not devise to her second family: *Huber v. Free*, 12 O. C. C. 333, 5 O. C. D. 537 [reversed, without opinion, *Huber v. Free*, 57 O. S. 662].

A bequest "I give and bequeath to my beloved husband so much of my personal property as he may desire to use absolutely in addition to the provision made for him," etc., conveys the use of all personal property after payment of debts, costs, expenses and legacies, i. e., the right not only to the income but so much of the principal as may be necessary for reasonable comfort and support: *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218.

When an estate is devised with an absolute power of disposal, a devise over of what may remain is void, but where a life estate only is given in express words with an express power in a certain event or for a certain purpose to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right, and the devise over is good: *Widows' Home v. Lippardt*, 70 O. S. 281, IV Longsdorf's Notes, 973.

Where the first devisee has absolute power of disposition, whether by deed or will, a limitation over is void on the ground that it is irreconcilable with the primary devise: *Brewing Co. v. Dick*, 1 O. N. P. (N.S.) 592, 13 O. D. (N.P.) 581.

A will reading, "I give and bequeath to my beloved wife all my estate, both real and personal, of which I am now possessed or shall afterwards come into my possession or under my control by deed or otherwise in fee simple, with power to sell or dispose of it as she may see fit; that after the death of my wife, if there is anything remaining of my personal or real estate, it shall be distributed in the following manner, to-wit," gives the widow power to convey the fee of the whole or any part of the real estate, and a deed making such a conveyance, good as against the widow, is good against the second devisees: *Widows' Home v. Lippardt*, 70 O. S. 281, IV Longsdorf's Notes, 973.

(1) Devisee takes life estate, (a) where devise is for life with absolute power of disposal followed by devise to another; (b) where devise is general with absolute power of disposal followed by devise of entire estate to another; (c) where devise is general with qualified power of disposal followed by devise of portion undisposed of, to another. (2) Devisee takes fee simple, where devise is general with absolute power of disposal or without power of disposal followed by devise of portion undisposed of, to another: *Steuer v. Steuer*, 8 O. C. C. (N. S.) 71, 18 O. C. D. 145.

A will provided that the remainder of an estate should be equally apportioned amongst testator's daughters, not to be paid over to them, but safely invested for their behoof, the annual income to be subject to the control of each child, whether married or unmarried, and the husband to have no power or control over the principal or interest, each devisee given power to dispose of her portion by will as she should see fit; in case of death without a will the decedent's share to be equally divided among her children surviving her, but if no children then said share to be paid to testator's children who may survive decedent. It was held that under this will the children of the testator took absolute title to the income, but only an

estate for life in the *corpus* of the estate, with power in each to dispose of her share and with remainder in the surviving children or failing those in the surviving children of the testator in case the *corpus* should not be disposed of by will. The will did not create a marital trust to be ended as to each daughter upon the decease of her then living husband. Two of the children referred to in the will still living, the trust has not been subverted but is an existing trust, and will continue as to each daughter during her life: *Robbins v. Smith*, 72 O. S. 1, IV Longsdorf's Notes, 987.

Under a will giving the widow the privilege of disposing of a specified amount at her death and providing that the children and grandchildren shall take the sum remaining to be divided *pro rata* among them if the amount at the death of the widow was insufficient to permit the carrying out of the former provision, the children and grandchildren will take under the latter clause: *Moore v. Idlor*, 6 O. C. C. (N.S.) 19, 16 O. C. D. 502.

Under a will containing a devise to A generally, with no power of disposal expressed, but followed by a devise to B of what shall remain undisposed of at A's death, A takes an estate in fee simple and the attempted limitation over is void: *Steuer v. Steuer*, 8 O. C. C. (N.S.) 71, 18 O. C. D. 145.

A devise of real estate for life with power to convey in fee simple conveys an estate for life only with power to sell for the benefit of the estate: *Gogreve v. Day*, 10 O. C. C. (N.S.) 69, 20 O. C. D. 609 [affirmed, without opinion, *Day v. Gogreve*, 80 O. S. 736].

A conveyance under a power, of property forming only an adequate consideration for services rendered testator and his wife, and acknowledged by testator, is a conveyance for the benefit of the estate: *Gogreve v. Day*, 10 O. C. C. (N.S.) 69, 20 O. C. D. 609 [affirmed, without opinion, *Day v. Gogreve*, 80 O. S. 736].

Where property is bequeathed to a widow by her husband for life "with power and authority to sell, transfer and assign the whole or any part thereof, if necessary, for her support," and she waives her right of dower and elects to take under the will, it is not necessary that she exhaust her separate property or reach a condition of actual want before she can draw upon the *corpus* of the estate: *Moore v. Idlor*, 6 O. C. C. (N.S.) 19, 16 O. C. D. 502.

Under a devise of the "income arising from the rents and profits" of property, real estate belonging to the estate may be sold and the proceeds, as well as the income, used for the support of an imbecile son, where the

language of the will indicates a purpose to provide for the care and support of such son, regardless of the interests of the remaindermen: *Riley v. Riley*, 7 O. N. P. (N.S.) 100, 19 O. D. (N.P.) 150.

A devise to a wife so long as she may live, with full power to sell and dispose of the property devised as she may wish, is a devise of a life estate, and there being no devise over, the husband died intestate as to the fee of such property not disposed of during the life of the widow: *Armstrong v. Armstrong*, 11 O. C. C. (N.S.) 474, 21 O. C. D. 261.

A devise to a wife of all real and personal property to be used and disposed of by her according to her best judgment, and at her death to be divided equally among the children, gives her a life estate only, and her right of disposition is only for her own support or consumption, and a conveyance for any other purpose is void: *Shannon v. Shannon*, 13 O. N. P. (N.S.) 193 [affirmed, without opinion by circuit court, which was affirmed, without opinion, *Shannon v. Shannon*, 85 O. S. 456].

Under a devise by a testator to his wife in fee simple, followed by a subsequent provision that "in case my wife should die leaving said estate unconsumed, I desire that the same shall be distributed" in payment of certain legacies mentioned, the wife takes a life estate only, but with the right to consume the estate in whole or in part during her lifetime: *O'Hara v. Peirano*, 8 O. N. P. (N.S.) 581, 19 O. D. (N.P.) 741.

A devise of all property to the widow, her heirs and assigns, to use, enjoy and dispose of as she shall deem best, any remainder at her decease to be divided between the children or their issue equally, gives her no power of testamentary disposition of the undisposed of remainder. Hence her will dividing the estate into five equal parts for four living children and one share in trust for the issue of a deceased child is a nullity. She can not burden the grandchild's share with a trust: *Greene v. Greene*, 38 Bull. 205 [without opinion in the supreme court].

Where a testator vests in his widow a life estate in his hands, with the provision that within a reasonable time after the death of his widow certain land shall be sold by the executors named in the will and the proceeds divided equally between his five children, or if any of his children should die before distribution the share of such child or children should go to his or their heirs, "so that the proceeds of said lot may vest in my children and their heirs forever," the power given to the executors with respect to conferring title is a power coupled with an interest and vests

the fee in the executors: *Knwisely v. Young*, 15 O. C. C. (N.S.) 49, 23 O. C. D. 439.

2. In Equity.

A devise to A and his heirs forever in trust for B for life, and to such uses as she shall appoint, and after her death to the use of her heirs forever, vests an equitable fee simple in B, and the trustee must convey to her appointee: *Armstrong v. Zane*, 12 O. 287, I Longsdorf's Notes, 609.

A devise to persons and their successors to be appointed by court as trustees, conveys the legal title for life only where they are not a corporation: *Miles v. Fisher*, 10 O. 1, I Longsdorf's Notes, 481.

If trusts in land under a will may require the entire legal estate, but the legal title is left to descend to the heirs, who have a contingent beneficial interest after the trusts end, the heirs hold the title as trustees, and a judgment creditor of one heir acquires no lien on the land entitling him to have a *bona fide* conveyance by such heir set aside: *Birchard v. Edwards*, 11 O. S. 84, II Longsdorf's Notes, 481.

A devise in fee to trustees gives the trustees only so much of the legal estate as the purposes of the trust require, as in this case, for the benefit of a daughter for life, remainder to her children, and she is childless: *Gilpin v. Williams*, 17 O. S. 396, II Longsdorf's Notes, 840.

A devise to one in trust to divide the land among children and pay them the rents, but to hold possession and title in the shares, but on the death of a child his share to go to his issue forever, the issue takes a fee discharged of the trust: *Lindsay v. Zanoni*, 6 O. C. C. 474, 3 O. C. D. 544.

A testator devised the share of one son in trust, the trustee to control and manage for the benefit of the son and his heirs, and to pay him such sums as are necessary for his support, and keep the balance of the income for emergencies. It was held that the son has the equitable fee simple. The emergencies mean his and his heirs' emergencies, and the balance of the income accumulated to him: *Murray v. Murray*, 5 Dec. Rep. 382, 5 Am. L. Rec. 266, 1 Bull. 299.

Where a devise of real estate is to the widow during widowhood, and after that the "profits and benefits" are to be divided between children, and after one child comes of age, and the widow's estate ends, the land shall be sold and proceeds divided. The words, profits and benefits, though generally sufficient to carry the fee, do not in this case, for the will shows the fee to be otherwise disposed of: *Collier v. Grimesey*, 36 O. S. 17, III Longsdorf's Notes, 827.

The trust under a will devising a life estate in land to children with remainder in fee to grandchildren, the legal title to be in trustee, will terminate when the grandchildren are of age, upon the consent thereto of both children and grandchildren, notwithstanding the opposition of the trustee: *Seventeenth Ward B. A. v. Fitzgerald*, 8 O. N. P. 160, 11 O. D. (N.P.) 133. See also TRUSTS.

A testator having bequeathed to his wife in trust for his infant daughter A \$10,000; left to A by a codicil "in addition to the sums provided for her in my will \$1,000 in money and my piano." It was held that the codicil made a direct gift and not in trust: *Rote v. Warner*, 17 O. C. C. 342, 9 O. C. D. 536.

A devise to a trustee to pay rents and profits without condition to the *cestui que trust* for a period of years, and at the end of that period to convey to the *cestui que trust*, or his children and heirs, is only a passive trust, and the *cestui que trust* has an equitable fee to the real estate described, and the *cestui que trust* having died, his heirs take title directly from the testator: *Kiefer v. Bard*, 8 O. N. P. (N.S.) 377, 20 O. D. (N.P.) 629.

C. RULE IN SHELLEY'S CASE.

1. Original Rule.

The rule in Shelley's Case is not a rule of construction, but a rule of property: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

A devise to A for life, "then to his heirs," the word heirs in another part of the will being used as children will be construed as only a life estate to A, remainder to his issue; hence, on his death without issue his widow gets nothing: *Bunnell v. Evans*, 26 O. S. 409, III Longsdorf's Notes, 316.

The court will not strain a point to bring a case within this rule, which is at best a mere artificial technicality: *King v. Beck*, 15 O. 559, I Longsdorf's Notes, 730.

The rule in Shelley's Case is not a rule of construction but a rule of property, not designed to give meaning to words but to fix the nature and quantity of an estate, and an express intent controls it: *King v. Beck*, 15 O. 559, I Longsdorf's Notes, 730.

The rule in Shelley's Case would not apply to a limitation to A for life remainder to her "children" and not to her heirs: *Turley v. Turley*, 11 O. S. 173, II Longsdorf's Notes, 489.

A fee tail was not converted into a fee simple by this rule: *Pollock v. Speidel*, 27 O. S. 86, III Longsdorf's Notes, 346.

A devise of realty to C while he lives, then to his heirs, if he have any, and if none, then over to nephews, does not give O a fee under the rule in Shelley's Case. The word heirs is intended as children, and they take as purchasers; i. e., not subject to C's debts: *King v. Beck*, 15 O. 559, I Longsdorf's Notes, 730 [reversing *King v. King*, 12 O. 390, I Longsdorf's Notes, 615].

Under a devise of land to Walker, and Phebe, his wife, for their use during their respective lives, and at their death to descend to their heirs, the grantee of Walker and Phebe takes to the exclusion of their heirs: *McFeely v. Moore*, 5 O. 464, I Longsdorf's Notes, 302.

Before abolition of the rule in Shelley's Case a devise to sons in fee, but with a later clause stating that the devise was for life only so that they could only sell a life estate, and after their deaths, to their respective heirs at law in fee, gives the sons a life estate only. The intent governs and prevents application of the rule in Shelley's Case: *Archer v. Brockschmidt*, 5 O. N. P. 349, 5 O. D. (N.P.) 348.

Before the rule in Shelley's Case was abrogated, as to wills, in this state by the statute of 1840, a testator devised certain lands to his son for life, and at his death to go to his heirs, and, there being nothing else in the will to show that the testator used the word "heirs" to designate a more limited class—as children, it was held that as the lands passed under the will precisely as they would have descended at law, the son took an estate in fee simple in the lands so devised: *Rockschmidt v. Archer*, 64 O. S. 502, IV Longsdorf's Notes, 876.

The rule in Shelley's Case as applied to wills was abrogated by statute in Ohio, in 1840, G. C. § 10578. But even before the passage of this statute, it was held inapplicable to defeat the clearly expressed intention of the testator. The rule can not be appealed to, to assist in ascertaining the intention of the testator: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

Where a testator in devising land to his sons employs apt words to create a fee simple, the language in each case being, "to him and to his heirs forever," but the *habendum* of a devise to a daughter is, "to her, her lifetime, and to her heirs forever, or whosoever she pleases to will it to at her death," the manifest intention of the testator is to grant the daughter a life estate only, but where such devise was contained in a will executed and probated prior to the passage of the act abrogating (so far as wills are concerned), the rule in Shelley's Case, 38 v. 126; G. C., § 10578, that rule applied, and the devise vested a fee simple

in the daughter: *Kimball v. Kimball*, 13 O. D. (N.P.) 555.

The purpose and effect of G. C., § 10578, as to construction of devises for life limited to heirs, was to abrogate the rule in Shelley's Case as to wills, and not to establish a hard and fast rule of construction that must resolve all doubtful cases into devises of estates for life with remainder over; it leaves courts the liberty to give controlling effect to the intention of the testator: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504.

2. Statutory Rule.

The rule in Shelley's Case is forbidden to apply to wills by G. C., § 10578, only when such application would defeat the manifest intent—otherwise the rule does not apply to wills: *Carter v. Reddish*, 32 O. S. 1, III Longsdorf's Notes, 617 [reversing *Reddish v. Carter*, 13 Dec. Rep. 551, 1 C. S. C. R. 283].

A devise to A generally, *habendum* during his natural life and to his heirs, with a limitation over if he dies under age without issue, gives A a fee simple, defeasible on so dying. Heirs does not mean children, and is a word of limitation, for such is the general scope of the will, and a different construction would leave the fee undisposed of if A died over age without issue: *Carter v. Reddish*, 32 O. S. 1, III Longsdorf's Notes, 617 [reversing *Reddish v. Carter*, 13 Dec. Rep. 551, 1 C. S. C. R. 283].

A bequest in trust for daughters to be "set off" to them on arrival at age, but still to be held in trust after coming of age, and said partition, only the rents and profits to be paid to them during life with the fee simple to their "heirs," gives them a life estate only. The clear intention controls such words as set-off and partition, which generally mean a fee. The rule in Shelley's Case being abolished as to wills, can not be appealed to, to ascertain intention: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

Where by a will executed in another state a testator devises land situated in Ohio to his daughter "during her natural life, and at her decease to go to her lawful heirs," these words created only a life estate in such Ohio lands, although under the rule prevailing in such other state they would have conveyed a fee simple: *Hosler v. Haines*, 7 O. C. C. (N.S.) 261, 18 O. C. D. 79 [reversed, without opinion, *Haines v. Hosler*, 76 O. S. 588].

A devise to A for her life, and at her decease to go to the heirs of her body in fee, gives her a life estate with remainder to her issue, and does not give her an estate tail,

which would have been created by a devise to her and the heirs of her body. In the former case the remaindermen take as devisees of the testator, and in the latter case they take by descent from the first donee in tail, and the abolished rule in Shelley's Case, being a rule of property and not of construction, can not be applied to affect testator's intention: *Williams v. Haller*, 13 O. N. P. (N.S.) 329.

A devise to two devisees of certain lands of testator "to be equally divided between them, and their heirs at their death" conveys the fee to the devisees named therein, and does not in terms, nor by construction, nor "by words to that effect" vest in devisees simply a life estate and after their death to their heirs in fee, within G. C., § 10578, providing that an estate limited to heirs vests only a life estate in the first takers. The words "at their death" are merely surplusage: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504.

Land was conveyed to A during his natural life and to his heirs forever. It was held that the rule in Shelley's Case was still a rule of property in Ohio and that A acquired fee simple in the property: *Jenkins v. Artz*, 7 Q. N. P. 371, 6 O. D. (N.P.) 439.

D. DEDICATION.

For the interest acquired under dedication, see DEDICATION; STREETS.

E. EMINENT DOMAIN.

For the interest acquired under Eminent Domain, see EMINENT DOMAIN; RAILROADS; ROADS; STREET RAILWAYS AND INTERURBAN RAILWAYS; STREETS.

III. CONDITIONAL, BASE OR QUALIFIED FEE.

Where, in a will, there is a devise to a son, and if he dies without lineal descendants living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease, his fee becomes absolute and such descendants have no interest under the will as against his grantee: *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043 [affirming *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267].

A devise by terms describing a fee simple, or from which a purpose to devise a fee is

inferable, followed by a limitation over in the event that the devisee shall die "without issue," "without children," "without descendants," "without heirs of his body," "without legitimate heirs," or the like, amounts to a limitation over on a definite failure of issue surviving the devisee at the time of his death; in such case no estate is limited to such "issue," "heir" or the like, but the provision simply declares the condition or contingency upon which the limitation over shall take effect. It qualifies the fee first devised, making it a conditional or defeasible fee: *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267 [affirmed, *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043].

Where a testator devises to his daughter all his real and personal estate "after the provisions of this will have been complied with," thus expressly limiting the character of the estate created, and, later in the will, makes provision for the disposition of his property in case of his daughter's death "without heirs," the daughter takes a defeasible estate in fee simple subject to its being determined by her death without heirs. The latter provision, owing to the express limitation on her estate, can not be construed to be inconsistent with the clause creating her fee simple estate: *Lodge v. Darrow*, 16 O. D. (N.P.) 120 [affirmed, without opinion, *Lodge v. Darrow*, 78 O. S. 397].

"At the death of my wife" property to "my children equally . . . but if any . . . shall die without issue, the survivors shall take the portion of such deceased child," devises a defeasible, vested remainder in fee subject to the life estate of the wife: *Miller v. Miller*, 10 O. N. P. (N.S.) 630, 21 O. D. (N.P.) 1.

"At the death of my wife" property to "my children equally . . . but if any . . . shall die without issue, the survivors shall take the portion of such deceased child." It was held that the remainder, while vested in interest, was not to vest in possession or be distributed to said children until the death of the life tenant: *Miller v. Miller*, 10 O. N. P. (N.S.) 630, 21 O. D. (N.P.) 1.

"At the death of my wife" property to "my children equally . . . but if any . . . shall die without issue, the survivors shall take the portion of such deceased child." It was held: That the three children and their assigns having divided the land between them at the death of the life tenant, and having quitclaimed the interest that each had in the portions acquired by the others in said division, none of the children thereafter had any estate in expectancy or otherwise in the portions acquired by the others

in said division: *Miller v. Miller*, 10 O. N. P. (N.S.) 630, 21 O. D. (N.P.) 1.

"At the death of my wife" property to "my children equally . . . but if any . . . shall die without issue, the survivors shall take the portion of such deceased child." It was held that since the will indicates that the words "dying without issue," were intended to relate to death during the life of the life tenant, the vested remainder interest of each child was subject to be divested in favor of the survivors as substituted devisees, only in the event of death before the life tenant without leaving issue *in esse* at the death of the life tenant: *Miller v. Miller*, 10 O. N. P. (N.S.) 630, 21 O. D. (N.P.) 1.

"At the death of my wife" property to "my children equally . . . but if any . . . shall die without issue, the survivors shall take the portion of such deceased child." It was held that all three children having survived the life tenant, each then had an absolute and indefeasible estate in the undivided one-third part of the land devised: *Miller v. Miller*, 10 O. N. P. (N.S.) 630, 21 O. D. (N.P.) 1.

IV. PERMANENT LEASEHOLDS.

For a discussion of the history of legislation on the subject of permanent leaseholds in Ohio, and the different views expressed thereunder, see *Taylor v. DeBus*, 31 O. S. 468, III Longsdorf's Notes, 598.

A lease to one and his heirs, executors, administrators and assigns for three and one-half years, renewable forever, is a permanent leasehold and is for some purposes to be regarded as a fee: *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513].

Leasehold is not included in the term "lands or tenements": *Acklin v. Waltermier*, 19 O. C. C. 372, 10 O. C. D. 629.

An estate for years created by lease granting the privilege of purchase in fee and becomes subject to lien only from time of levy and seizure in execution: *Powder Co. v. Loomis*, 13 Dec. Rep. 333, 2 D. 544.

A judgment lien against a perpetual lessee does not operate upon the premises when conveyed prior to judgment as security: *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565.

Perpetual leases are subject to the lien of the judgment: *Bank v. Roosa*, 13 O. 334, I Longsdorf's Notes, 642; *St. Bernard v. Kemper*, 60 O. S. 244, IV Longsdorf's Notes, 784.

A judgment against a liquor dealer creates no lien upon land of landlord of such liquor

dealer without suit to so subject it: *Bellinger v. Griffith*, 23 O. S. 619, III Longsdorf's Notes, 151.

The owner of a perpetual lease with a privilege of purchase, is an owner within the terms of the statute authorizing an owner to sign for a street improvement: *Latrod v. Cincinnati*, 6 Dec. Rep. 1006, 9 Am. L. Rec. 479, 5 Bull. 903.

Judgments are liens, without levy for one year, on perpetual leaseholds as upon other real estate. Such estates are subject to levy and execution: *Bank v. Roosa*, 13 O. 334, I Longsdorf's Notes, 642; *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565; *St. Bernard v. Kemper*, 60 O. S. 244, IV Longsdorf's Notes, 784; *Oliver v. Jones*, 3 O. N. P. 129, 6 O. D. (N.P.) 194.

The common law incidents of leasehold estates, so far as dower is concerned, yet obtain in Ohio: *Kampmann v. Schaaf*, 8 Dec. Rep. 351, 7 Bull. 159; see also *Oliver v. Jones*, 3 O. N. P. 129, 6 O. D. (N.P.) 194.

This decision was not necessary to this case. Thus in questions as to execution, with reference to which by statute (see G. C., § 11655), such estates are to be regarded as estates in fee simple, such estates have been said to be estates in fee simple for all purposes: *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565.

Perpetual leaseholds have been said since the enactment of G. C., § 8597, and G. C., § 11655, to be estates in fee simple: *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565; *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513];

McLean v. Rocky, 3 McLean, 230, Fed. Cases 11586, 2 O. F. D. 270.

The view at present entertained is that such estates are to be regarded as estates in fee for the purpose of descending by virtue of G. C., § 8597, and for purposes of execution by virtue of G. C., § 11655, but otherwise such estates continue to be chattels real as at common law: *Taylor v. DeBus*, 31 O. S. 468, III Longsdorf's Notes, 598.

The lessee in possession under a lease of real property for ninety-nine years, renewable forever, the property standing in his name for taxation, is so far the owner of such property as to authorize him to subscribe a petition for street improvements; and in such case the signature of the lessor to such petition is not required in order to authorize an assessment against the *corpus* of such property: *St. Bernard v. Kemper*, 60 O. S. 244, IV Longsdorf's Notes, 784; see also *Clements v. Norwood*, 2 O. N. P. 274, 1 O. D. (N.P.) 193.

A permanent leasehold, renewable forever, is said not to be an estate of inheritance within the meaning of the Dower act: *Oliver v. Jones*, 3 O. N. P. 129, 6 O. D. (N.P.) 194.

Under a perpetual lease which does not contain a covenant requiring the lessee to pay the taxes, it is nevertheless said that so much of the taxes as are on account of the improvement put upon the lot by the lessee to be charged to such lessee: *Joslyn v. Spellman*, 9 Dec. Rep. 258, 12 Bull. 7.

FELONIOUS ASSAULT.

See ASSAULT WITH INTENT.

FEE TAIL.

Scope Note—Includes definition, constitutionality and construction of statutes, creation, the interests of the donee and issue, incidents of fee tail and actions for the sale of entailed estates. Excludes construction of specific devises and grants and questions involving the statute against perpetuities.

Cross References.

For the statute against perpetuities as restricting entails, see PERPETUITIES.

For the construction of devises creating estates in fee tail, see WILLS, LEGACIES AND DEVISES.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Constitutionality and Construction of Statutes.
- III. Creation.
- IV. Interests of Donee and Issue.
 - A. First donee.
 - B. Issue of donee.
 1. Who are issue.
 2. Interest during life of donee.
 3. Interest on death of donee.

V. Incidents of Fee Tail.

VI. Action to Sell Entailed Estate.

- A. *Jurisdiction.*
- B. *Parties.*
- C. *Petition.*
- D. *Priority and sale.*

I. DEFINITION.

A fee tail is an estate which by the terms of the grant expressly limits the inheritance to a particular class of heirs, to-wit: "to the heirs of his body," and thus exclude collateral heirs: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

II. CONSTITUTIONALITY AND CONSTRUCTION OF STATUTES.

Our disentailing act was substantially copied from Connecticut: *Harkness v. Corning*, 24 O. S. 416; III Longsdorf's Notes, 181.

Applying the principles as to the applicability of the common law to the statute *de donis* it is not likely the courts would give force to the statute: *Carroll v. Olmsted*, 16 O. 251, I Longsdorf's Notes, 761.

G. C., § 8622, was enacted December 17, 1811 (2 Curwin 2293). It was held that this statute applied to estates in fee tail, which were created before that time as well as to those which might be created thereafter; and that such change of estates in fee tail into estates in fee simple in the issue of the first donee in tail was not an unauthorized exercise of legislative power; and was not unconstitutional as interfering with the vested rights: *Pollock v. Speidel*, 27 O. S. 86, III Longsdorf's Notes, 346.

If an estate in fee tail was created in 1807 and the statute changing a fee tail to a fee simple in the first donee in tail was enacted in 1811, the immediate issue of the first donee in tail acquired a fee simple; and if he conveyed such premises in 1836 by a deed containing covenants of general warranty, the title to such realty passed in fee simple, and neither such grantor nor his heirs could thereafter claim title thereto as against such grantee, his heirs or assigns: *Pollock v. Speidel*, 27 O. S. 86, III Longsdorf's Notes, 346.

G. C., § 11925, is valid and constitutional as applying to estates tail created after the enactment of such statute: *Oyler v. Scanlan*, 33 O. S. 308, III Longsdorf's Notes, 675.

The disentailing acts are constitutional in so far as they relate to subsequently created estates: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

The legislature could, by special act, authorize a sale in fee of lands perpetually entailed by a will: *Carroll v. Olmsted*, 16 O. 251, I Longsdorf's Notes, 761.

The act of April 4, 1859 (56 v. 154), and the acts supplementary thereto, passed March 30, 1864 (61 v. 80), and April 13, 1865 (62 v. 184; for present statute see G. C., § 11925), include estates created before as well as after their passage, but as to estates created before their passage they are in conflict with § 19, Art. I, and § 28, Art. II, of the Constitution, and are unconstitutional: *Gilpin v. Williams*, 25 O. S. 283, III Longsdorf's Notes, 230; *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667; *Oyler v. Scanlan*, 33 O. S. 308, III Longsdorf's Notes, 675; *Roam v. Wolls*, 61 O. S. 131, IV Longsdorf's Notes, 803.

The Act of April 13, 1865, extends and applies the Acts of April 4, 1859, and March 3, 1864, to all estates tail or for life with remainder over to any other person or persons, and to all determinable estates which may be created by will, etc., after its passage: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

Upon the principle that the expectation of an heir presumptive is not a vested right, but a mere possibility, estates tail, in this country, have generally been changed into estates in fee simple by statute, the validity of which has not been disputed: *Gilpin v. Williams*, 25 O. S. 283, III Longsdorf's Notes, 230.

The statute against entails does not affect the curtesy of the surviving husband: *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181.

The rule that the statute against entails does not affect the curtesy of the surviving husband is the same whether the estate is created by will or deed: *Broadstone v. Brown*, 24 O. S. 430, III Longsdorf's Notes, 132. See also CURTESY.

III. CREATION.

The English presumption of an intent to create an estate tail was designed to build up families, cheat creditors, and prevent forfeitures, and is not consistent with our institutions: *King v. Beck*, 15 O. 559, I Longsdorf's Notes, 730.

Entails are not favored, and the presumption is against an intention to create them, and it must be overcome by language entirely free from ambiguity: *Collins v. Collins*, 40 O. S. 353, IV Longsdorf's Notes, 30.

The policy of Ohio which is unfavorable to entails is also unfavorable to provisions tying up property, and will not by liberal construction create limitations: *Bierce v. Bierce*, 41 O. S. 241, IV Longsdorf's Notes, 59; *Pendleton v. Bowler*, 10 Dec. Rep. 551, 27 Bull. 313. See also WILLS, LEGACIES AND DEVISES.

There is nothing in the policy of the law of Ohio to discourage estates in fee tail further than the rule laid down by the courts, that when language conveys equally well two different estates, that construction will be placed upon it which will confer an estate in fee simple in preference to an estate in tail: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

An estate in lands created by will or deed which, by the granting clause, would be an estate in fee simple may be limited by the *habendum* clause to an estate tail: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

Where the language in the granting and *habendum* clauses of a will is such that it creates an estate tail in the lands devised, an intention to create an estate in fee can not be construed out of other clauses in the will unless such intention be clearly and unmistakably expressed: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

Where the language of a will is such that it creates an estate tail in lands devised, a proviso that the devisee "shall pay all taxes which may accrue upon said lands after he arrives at the age of twenty-one years," is not sufficient to establish an intention on the part of the testator to devise such lands in fee simple: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

Where lands are conveyed by deed "to A the heirs of his body, and assigns, forever" the grantee takes an estate tail: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

A devise to a son "and his heirs to the third generation" must be construed as an estate tail, else these words would be meaningless. Accordingly, under G. C., § 8622, the son takes a life estate and his children take a fee simple: *Naylor v. Loomis*, 9 O. C. C. 96, 6 O. C. D. 41.

A devise of a remainder "to my youngest child and the heirs of her body forever," creates an estate tail, and the issue of such

child as first donee in tail takes in fee: *Wolf v. Stout*, 9 Dec. Rep. 231, 11 Bull. 236.

A will devising lands to testator's son, "to be held and enjoyed by him and the heirs of his body lawfully begotten forever," creates an estate tail and not in fee simple, and the devisee can not by deeding away the lands so devised to him cut off his heirs: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

A will devising the landed estate to testator's three sons, to one about eighty acres, to another about seventy-eight acres, with the *habendum* clause, creating estates tail, to vest upon the death or marriage of testator's wife, is not affected or the estates changed to fee simple by a provision following in another part of the will, that: "It is my will and desire and I wish to be distinctly understood that the preceding items contain my last will and testament upon this express condition, that my now wife shall continue to be a widow, after my decease, during her natural life, but in case my said wife should afterward marry, then and in that case it is my will and desire that all my landed estate shall be equally divided between my three sons and all the other property divided as aforesaid as near the manner pointed out in the respective items as the circumstances will admit": *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

Under a devise "to my said son" of the undivided one-half of certain real estate, "to have and to hold the said property for his life, and the remainder over at his death to the heirs of his body, their heirs and assigns forever share and share alike," the children of the said son of the testatrix are seized with a fee simple title: *Poor v. Hart*, 11 O. N. P. (N.S.) 49, 21 O. D. (N.P.) 260 [affirmed, without opinion, *Hart v. Poor*, 84 O. S. 489]. See also WILLS, LEGACIES AND DEVISES.

A conveyance in fee to the grantee (son of grantor), "during his natural life, and then to pass exclusively to the heirs of his own body in fee simple forever," provided said grantee "does not sell or convey said premises before his death, in such event the title passes to the purchaser," creates a conditional limitation in tail to the issue of the donee in tail subject to be barred and defeated by alienation by the donee in tail during his life and the grantee of the donee in tail takes a fee simple: *Aiken v. Spellman*, 4 O. N. P. 297, 6 O. D. (N.P.) 409.

An estate tail must contain no limitation as to duration or heirs of the body of the first donee in tail. If a devise, which would otherwise have created an estate tail, pro-

vides for the estate going over on failure of issue in the remaindermen, no estate tail is created: *Williams v. Haller*, 13 O. N. P. (N.S.) 329.

A devise to A for life, and, after his decease, to the heirs of his body, and failing heirs at his decease, then over, is an estate tail in A: *King v. King*, 12 O. 390, I Longsdorf's Notes, 615.

IV. INTERESTS OF DONEE AND ISSUE.

A. FIRST DONEE.

The first donee in tail does not take merely a life estate: *Poor v. Hart*, 11 O. N. P. (N.S.) 49, 21 O. D. (N.P.) 260 [affirmed, without opinion, *Hart v. Poor*, 84 O. S. 489].

G. C., § 8622, does not affect the interest of the first donee in tail: *Richardson v. Stockyard Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

The first donee takes merely fee tail; and he can not convey a fee simple so as to defeat the right of his issue: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

G. C., § 8622, does not reduce the interest of the first donee from an estate tail to a life estate; and accordingly the surviving spouse of the first donee in tail is entitled to dower or curtesy in accordance with the statutes then in force: *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181.

The rule in Shelley's Case did not convert the fee tail into a fee simple: *Pollock v. Speidel*, 27 O. S. 86, III Longsdorf's Notes, 346.

The first donee in tail can not, in this state, by a sale and conveyance in fee simple, with covenant of warranty, bar the entail, or deprive his issue of the right of succession to the inheritance: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

It is not a bar to an action by the issue of a tenant in tail to recover the entailed lands, that their ancestor, the tenant in tail, has conveyed with covenants of warranty and that assets have descended to them from his estate: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

The statute of limitations will not begin to run against the right of action of the heirs of one who being entitled to a fee tail in land attempted to convey the same in fee simple, until the death of the grantor, and the right of action of the heirs accrues: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, without opinion, *Hippel v. Darling*, 60 O. S. 591].

B. ISSUE OF DONEE.

1. Who are Issue.

The phrase "issue of the body" is capable of two constructions, it may be that the legislature intended it to apply only to those who were in fact "issue," or it may be that it was intended to embrace all those whom the law placed in the position and class of issue: *Fugmann v. Teobald*, 3 O. N. P. 65, 4 O. D. (N.P.) 67 [on appeal, *Fugmann v. Teobald*, 12 O. C. D. 720, and not affected by the reversal in *Theobald v. Fugman*, 64 O. S. 473, IV Longsdorf's Notes, 876].

"Issue of the body" and "children born in lawful wedlock" are convertible terms, but "heirs" and "issue of the body" are not. A person may be the "heir" of another person, without being "issue of the body" of that other, but no one can be the "child" of another without being both "heir" and "issue of the body" of that other: *Fugmann v. Teobald*, 3 O. N. P. 65, 4 O. D. (N.P.) 67 [on appeal, *Fugmann v. Teobald*, 12 O. C. D. 720, and not affected by the reversal in *Theobald v. Fugman*, 64 O. S. 473, IV Longsdorf's Notes, 876].

The general meaning applicable to the word "issue" is that it includes grandchildren, and that it is as broad as "heirs of the body" including lineal descendants indefinitely: *Moon v. Hepford*, 2 O. N. P. 365, 3 O. D. (N.P.) 508.

One not of the blood of the testator who has been designated an heir under favor of G. C., § 8598, is not issue of the body of such testator within the meaning of G. C., § 10504: *Theobald v. Fugman*, 64 O. S. 473, IV Longsdorf's Notes, 876 [reversing *Fugmann v. Teobald*, 12 O. C. D. 720, in which the same judgment was rendered as in *Fugmann v. Teobald*, 3 O. N. P. 65, 4 O. D. (N.P.) 67].

A person adopted and designated as an heir under G. C., §§ 8030 and 8598, can not be regarded as issue and take under a devise to his adopter and to the issue of her body in fee, with reversion in her surviving brothers: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

An adopted child is not such issue as will prevent a legacy from lapsing as provided in G. C., § 10581, where a legatee dies before the testator: *Phillips v. McConica*, 59 O. S. 1, IV Longsdorf's Notes, 757.

G. C., §§ 8030 and 8598, permitting the adoption of children and designation of heirs, confer the right and power upon an adopter to prescribe who shall be heir to himself, but do not extend the power so that he may designate who may take the property of some one else, nor give him the right to change

without the consent of the donor of an estate tail, or those in privity with him, the course of succession prescribed by the donor, so as to divest him or his heirs of vested rights: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367. See also WILLS, LEGACIES AND DEVISES.

An illegitimate daughter can not take under a will as the "issue" of her mother, nor could she inherit collaterally from her mother's niece: *Gibson v. McNeely*, 11 O. S. 131, II Longsdorf's Notes, 488 [affirming *Gibson v. Moulton*, 13 Dec. Rep. 97, 2 D. 158].

For the capacity of illegitimate children to take under a gift to A and the heirs of his body lawfully begotten, where they had been made legitimate by the subsequent marriage of the parents and the recognition of their father, see *Kniffin v. Schaffer*, 12 O. C. C. 753, 4 O. C. D. 62.

2. Interest During Life of Donee.

The children of a donee in tail have no interest during the life of the donee in tail which they can alienate: *Dungan v. Kline*, 81 O. S. 371; *Carter v. Grossnickle*, 11 O. N. P. (N.S.) 465, 22 O. D. (N.P.) 680.

During the life of the first donee in tail, the issue of such donee has no estate or interest in the lands entailed which he can alienate; and a deed given by such issue during the life of the first donee in tail passes no interest where such issue die before the death of the first donee in tail, themselves leaving issue surviving: *Dungan v. Klien*, 81 O. S. 371.

A devise to testator's daughter A and the heirs of her body devises a fee tail. The children of such daughter, during the life of their mother, have no interest in such property which they can release or quitclaim by deeds given upon a nominal consideration and purporting to convey "all my right, title, interest, and estate in and to the foregoing described real estate, whether vested or contingent, which I now have or may hereafter have or derive from the will of my late grandfather B, giving and bequeathing said real estate to my mother A and the heirs of her body": *Carter v. Grossnickle*, 11 O. N. P. (N.S.) 465, 22 O. D. (N.P.) 680.

Quitclaim deeds by the donees in tail, reciting a consideration of one dollar, and reciting an intent to convey all their interest, vested or contingent, which they now have or may hereafter acquire, will not pass their after-acquired title by estoppel, for there is no assertion of being possessed of the estate, but only of an intention to convey a hoped-for estate; nor do the deeds amount to a

contract to convey, because there is no adequate consideration to support specific performance: *Carter v. Grossnickle*, 11 O. N. P. (N.S.) 465, 22 O. D. (N.P.) 680.

3. Interest on Death of Donee.

The effect of G. C., § 8622, is to pass to the issue of the first donee in tail an estate in fee simple upon his death: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842; *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181; *Broadstone v. Brown*, 24 O. S. 430, III Longsdorf's Notes, 182; *Richardson v. Stockyard Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

The fact that the first donee in tail has himself conveyed the entailed realty to his issue and to the heirs of their bodies forever, does not reduce their interest on his death from a fee simple to a fee tail: *Pollock v. Speidel*, 27 O. S. 86, III Longsdorf's Notes, 346.

A devise of realty by a testator to his granddaughter A and her issue, with a *habendum* "to A and her issue and their heirs" gives to A an estate in fee tail, the word "heirs" being used as a word of limitation and not of purchase: *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181.

Under a devise of certain real estate to a son "to have and to hold the said property for his life, and the remainder over at his death to the heirs of his body, their heirs and assigns forever, share and share alike," the children of said son take the fee and not an estate tail: *Poor v. Hart*, 11 O. N. P. (N.S.) 49, 21 O. D. (N.P.) 260 [affirmed, without opinion, *Hart v. Poor*, 84 O. S. 487].

A testator devised certain lands to his daughter for life, with remainder after her death to her children, then unborn, forever, without otherwise disposing of the inheritance. It was held, the reversion in fee descended to and vested in the heirs of the testator at his death, subject, however, to divest in the event that the devisee for life should die leaving children, surviving her: *Gilpin v. Williams*, 25 O. S. 283, III Longsdorf's Notes, 230.

Where a testator gives property to two daughters and two grandsons for life, and then provides that the portion in which each of them enjoyed a life estate shall "descend and pass absolutely, unconditionally, and in fee simple, respectively, to the children of each, lawfully begotten of the body of each, or to the children or child lawfully begotten of the body of such child or children," it was held that the words "or to the children or child lawfully begotten of the body of such child or children" were

intended to designate persons who might be living at the death of the tenants for life, and not as words of limitation, requiring a succession first to children and then to children of the children: *Stevenson v. Erans*, 10 O. S. 307, II Longsdorf's Notes, 438.

V. INCIDENTS OF FEE TAIL.

An estate tail must contain no limitation as to duration or heirs of the body of the first donee in tail; accordingly if a devise, which would otherwise have created an estate tail, provides for the estate going over on failure of issue in the remaindermen, no estate tail is created: *Williams v. Haller*, 13 O. N. P. (N.S.) 329.

The donor in tail, as the source of the title in expectancy of the heirs of the body of the tenant in tail, has the legal right to provide the means of barring the entail, or cutting off the expectancy, by the same instrument which created such expectancy: *Yoder v. Ford*, 10 Dec. Rep. 675, 23 Bull. 54.

Though, under a deed to A and the heirs of his body, the issue take by descent, yet the tenant in tail is not the source of their title; they take *formam doni*, from the person who first created the estate, and are therefore not estopped by a deed of the tenant in tail: *Pollock v. Speidel*, 17 O. S. 439, II Longsdorf's Notes, 842.

An estate tail is an estate of inheritance and the issue of the donee takes by descent *per formam doni* from the person who first created the estate and not from his immediate ancestor, nor by purchase, and is excepted from the operation of G. C., §§ 8030 and 8598, relating to adopted or designated heirs: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

Under the will of A devising his estate to his wife for life with remainder to his sisters and their heirs forever, the share of any sister dying without issue to be divided among the survivors, all of his estate passed to his wife for life, then to his sisters in fee tail, and then to their issue in fee simple. In the absence of issue of any sister, her share passed to the surviving sister or sisters in fee simple: *Harding v. Marsh*, 9 O. C. C. (N. S.) 542, 19 O. C. D. 676 [affirmed, without opinion, *sub nomine*, *Knight v. Harding*, 76 O. S. 614].

Where the donor in a deed tail reserved "the right during his natural life to control the conveyance of said premises during the minority of any of the heirs of the body" of the tenant in tail, a deed by the tenant in tail and the donor during the minority of all the children of the tenant in tail is an execution of the power reserved and

bars the entail, and cuts off the expectancy of the heirs of the body of the tenant in tail: *Yoder v. Ford*, 10 Dec. Rep. 675, 23 Bull. 54.

A the owner in fee conveyed lands to his son B "During his natural life and then to pass exclusively to the heirs of his own body in fee simple forever, provided B does not sell and convey said premises before his death, in such event, the title passes to the purchaser." B reconveyed the said real estate to A by deed in fee simple and A then conveyed to the wife in fee. It was held that the wife of B took an estate in fee and that the limitation entailed by the deed of A was defeated: *Aikin v. Spellman*, 4 O. N. P. 297, 6 O. D. (N.P.) 409 [affirmed, without opinion, *Cook v. Aikin*, 60 O. S. 608].

Where a wife died, leaving a husband and three children, and the husband mortgaged his estate by curtesy, such mortgage could not be enforced so long as either of said children survived: *Robert v. Sliffe*, 41 O. S. 225, IV Longsdorf's Notes, 58.

VI. ACTION TO SELL ENTAILED ESTATE.

A. JURISDICTION.

The probate court has no jurisdiction to sell entailed real estate: *Jones v. Wright*, 1 O. C. C. (N.S.) 59, 14 O. C. D. 649.

An order for the sale of an estate limited to the first taker for life, remainder to her children, created previously to that statute, made in a proceeding commenced by the life tenant, is of no legal force whatever, because the court is without jurisdiction of the subject-matter and may therefore be collaterally impeached by those who did not, or who could not, by reason of minority, assent. The fact that the petitioner, the life tenant, was the guardian of her minor children, and as such guardian entered their appearance and consented for them, does not estop such minors or their legal representatives from recovering the possession of the land from a purchaser at the sale or those claiming under him: *Ream v. Wolls*, 61 O. S. 131, IV Longsdorf's Notes, 803.

An order confirming the report of a trustee of the proceeds of entailed estates, sold under G. C., §§ 11925, *et seq.*, which shows the investment or other disposition of substantially all of the proceeds of the sale, is a final order in a civil action in which the right to demand a jury does not exist and is therefore appealable: *Ludlow v. Moore*, 17 O. C. D. 496, 2 O. L. R. 491.

B. PARTIES.

Under the act of April 4, 1859, and the supplemental acts (see G. C., § 11925), the

owner of a life estate in possession created by will subsequent to April 13, 1865, may institute proceedings for the sale of both the life estate and the estate in remainder; and this may be done notwithstanding the testator provided in the will for the disposition of the land and the determination of the life estate: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

A widow seeking a life estate under a will by election can have relief under G. C., § 11925: *Dukes v. Dukes*, 4 O. C. C. 507, 2 O. C. D. 676.

If the petition to sell under the disentailing acts makes all those named in the will parties, and avers they are the sole heirs at law, this, in effect, avers that these are all the heirs, as against a demurrer for defect of parties: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

C. PETITION.

For the contents of the petition, see *Dukes v. Dukes*, 4 O. C. C. 507, 2 O. C. D. 676.

A copy of the will is to be filed with the petition: *Dukes v. Dukes*, 4 O. C. C. 507, 2 O. C. D. 676.

Omission to give a copy of the will, or other instrument creating the estate in the petition, though required by G. C., § 11926, is not reversible error if not objected to below: *Oyler v. Scanlan*, 33 O. S. 308, III Longsdorf's Notes, 675.

D. PRIORITY AND SALE.

A recorded mortgage of an equitable interest under a contract for the sale of an entailed estate, is not prior to a subsequent assignment with said contract with the approval of the court: *Door & Paint Co. v. Burrows*, 2 O. C. C. (N.S.) 213, 15 O. C. D. 781.

A tenant for life asked for the sale of the undivided half, held by remaindermen, who objected that such sale would injure them. It was competent for the court to order sale of the whole, with the consent of the tenant for life who held the other undivided half, it appearing that such sale would not injure remaindermen: *Oyler v. Scanlan*, 33 O. S. 308, III Longsdorf's Notes, 675.

Where in a proceeding under G. C., § 11925, an action was brought by the tenant for life of real estate against the remainderman, asking for the sale or lease of said premises, it was held that an order of court authorizing a lease of said premises with a privilege of purchase, even if erroneous was not void, and is valid and binding until reversed: *Osseforth v. Bussman*, 8 O. C. C. 694, 4 O. C. D. 391, 1 O. D. (N.P.) 435.

FEIGNED ACCOMPLICE.

See ENTRAPMENT.

FEIGNED CONTROVERSY.

See COURTS.

FEIGNED ISSUE.

For feigned issue, see EQUITY.

FELLOW SERVANTS.

For a discussion of the questions concerning fellow servants, see MASTER AND SERVANT; NEGLIGENCE.

FELONIES AND MISDEMEANORS.

See FELONY; MISDEMEANOR.

FELONY.

For a discussion of the particular acts which constitute felonies, see the titles of the specific crimes and cross references thereunder.

For general questions, see AIDERS, ABETTERS AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; COURTS; EVIDENCE; FINES; INDICTMENT; INFORMATION; JURISDICTION; SENTENCE; VENUE; VERDICT.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For compounding of a felony, see COMPOUNDING FELONY.

That a conviction of a felony may be had on the uncorroborated testimony of an accomplice, see AIDERS, ABETTERS AND ACCOMPLICES.

As to admission to bail of one convicted of a felony pending the hearing on a petition in error, see BAIL AND RECOGNIZANCE.

Felonies are those crimes that may be punished by death, or by imprisonment in the penitentiary: *Hallett v. State*, 29 O. S. 168, III Longsdorf's Notes, 454.

The fact that an offense may be punished by fine and imprisonment in the county jail does not make it a misdemeanor only, if it may be punished by imprisonment in the penitentiary: *State, ex rel., Hamilton*, 3 O. C. C. 10, 2 O. C. D. 6.

G. C., § 12372, attaches to the word felony a meaning wholly at variance with its meaning at common law. The common law dis-

inction between felonies and misdemeanors never existed in this state: *Mitchell v. State*, 42 O. S. 383, IV Longsdorf's Notes, 118.

"Felony" and "feloniously" in criminal law in Ohio have only such meaning as is fixed by the statute: *Mitchell v. State*, 42 O. S. 383, IV Longsdorf's Notes, 118.

The word "felony" is a technical word and is to be understood in its recognized legal sense, unless the legislature, in the act in which it is found, has by an interpretation clause, or otherwise, given the sense in which it is understood when used in the penal statutes of general code: *Griffin v. State*, 34 O. S. 299, III Longsdorf's Notes, 717.

To predicate an act as being "felonious" is merely to assert a legal conclusion as to the quality of the act; and, unless the act charged of itself imports a felony, it is not made so by describing it as "felonious": *Mathews v. State*, 4 O. S. 540, II Longsdorf's Notes, 129.

Where both a misdemeanor and a felony are charged and the accused is held to answer for the felony, he should be discharged from the misdemeanor: *Stief v. Cincinnati*, 19 O. D. (N.P.) 484, 6 O. L. R. 602.

The statutory provision that a convicted person may be imprisoned until his fines and costs are paid, applies only to misdemeanors, and where such a provision is made a part of the sentence of one convicted of a felony, error will lie to a refusal to eliminate that portion of the sentence: *Smith v. State*, 4 O. C. C. (N.S.) 101, 14 O. C. D. 140.

Inasmuch as malicious destruction of property is a felony if the property destroyed is of the value of one hundred dollars or more, the probate court is without jurisdiction over a cause where the defendant is so charged: *Adams v. State*, 11 O. N. P. (N.S.) 11.

The offense of stoning a passenger car of a railway train punished by G. C., § 12497, is a felony since it may be punished by imprisonment: *State, ex rel., Hamilton*, 3 O. C. C. 10, 2 O. C. D. 6.

The amount of a note, which is the subject of a criminal act, and not its value, determines whether it is a felony or a misdemeanor: *Ellars v. State*, 25 O. S. 385, III Longsdorf's Notes, 246.

An heir does not forfeit the inheritance by having murdered the ancestor in order to obtain it, there being no corruption of blood or forfeiture of estate by felony: *Deem v. Millikin*, 6 O. C. C. 357, 3 O. C. D. 491 [affirming *Deem v. Risinger*, 11 Dec. Rep. 492, 27 Bull. 156].

In the procedure prescribed by the provisions of the fourth article of the constitution all judgments which the court of appeals may render in cases involving questions arising under the constitution of the

United States or of this state, in cases of felony (on leave first obtained) and in cases which originated in the court of appeals, without regard to the time when the cases may be brought into that court, there may be a review by the supreme court by proceedings in error instituted in accordance with the laws in force January 1, 1913; and the same course may be taken for the review of judgments of the court of appeals in cases of public or great general interest if the cases were pending in the circuit court on said first day of January: *Akron v. Roth*, 88 O. S. 456.

G. C., §§ 13682, 13683 and 13684, in so far as they purport to confer upon the supreme court appellate jurisdiction in misdemeanors, are inconsistent with the constitution as amended and therefore have no further force or effect. The question of the jurisdiction of this court under the provisions of said sections in felony cases is not involved in this case and is not here decided: *State v. Mansfield*, 89 O. S. —.

FEMALE.

For the fact that carnal knowledge of a female under sixteen years constitutes rape, see RAPE.

For the fact that carnal knowledge of a female under sixteen years constitutes rape, See RAPE.

For the effect of carnal knowledge of a female over sixteen years with her consent, see ADULTERY; INCEST; SEDUCTION.

Females can not be sentenced to the Ohio state reformatory: *State v. Wilson*, 4 O. D. (N.P.) 328, 36 Bull. 185. See also SENTENCE.

FEMALE EMPLOYES.

See MASTER AND SERVANT.

FEMALE PUPIL.

A male teacher, who has sexual intercourse with a female under his instruction, with her consent, at her father's house, after school hours of one day, and before school hours of the succeeding day, during the term of his engagement as her instructor, is liable to punishment under G. C., § 13030: *Brown v. State*, 38 O. S. 374, III Longsdorf's Notes, 976.

Where a music teacher, who is employed to give a certain number of lessons but not for a definite time, has intercourse with a female pupil during the time of such employment, it is within the meaning of G. C., § 13030: *Esley v. State*, 10 O. C. C. (N.S.) 169, 19 O. C. D. 568.

In an indictment under this section it is not necessary to aver that the teacher and pupil were not husband and wife: *Esley v. State*, 10 O. C. C. (N.S.) 169, 19 O. C. D. 568.

G. C., § 13671, provides that in prosecutions under G. C., § 13030, a conviction shall not be had on the testimony of the female unsupported by other evidence to the extent required as to the principal witnesses in case of perjury. Under G. C., § 13671, evidence of sexual intercourse between the parties at other times and places than those charged in the indictment are admissible: *Esley v. State*, 10 O. C. C. (N.S.) 169, 19 O. C. D. 568.

The positive testimony of a witness of an act of sexual intercourse between a teacher and a female pupil, that such act occurred at a certain place on Wednesday, is sufficient to sustain a verdict of guilty, even though the complaining witness testified that no such act occurred at that place except on Sunday. Such testimony will not be excluded as not

corroborative of the complaining witness: *Esley v. State*, 10 O. C. C. (N.S.) 169, 19 O. C. D. 568.

FEMALE REFORMATORY.

See GIRLS' INDUSTRIAL HOME.

FEMALE SUFFRAGE.

The constitutional power of the legislature to provide for common schools is not limited by the definition of elector in Art. V, § 1, of the Constitution of Ohio, and the right to vote for school officers may be conferred on women: *State, ex rel., v. Board of Elections*, 9 O. C. C. 134, 6 O. C. D. 36. See also ELECTIONS, POLITICAL.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

Scope Note.—Includes nature and character of fences; partition fences and the effect of a failure to fence. Excludes fences as boundaries and the fencing of dangerous premises.

Cross References.

For the effect of a failure to fence, see ANIMALS.

For fence laws as relating to trespass by animals, see ANIMALS.

For the liability for animals breaking through fences, see ANIMALS; RAILROADS.

For fences as boundaries, see BOUNDARIES.

For the fencing of dangerous premises, see DANGEROUS PREMISES; NEGLIGENCE.

ANALYTICAL OUTLINE.

I. Definition.

II. Nature and Kind of Fence.

III. Partition Fence.

A. Uninclosed lands.

B. Location.

1. In general.

2. Evidence of location.

C. Notice.

D. Disqualification of township trustee.

E. Conclusive character of award.

F. Contribution.

IV. Failure to Fence.

A. Natural person.

B. Railroads.

I. DEFINITION.

In law, a fence or wall is a building: *University v. Cincinnati*, 1 O. N. P. (N.S.) 106, 13 O. D. (N.P.) 741 [affirmed, without opinion, *Cincinnati v. University*, 71 O. S. 500].

II. NATURE AND KIND OF FENCE.

Certain kinds of fences may be forbidden by restrictions in the deed conveying title to such land: *MacGregor v. Linney*, 6 O. C. C. (N.S.) 524, 17 O. C. D. 490.

The kind of fence which must be built is that which an ordinarily prudent man would construct under similar circumstances: *Kittredge v. Cincinnati*, 6 O. C. C. (N.S.) 646, 18 O. C. D. 100 [affirming *Kittredge v. Cincinnati*, 2 O. N. P. (N.S.) 6, 14 O. D. (N.P.) 504].

The measure of care required in maintaining a fence around a pasture to restrain stock is that which an ordinarily prudent man would exercise under like circumstances: *Kittredge v. Cincinnati*, 6 O. C. C. (N.S.) 646, 18 O. C. D. 100 [affirming *Kittredge v. Cincinnati*, 2 O. N. P. (N.S.) 6, 14 O. D. (N.P.) 504].

If the kind of fence which is required by statute has not been constructed, it is no defense that the fence which has been constructed is better or more expensive than that which is required by statute: *Robb v. Bruchmann*, 24 O. S. 3, III Longsdorf's Notes, 155.

The sufficiency of a fence to turn stock, if an issue, can not be proved by the opinion of those whose only qualification was having seen it: *Railroad v. Schultz*, 43 O. S. 270, IV Longsdorf's Notes, 165. See also EVIDENCE.

A board fence eight or more feet in height, extending the entire length of the grantor's premises to the sidewalk, which shuts off the view of the grantor's remaining ground and dwelling house, diminishes the air and light formerly enjoyed by him, and which is contrary to the intention of the parties as evidenced by the stipulations in the deed and the circumstances and condition of the property at the time of the conveyance, is a "building" within the meaning of a deed providing against the erection of certain buildings: *MacGregor v. Linney*, 6 O. C. C. (N.S.) 524, 17 O. C. D. 490 [affirmed, without opinion, *Linney v. MacGregor*, 74 O. S. 449]. See also DEEDS.

A and B owned adjoining lots and A erected on his lot a board fence reaching to the roof of B's house which stood on the line of the two lots, which fence shut off light and air from the windows of the house of B to its injury, which fence was so erected by

A for no useful or ornamental purpose, but from motives of unmixed malice toward B. In an action by B against A to compel the removal of the fence, it was held that A had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal: *Letts v. Kessler*, 54 O. S. 73, IV Longsdorf's Notes, 624 [reversing *Kessler v. Letts*, 7 O. C. C. 108, 3 O. C. D. 687].

Where windows in a division wall look down into the adjoining yard, the owner of the latter may erect a frame against them and cut off the light and air, and his motive is immaterial: *Dawson v. Kemper* 32 Bull. 15 [denying *Kessler v. Letts*, 7 O. C. C. 108, 3 O. C. D. 687]. See also NUISANCE.

A partition fence erected wholly on his own lot by defendant, of high boards and unsightly appearance, from house line to street line, erected wholly for malice and unfriendliness, is not justifiable use of one's own premises, but is a nuisance and will be enjoined: *Peck v. Bowman*, 10 Dec. Rep. 567, 22 Bull. 111.

The admission of opinion evidence on a matter not altogether one of common knowledge is largely discretionary with the court, and if the court thinks the testimony of one having expert knowledge on the subject would aid the jury it may be admitted, though on a question not really requiring expert testimony; and the opinion of a man having experience with stallions as to the propensity of young stallions to jump out of their pastures at a certain time of the year is proper to go to the jury where the sufficiency of a fence to keep a young stallion in a pasture is in question: *Kittredge v. Cincinnati*, 2 O. N. P. (N.S.) 6, 14 O. D. (N.P.) 504. See also EVIDENCE.

Council may prescribe such rules for the erection of future bill boards as are reasonable and uniform in their application to all kindred subjects—that is, such as do not unwarrantably interfere with the use of private property and do not make one rule for a bill board and another for a fence which is in all respects of like character with the bill board: *Cusack Co. v. Cincinnati*, 9 O. N. P. (N.S.) 466, 20 O. D. (N.P.) 219.

III. PARTITION FENCE.

A. UNENCLOSED LANDS.

G. C., §§ 5908, *et seq.*, can not be so construed and administered as to charge an owner of lands which are, and which are to remain unenclosed, with any part of the expense of constructing and maintaining a fence for the sole benefit of the adjoining proprietor: *Coal Co. v. Cozad*, 79 O. S. 348, IV Longsdorf's Notes, 1046. *Contra, Nichols*

v. *Turner*, 10 O. C. C. (N.S.) 509, 20 O. C. D. 319 [reversed, without opinion, *Nichols v. Turner*, 82 O. S. 410].

B. LOCATION.

1. In General.

It is only where parties agree to a partition fence and join in its construction, that it may be placed half and half on the property of each: *McCleery v. Alton*, 8 O. C. C. (N.S.) 481, 19 O. C. D. 97.

The fact that a fence has been for many years kept up along part of the line of a private road between the opposite owners, if not called for by the contract establishing the road, will not authorize the court to prevent a party tearing down his fence, or to require a party to erect a fence: *Sachs v. Cordes*, 11 O. C. C. 145, 5 O. C. D. 67 [reversed, on other grounds, in memorandum opinion, *Sachs v. Cordes*, 60 O. S. 609]. See also EASEMENT.

2. Evidence of Location.

If a partition fence has been destroyed by one owner, without consulting the other, any doubt as to the location of such fence must be determined adversely to the interest of the party who thus destroyed it: *McCleery v. Alton*, 8 O. C. C. (N.S.) 481, 19 O. C. D. 97.

In a controversy over the location of a boundary line between city lots, the original monument having disappeared, old boundary fences are by far the better evidence of where the lot lines actually are. The presumption favoring the fence as establishing said line is not overcome by the fact that upon a resurvey based upon no original monument another line is established: *Wilson v. Sidle*, 4 O. N. P. (N.S.) 465, 17 O. D. (N.P.) 393.

Where the description shows the boundary line to be a straight line, it is established by the wall of a permanent building standing for the statutory period, even though the building does not extend the entire length of the boundary. The occupancy was such as to give notice of the extent of the adverse claim: *Wilson v. Sidle*, 4 O. N. P. (N.S.) 465, 17 O. D. (N.P.) 393.

C. NOTICE.

The provisions of the statutes with reference to the building of partition fences contemplate a continuing proceeding, and the notice required by G. C., § 5910, is sufficient for all the purposes of the case: *Gatchell v. Trustees*, 13 O. C. C. (N.S.) 495, 22 O. C. D. 537.

G. C., § 5908, shows the legislative intention that the parties who occupy and improve the lands which are divided by a partition fence for their own benefit are the parties who are immediately concerned in its repair; and notice to such person is sufficient. Accordingly notice to a tenant in common who is in sole possession of the premises and who is alone interested in the possession of them and in the repair of the fence is sufficient: *Moore v. Given*, 39 O. S. 661, III Longsdorf's Notes, 1059.

In a case involving a partition fence the notice must be actual if the statute is silent as to the manner of service. Notice to a part owner in possession, who is alone interested in the possession, is a compliance with a statute requiring notice to all parties having an interest in the title or possession of land affected by a partition fence, and gives the trustees power to assign to each his share to repair. Notice to nonresident owners, remaindermen, etc., is not necessary: *Moore v. Given*, 39 O. S. 661, III Longsdorf's Notes, 1059.

D. DISQUALIFICATION OF TOWNSHIP TRUSTEE.

If a trustee who joins in making the award is a son-in-law of one of the property owners, such disqualification is waived if no objection is made thereto by the other property owner before the award is made: *Robb v. Brachman*, 38 O. S. 423, III Longsdorf's Notes, 980.

E. CONCLUSIVE CHARACTER OF AWARD.

The award of the township trustees made in the manner provided for by statute is final and conclusive, in the absence of fraud or mistake: *Robb v. Brachman*, 24 O. S. 3, III Longsdorf's Notes, 155.

F. CONTRIBUTION.

The provision for contribution to the expense of building a partition fence applies only to cases where such fence, when built, will complete an enclosure of lands which belong to the owner upon whom it is sought to impose such charge, without including the land of any other person: *Kingman v. Williams*, 50 O. S. 722, IV Longsdorf's Notes, 525.

The act of April 18, 1904 (97 v. 138, G. C., §§ 5908, *et seq.*), may not be so construed and administered as to charge an owner of lands which are to remain unenclosed with any part of the expense of constructing and maintaining a line of fence for the sole benefit of the adjoining proprietor: *Coal Co. v. Cozad*, 79 O. S. 348, IV Longsdorf's Notes, 1046.

A tenant in common who is in the sole possession of certain land, and who alone is interested in the possession of such land and in the repair of fences, is entitled to notice since he is liable to contribution; and the other cotenants are not liable to contribution, and therefore are not entitled to notice: *Moore v. Given*, 39 O. S. 661, III Longsdorf's Notes, 1059.

The fact that the fence does not conform to the boundary line between the lands of the respective parties does not necessarily constitute a defense to an action to recover one half its value. It is sufficient upon this point if it was constructed and maintained as and for such line fence and was recognized and acquiesced in as such by the defendant: *Robb v. Brachmann*, 24 O. S. 3, III Longsdorf's Notes, 155.

The plaintiff in an action to recover one half the value of a partition fence is not precluded by the fact that the fence is a better or more expensive one than would have satisfied the requirements of the statute: *Robb v. Brachmann*, 24 O. S. 3, III Longsdorf's Notes, 155.

IV. FAILURE TO FENCE.

A. NATURAL PERSON.

If a landlord enters into an agreement to keep up the fences of the land which he has leased, and he fails to perform, the remedy as against him is by an action on the contract and not by an action in trespass: *Mathis v. McCord*, W. 647, I Longsdorf's Notes, 50.

A deed poll by a railway to A, conditioned that he and "his assigns" shall make and maintain fences, "which obligation shall be perpetually binding on the owners of the land," binds the grantee by express undertaking to perform the condition, and also binds purchasers from him. The agreement runs with the land, and binds A only while he is owner, and after he has subdivided and sold no action lies against him for breach of the obligation: *Hickey v. Railway Co.*, 51 O. S. 40, IV Longsdorf's Notes, 529.

In a grant of a right of way to a railroad, with a covenant by the grantor, his heirs and assigns, to keep up the fences, the covenant runs with the land, and grantees of the remaining ground can not hold the railroad for negligently running over stock: *Easter v. Railroad Co.*, 14 O. S. 48, II Longsdorf's Notes, 634. See also COVENANT, ACTION OF; DEEDS.

A covenant to make and keep up the fences made by a grantor of a right of way to a railroad is available to the successor of the railroad without words of perpetuity, and is not personal to the grantor. but runs with

his land and binds successive owners: *Railway v. Bosworth*, 46 O. S. 81, IV Longsdorf's Notes, 313 [affirming *Bosworth v. Railway Co.*, 1 O. C. C. 69, 1 O. C. D. 42].

Neglect of a defendant to keep his part of a partition fence in order, whereby his neighbor's cattle escaped into his field, is not the proximate cause of the injury where plaintiff's sons let them out of the latter field by a gate in order to drive them home and they escaped to other lands of defendant and were injured there: *Ferguson v. Powder Co.*, 9 O. C. C. 445, 6 O. C. D. 408. See also NEGLIGENCE.

If a land owner who has not kept his share of a partition fence in repair wishes to recover for injury done by stock which entered upon his land through such fence, he must, in order to recover, show that such defect in such fence was not the proximate cause of the injury: *Phelps v. Cousins*, 29 O. S. 135, III Longsdorf's Notes, 450.

If the owner of a partition fence fails to keep the part which has been assigned to him in repair, and by reason of such failure, stock from an adjacent enclosure enters upon his land and does damage there, such owner can not recover for such damage: *Phelps v. Cousins*, 29 O. S. 135, III Longsdorf's Notes, 450.

B. RAILROADS.

The liability of a railroad company, under G. C., § 8913, to respond in damages for injuries to stock in consequence of its neglect to construct and maintain a sufficient fence on each side of its road, is limited to loss or injuries occurring upon its own right of way: *Railway v. Phillips*, 81 O. S. 453.

Where a railroad company is proceeding to repair or rebuild a defective fence along the line of its right of way and upon the line where the fence has always been, and the adjoining land owner orders the company's employes off the premises and notifies the company to stop work, claiming that the line of the old fence is not the true line, and the adjoining proprietor continues to use his land as a pasture knowing that the fence is defective and dangerous, without revoking or modifying his warning to the company or doing anything to determine the true line, and his horse is then injured by becoming entangled in the loose barbed wire of the defective fence, he can not recover for the injury to the animal, because his own conduct has proximately contributed to bring about the condition which resulted in the injury: *Railroad v. McIllyar*, 77 O. S. 391, IV Longsdorf's Notes, 1034.

If a fence is constructed by an individual property owner, and it serves as a partition fence between the right of way of a railroad and the enclosed lands of such proprietor,

that such partition fence is not divided so as to charge each owner with the duty of maintaining a distinct part thereof, such railroad company and such individual are equally bound to maintain the entire fence in repair, until such division is made, and if such individual owner turns stock into a field, which is separated from the right of way of the railroad by such defective fence, such act is contributory negligence, which will prevent him from recovery for injury to such stock caused by their passing through such defective fence upon the railroad: *Railroad v. Infirmary*, 32 O. S. 566, III Longsdorf's Notes, 650.

Under provisions prior to G. C., § 8913, the land owner was bound to fence as well as the railroad company; and in case of failure so to do, the land owner would be guilty of contributory negligence in turning stock into the field: *Railroad v. Sloan*, 27 O. S. 341, III Longsdorf's Notes, 360.

Under provisions prior to G. C., § 8913, it was held that both the individual land owner and the railroad were liable to make repairs; and accordingly the railroad company would not be liable for stock which passed through such defective fence upon the railroad track, and was there killed by railroad trains, unless such trains were operated negligently: *Railway v. Heiskill*, 38 O. S. 666, III Longsdorf's Notes, 1001.

An owner whose cattle run at large without his fault, and which enter upon the enclosed field of another person through which a railroad passes, and thence go upon the track of the road by reason of the want of a fence, which it was the duty of the railroad company to have constructed so as to separate the railroad from adjacent land, may recover from such railroad for injury done by its trains to such cattle and he is not guilty of contributory negligence: *Railroad v. Stephenson*, 24 O. S. 48, III Longsdorf's Notes, 158.

A clause that a railway shall fence, in a contract for the right of way is not a condition precedent or subsequent but an interproprietary regulation, and the owner can not eject the railroad on failure to fence: *Hornback v. Railroad Co.*, 20 O. S. 81, II Longsdorf's Notes, 981. See also DEEDS.

The damages for breach by a railroad of a covenant to erect and keep up fences is the amount of injury to the enjoyment of the property while the defendant owned the railroad: *Huston v. Railroad Co.*, 21 O. S. 235, III Longsdorf's Notes, 26. See also COVENANT, ACTION OF.

Neglect to fence, whereby an animal is injured by a railroad, but without other fault of the railroad, is not an injury under G. C., § 11224, but is a liability created by

statute and barred in six years: *Seymour v. Railway Co.*, 44 O. S. 12, IV Longsdorf's Notes, 191. See also LIMITATIONS, STATUTE OF.

Liability of a railway company for live stock killed by a train is not defeated by an agreement on the part of a predecessor in title to build and maintain a right of way fence, in the absence of an averment by the railway company that compensation for the building of the fence was taken into account and made a part of the consideration to be paid to the land owner by the railway company at the point where the stock was killed: *Hulshizer v. Railway*, 13 O. N. P. (N.S.) 497.

For a general discussion of the subject of fences by railroads, see ANIMALS; RAILROADS.

FERAE NATURAE.

See ANIMALS.

FERMENTED LIQUORS.

See INTOXICATING LIQUOR.

FERRETS.

Under a statute analogous to G. C., § 1414, the right reserved to the owner or lessee of lands or to his employe to use ferrets to catch rabbits is personal to such owner and to those acting for him. His mere permission to another to use and employ ferrets for such purpose on his premises does not relieve the latter from the penalty prescribed by the statute for its violation: *Hart v. State*, 29 O. S. 666, III Longsdorf's Notes, 509.

FERRIES.

The keeper of a ferry whose ferry is a connecting link in a line of public travel, and who holds himself out for employment by the public at large, is a common carrier; and he is responsible for the transportation of animals to the same extent as he is responsible for the transportation of other property: *Wilson v. Hamilton*, 4 O. S. 722, II Longsdorf's Notes, 147.

Even if a ferryman were not a common carrier, yet if the boat has no gates or chains, nor assistance to prevent the escape of horses if frightened by the noise of the engine, he has not used due care, and is liable for the loss: *Wilson v. Hamilton*, 4 O. S. 722, II Longsdorf's Notes, 147. See also CARRIERS.

A ferryman who transports passengers from the Virginia shore to the Ohio shore,

crossing the Ohio river and who lands passengers upon real property belonging to one who has a ferry upon the Ohio shore, is a mere trespasser, and such acts do not amount to an invasion of a franchise; and equity will not restrain such trespass by an injunction, since the remedy at law is clear, adequate and complete: *Ross v. Page*, 6 O. 166, I Longsdorf's Notes, 330.

A city ordinance requiring every "steamboat, barge, keelboat and flatboat" to pay wharfage does not include a ferryboat: *Cincinnati v. Walls*, 1 O. S. 222, I Longsdorf's Notes, 966.

A steam ferryboat is within G. C., §12088, as a "steamboat or other watercraft navigating," etc.: *Butler v. Ferryboat*, 1 Dec. Rep. 55, 1 W. L. J. 394. See also WATERCRAFT.

Consistently with the rule that statutes in derogation of the common law should not be extended beyond the plain meaning of their terms, the amendment of G. C., §2408, providing that county commissioners shall be liable for negligence "in keeping any such road or bridge in proper repair" can not be interpreted as creating a liability for negligence in the operation of a free ferry: *Commissioners v. Transfer & Storage Co.*, 75 O. S. 244, IV Longsdorf's Notes, 1015. See also COUNTIES AND COUNTY COMMISSIONERS.

When A conveyed to B an undivided half of his ferry franchise, they became tenants in common thereof, but in the running of the business they are partners. The conveyance did not convey A's landing, and he is not obliged to furnish the landings. Accordingly, B is chargeable for a share of their use and also of the expense of improving them, but these are to be determined in one suit, and two law actions are to be consolidated and amended to ask an account: *Wiggins v. Good*, 3 Dec. Rep. 318, 1 Gaz. 217.

One who is in possession of a ferry landing and who receives rents therefor, can not be held liable to pay over the rents thus received to a municipal corporation within whose limits such ferry is situated, until the right of such municipal corporation to such ferry landing has been established in a direct proceeding to try title thereto: *Cincinnati v. Walls*, 1 O. S. 222, I Longsdorf's Notes, 966.

FERTILIZERS.

The provision in G. C., §1139, clothing the secretary of the state board of agriculture with authority to exercise police power at his discretion, is an attempt to confer upon him one of the sovereign functions of government, and renders the act unconstitutional and void: *Chemical Co. v. Calvert*, 7 O. N. P.

(N.S.) 103, 18 O. D. (N.P.) 583 [affirmed, without opinion, *State, ex rel., v. Chemical Co.*, 80 O. S. 754]. See also STATE BOARD OF AGRICULTURE.

An action to enjoin proceedings under G. C., §1139, will not lie as to the auditor of state or the supervisor of public printing, but will be granted as to the state board of agriculture and the printing company which is doing the work complained of: *Chemical Co. v. Calvert*, 7 O. N. P. (N.S.) 103, 18 O. D. (N.P.) 583 [affirmed, without opinion, *State, ex rel., v. Chemical Co.*, 80 O. S. 754].

FICTIONS.

For presumption of payment as a fiction, see PAYMENT.

Legal fictions have vitality and effect to promote the ends of justice but not to thwart them: *Wilson v. Wilson*, 17 O. S. 150, II Longsdorf's Notes, 298.

A fiction will never be allowed to work injustice when it may be avoided: *Müller v. Donaldson*, 17 O. 264, I Longsdorf's Notes, 810.

Legal fictions were invented for the advancement of justice and at the same time to preserve the semblance of logical consistency, and will be applied for no other purpose: *Wood v. Ferguson*, 7 O. S. 288, II Longsdorf's Notes, 298.

A fiction resorted to for equitable purposes must not alter legal defenses such as the statute of limitations: *Neilson & Co. v. Fry*, 16 O. S. 552, II Longsdorf's Notes, 800.

That a day is not divisible in law is a mere fiction never adhered to if it would work mischief: *Follett v. Hall*, 16 O. 111, II Longsdorf's Notes, 754; *Arrowsmith v. Hammering*, 39 O. S. 573, III Longsdorf's Notes, 1049. See also TIME.

By the fiction of implied warranty of authority an agent who contracts for a non-existent principal or in excess of his authority is liable to the person with whom he makes such contract: *Trust Co. v. Floyd*, 47 O. S. 525, IV Longsdorf's Notes, 392.

The doctrine of relation—of a right relating back—is but a legal fiction, and will be applied only to advance justice and for no other purpose: *Wood v. Ferguson*, 7 O. S. 288, II Longsdorf's Notes, 298.

The doctrine that appointing a debtor administrator does not extinguish the debt and that the administrator *de bonis non* can sue on and have judgment for such debt is a fiction adopted to accomplish useful purposes, since the administrator can not sue himself; but will not be allowed to work an injustice. Hence appointment of a mortgagor as executor of the mortgagee does not extinguish the mortgage, for that would be

unjust to the sureties and to the heirs, and the administrator *de bonis non* can foreclose: *Collard v. Donaldson*, 17 O. 264, 1 Longsdorf's Notes, 810. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

FICTITIOUS CAPITALIZATION.

See CORPORATIONS.

FICTITIOUS CHECKS.

See FALSE PRETENSES; FORGERY.

FICTITIOUS GRANTEE.

See DEEDS.

FICTITIOUS NAMES.

For the effect of a fictitious name of a party to an instrument, see DEEDS; NEGOTIABLE INSTRUMENTS.

A statement in a bill of particulars in a justice court that the first name of one of the defendants, Mrs. William Rogers, is unknown, is in effect an allegation that the real name is unknown: *Uihlein v. Gladieu*, 74 O. S. 232, IV Longsdorf's Notes, 1009. See also NAMES.

Where the first name of a defendant is unknown in a suit before a justice of the peace, the plaintiff, under G. C., § 11367, must allege that he could not discover the true name: *Uihlein v. Gladieu*, 74 O. S. 232, IV Longsdorf's Notes, 1009. See also PLEADINGS.

A transcript of a judgment without personal service rendered against Mrs. William Rogers, whose first name is unknown, filed in the office of the clerk of common pleas, does not constitute a lien on the lands of Lucy Rogers, although she may in fact be Mrs. William Rogers: *Uihlein v. Gladieu*, 74 O. S. 232, IV Longsdorf's Notes, 1009. See also JUDGMENT.

Where the first name of a defendant is unknown, service must be made personally by serving a copy of the summons containing the words "real name unknown;" service at residence in such case does not give jurisdiction: *Uihlein v. Gladieu*, 74 O. S. 232, IV Longsdorf's Notes, 1009. See also SUMMONS.

Failure to comply with G. C., § 8099, requiring partnerships to file certificates of the names and residences of its members as prerequisite to the bringing of actions, being established by evidence, is a defense to an action brought by a partnership, but no pre-

sumption of noncompliance with such statute will arise against such partnership, the statute being penal in its nature, and as such requiring strict construction: *K. B. Co. v. Batie*, 2 O. C. C. (N.S.) 358, 15 O. C. D. 482.

A judgment taken by a partnership in its firm name upon a note with a power of attorney to confess judgment and release all errors, after a change in its membership and before filing a new certificate, is invalid and may be set aside by the debtor or his assignee for the benefit of creditors; and where the latter refuses, on request of creditors, to bring suit, the creditors, or any of them, may maintain an action to set it aside for the benefit of themselves and all other creditors of the debtor: *Cobble v. Bank*, 63 O. S. 528, IV Longsdorf's Notes, 861.

Two brothers doing business as Doob & Brother, must register under the statute relating to the use of fictitious names in partnerships: *Doob v. Manufacturing Co.*, 12 O. C. D. 722.

A banking partnership whose capital is not divided into shares and transferable on the books of the concern is within the provisions of the act prohibiting the use of fictitious names in partnerships, and at each change in the partnership is required to file a new certificate: *Cobble v. Bank*, 63 O. S. 528, IV Longsdorf's Notes, 861. See also PARTNERSHIP.

Under an indictment for murder a judgment against the accused will be reversed and the accused will be discharged if the indictment alleges that the murdered man was also known by another name and the evidence fails to show what was the real name of the murdered man, but shows that he was known by such false name: *Goodlove v. State*, 82 O. S. 365 [reversing *Goodlove v. State*, 13 O. C. C. (N.S.) 17, 21 O. C. D. 537].

FICTITIOUS OR FRIVOLOUS ISSUES.

See PLEADINGS.

FICTITIOUS PRICE.

See FRAUD AND DECEIT.

FICTITIOUS STOCK.

See CORPORATIONS.

FIDELITY AND GUARANTY INSURANCE.

For fidelity and guaranty insurance, see BONDS, SURETY; INSURANCE.

FIDELITY AND TRUST COMPANIES.

Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons because the legislation evincing an intention to clothe them with such capacity (R. S., §§ 3821c, 3821f), is void, being of a general nature and not of uniform operation throughout the state as is required by Art. II, § 26, of the constitution: *Schumacher v. McCalip*, 69 O. S. 500, IV Longsdorf's Notes, 963.

R. S., § 3821c, which conferred additional powers upon safe deposit and trust companies, and R. S., § 3821f, which restricted the operation of said § 3821c to certain counties, are unconstitutional: *State Savings Bank & Trust Co. v. Reinhard*, 13 O. D. (N.P.) 630.

A foreign trust company appointed trustee of land in this state and given the legal title thereto in trust, by a will probated in another state, and of record here, may, upon giving bond here, upon established principles of comity, execute such trust to the same extent as a domestic trust company is authorized to do by G. C., § 9828: *Bank Co. v. Railroad Co.*, 7 O. N. P. (N.S.) 497, 53 Bull. 450.

The trusts intended by G. C., § 9828, authorizing incorporated companies to act as trustees are those created by will or other instrument, where property is placed in the possession and control of a trustee to invest, care for, manage, protect and dispose of in accordance with the terms of the trust. This class of trusts are fairly distinguishable from a trust arising in assignments for the benefit of creditors: *In re Assignment of Commercial Bank*, 6 O. L. R. 682, 54 Bull. 124.

"Care and management" as used in G. C., § 9828, relative to the power of trust companies to act as trustee are used in a sense large and broad enough to sustain the bringing of an action under G. C., § 11084, for compensation for land unlawfully taken: *Bank v. Railroad Co.*, 7 O. N. P. (N.S.) 497, 53 Bull. 450.

A foreign trust company having the legal title to land in this state is entitled by comity to exercise the same powers as to the "care and management" of such property as are conferred upon domestic trust companies by G. C., § 9828: *Bank v. Railroad Co.*, 7 O. N. P. (N.S.) 497, 53 Bull. 450.

G. C., § 9571, as amended (97 v. 182), requiring official bonds exceeding two thousand dollars to be executed by surety companies is unconstitutional and void, being in

violation of Art. I, §§ 1 and 2 of the constitution of Ohio: *State, ex rel., v. Robins*, 71 O. S. 273, IV Longsdorf's Notes, 982. *Contra, McKisson v. Wright*, 15 O. D. (N.P.) 105.

A trust company may be appointed testamentary trustee under G. C., §§ 9817 and 9828. These sections were not modified or qualified by R. S., §§ 3821c and 3821f, and the fact that these latter sections were unconstitutional has no effect upon the former: *Bank v. Reinhard*, 13 O. D. (N.P.) 630. See also TRUSTS.

A trust company incorporated under the laws of this state is without legal capacity under G. C., § 9828, to act as trustee in an assignment for the benefit of creditors: *In re Assignment of Commercial Bank*, 6 O. L. R. 682, 54 Bull. 124. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

G. C., § 9571, in an earlier form (R. S., § 3641c), was unconstitutional in so far as it denies the right of offering personal sureties on bonds executed in civil actions: *Haunts v. Lanman Co.*, 2 O. N. P. (N.S.) 405, 15 O. D. (N.P.) 64. *Contra, McKisson v. Wright*, 15 O. D. (N.P.) 105.

A bonding company giving bond for an officer for a money consideration is regarded as an insurer, whose contract being drawn by the surety himself and for a money consideration, is to be construed most strongly against the surety: *Bryant v. Bonding Co.*, 77 O. S. 90, IV Longsdorf's Notes, 1030 [reversing *Bonding Co. v. Bryant*, 7 O. C. C. (N.S.) 399, 18 O. C. D. 195]. See also BONDS, SURETY.

A trust company which was appointed without objection as administrator of an estate, and has performed services in that capacity is entitled to compensation therefor, notwithstanding the invalidity of the act under which the appointment was made, and the measure of such compensation is the amount allowed by statute to legally appointed executors and administrators: *Savings Trust Co. v. Smith*, 4 O. C. C. (N.S.) 237, 16 O. C. D. 317.

The probate court has jurisdiction to hear and determine the question whether or not a trust company is legally competent to perform the duties of an executor, and where this jurisdiction has been exercised, the determination by that court of the competency of the appointee can not be collaterally attacked: *Smith v. Telegraph Co.*, 7 O. N. P. (N.S.) 609, 19 O. D. (N.P.) 537, IV Longsdorf's Notes, 1044 [reversing *Telegraph Co. v. Savings & Trust Co.*, 20 O. C. D. 380; affirmed, *Savings & Trust Co. v. Telegraph Co.*, 79 O. S. 89]. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

FIDELITY BONDS.

See BONDS, SURETY; FIDELITY AND TRUST COMPANIES.

FIDUCIARIES.

For fiduciary, see FIDUCIARY CAPACITY.

FIDUCIARY CAPACITY.

Scope Note—Includes in general the relation of trust and confidence existing between parties; the rights, duties and powers arising from such relationship; pleading and evidence. Excludes the fiduciary capacity of particular classes of persons; enforcement of trusts; accounting between parties, etc.

Cross References.

For necessity of bond on appeal by party acting in fiduciary capacity, see APPEALS.

For the enforcement of trusts, see TRUSTS.

For accounting between parties, see ACCOUNTING.

ANALYTICAL OUTLINE.

- I. What Constitutes.
- II. Powers and Duties of Persons Acting in Fiduciary Capacity.
- III. Transactions Between.
 - A. In general.
 - B. Fraud and undue influence.
 - C. Other cases.
- IV. Incompetency.
- V. Fiduciary Debt.
- VI. Pleading.
 - A. Averments.
 - B. Notice of appeal.
- VII. Evidence.

I. WHAT CONSTITUTES.

A fiduciary relation exists in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed: *Gray v. Hafer*, 2 O. N. P. (N.S.) 341, 15 O. D. (N.P.) 256.

Dealings having a fiduciary color do not establish a fiduciary relation, and where administrators who are men of affairs and have access to sources of information undertake to act with the defendant in the matter of leasing a railway in which they all hold stock, but subsequently seek independent advice and sell their stock without consulting defendant, they can not be heard to complain because the defendant at a later date, and in a different deal from that first contemplated, sold the stock under his control at a greatly enhanced price: *Gray v. Hafer*, 2 O. N. P. (N.S.) 341, 15 O. D. (N.P.) 256.

The relation existing between persons who have entered into an agreement to marry is of a confidential character, and an antenuptial agreement entered into between them while such relation exists is to be tested by

the rules which determine the validity of contracts made by persons standing in confidential relation to each other: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 736.

The property of a corporation is a trust fund for the benefit of its creditors and stockholders, to be used only in the attainment of the objects for which the corporation is created. Its officers are trustees and deal with such funds in their fiduciary capacity: *Hamilton v. Coal Co.*, 12 O. C. D. 637.

The trust relation of a corporation to its shareholders clearly exists in Ohio to the extent that a corporation brought into court for an accounting by its creditors, may ask the instruction of the court as to its duties in the premises; and this principle is true whether the corporation be solvent or insolvent: *Everhardt v. Investment Co.*, 8 O. N. P. 525, 11 O. D. (N.P.) 687.

A bank's individual bookkeeper embezzling its money by collusion with the paying teller is not acting in a fiduciary capacity within the bankrupt law: *Strader v. Bald-*

win, 1 Dec. Rep. 218, 4 W. L. J. 528 (supreme court).

One employed to perfect an invention occupies a confidential relation toward his employer, and is not at liberty to make disclosures with reference to the work in hand, nor will he be permitted, after successfully accomplishing the work for which he was employed and perfecting the machine, to claim title thereto as against his employer, or to engage in work for a rival concern on the same machine or other machines involving the same mechanical features, or involving devices or ideas peculiar to said machine: *Machine Co. v. Neth*, 7 O. N. P. (N. S.) 217, 19 O. D. (N.P.) 169 [affirmed, without opinion, *Neth v. Machine Co.*, 75 O. S. 603]. See also TRADE SECRETS.

II. POWERS AND DUTIES OF PERSONS ACTING IN FIDUCIARY CAPACITY.

An officer and director of a corporation is a trustee for the creditors and stockholders of the corporation, and can not, without the knowledge and consent of the *cestui que trust*, directly or indirectly, become the purchaser, or derive any benefit or profit for himself by contract, purchase, sale or other dealings with the corporate property under color of his fiduciary functions: *Coal Co. v. McManigal*, 6 O. N. P. (N.S.) 193, 18 O. D. (N.P.) 323.

A bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of the bank, thereby becomes the agent of said customer and can not thereafter himself become the purchaser of said stock without full disclosure of that fact to his principal and the latter's assent thereto: *Telling v. Sullivan*, 14 O. C. C. (N.S.) 1, 32 O. C. D. 312. See also AGENCY.

If a trustee of a testamentary trust invests the trust fund according to the direction of the will of the testator; and without his fault the trust fund is imperiled by reason of want of bidders at a foreclosure sale of the property mortgaged to secure the fund, and for the purpose of protecting the fund, he purchases the property at sheriff's sale, taking the title to the same in his own name as trustee, and the *cestui que trust* then being under no legal disability to act for himself, without protest on his part, enters into the possession of the land and uses and occupies the same, or accepts from the trustee the rents or revenues thereof in lieu of the interest earnings on the trust fund had the same been continued at interest, such *cestui que trust* is estopped by his conduct from questioning the right or the authority of the trustee to make such purchase, and from

demanding from him an accounting of an amount equal to the interest such fund would have earned during the time he so occupies the land or accepts the rents and revenues therefrom: *Willis v. Holcomb*, 83 O. S. 254.

Where such purchase has been made and it afterward appears that the trust fund is not in peril of diminution by reason of the land selling for a lesser sum than the amount thereof, it is the right of the *cestui que trust* to require the trustee to sell the land and reinvest the proceeds thereof according to the terms and provisions of the will creating such trust, and upon failure of the trustee to do this after demand made therefor a court of competent jurisdiction may compel him to do so: *Willis v. Holcomb*, 83 O. S. 254.

Out of the proceeds of the sale of such land the original trust fund must be first sequestered and no part thereof can be used for the purpose of paying any amount or installment of interest due the *cestui que trust*, but if there is any such interest due the *cestui que trust* that he has not estopped himself from demanding, then such amount must be paid him out of the surplus of the proceeds of the sale after first deducting an amount equal to the original trust fund, and any surplus then remaining of the proceeds after such payment must be added to the original trust fund, the sum of which will constitute a new trust fund to be invested and distributed according to the terms of the trust: *Willis v. Holcomb*, 83 O. S. 254.

Whatever profits an officer and director of a corporation derives to himself by contracting, purchasing, selling or otherwise dealing with the corporate property under color of his fiduciary functions, without consent of the corporation are the profits of the corporation: *Coal Co. v. McManigal*, 6 O. N. P. (N.S.) 193, 18 O. D. (N.P.) 323. See also CORPORATIONS.

A trustee should confine his acts to the carrying into effect of the provisions of the trust under which he is acting, and if in doubt apply to the proper court for instruction. (G. C., § 10857): *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

A promoter is one who participates in bringing about the organization of an incorporated company and in getting it into condition to transact its business, and as such occupies a fiduciary relation thereto. He is bound to fully disclose his relations to the property which is the subject of the enterprise; and persons induced to become stockholders therein have the right to rely on the good faith and fair dealing of its promoters, and to assume that the latter have not secretly perverted the organization to the accomplishment of selfish purposes,

personal gain, and the destruction of that equality of right which all stockholders are entitled to enjoy in the absence of some known modification: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198; *Bank v. Post Co.*, 3 O. C. C. (N.S.) 372, 13 O. C. D. 274.

When known facts suggest that an improper advantage is being taken of a fiduciary relation, it is incumbent upon a mortgagee to make reasonable inquiry; he will not be held to the ascertainment of bad faith at his peril; the convenience of banking houses does not modify this rule: *Lane v. Trust Co.*, 10 O. C. C. (N.S.) 512, 2 O. C. D. 367.

III. TRANSACTIONS BETWEEN.

A. IN GENERAL.

The doctrine requiring a court to scrutinize dealings between attorney and client, as calling for *uberrima fides*, does not apply to a settlement made between parties represented by the same attorney, he having no personal interest and not influenced otherwise than for the best interests of all: *Case v. Hewitt*, 7 O. N. P. 609, 10 O. D. (N.P.) 365. See also ATTORNEY AND CLIENT.

The rule as to transactions between fiduciaries applies to all varieties of confidential relations: *Keck v. Sayre*, 3 O. N. P. 45, 4 O. D. (N.P.) 195. See also RESCISSION.

It is not universally true that a misrepresentation of the law is not binding upon the party who makes it. The exception consists in cases of transactions between parties to fiduciary and confidential relations and the like: *Bank v. Savings & Trust Co.*, 14 O. D. (N.P.) 577. See also MISREPRESENTATION.

B. FRAUD AND UNDUE INFLUENCE.

Where the vendee obtained the land for a grossly inadequate price by procuring the vendor's confidential adviser and attorney to make representations which are false, but believed by the attorney to be true, as that the land was needed for a railroad, which would enhance the value of the vendor's remaining land, but would not be built without it, whereas the road did not need the land, and was built soon afterwards, though some of the elements of actual fraud are wanting, yet, by reason of the fiduciary relation, there is constructive fraud, and the conveyance will be rescinded: *Appleby v. Frost*, 2 O. N. P. 178, 3 O. D. (N.P.) 441.

If an unmarried daughter living with her father releases to him without consideration interests which he held for her, the release will be presumed made before emancipation,

and is fraudulent: *Jaeger v. Herancourt*, 7 Dec. Rep. 1, 1 Bull. 10. See also PARENT AND CHILD.

A promoter of a corporation is chargeable with the duties of the trust relation for the benefit of stockholders from the time he begins to organize the company; and he is bound to act openly and fairly and in such a way that those having independent charge of the company, as well as those who are induced to become subscribers to its stock, may be fully advised of the relation he bears to the property which he proposes to sell and the true value thereof in like manner as one who assumes to act as the agent of another in the purchase of property. Any suppression, concealment or misrepresentation of material facts connected therewith made by the promoter thereof is a fraud upon the corporation: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198.

Those who participate in the organization of an incorporated company and enter the board of directors occupy a fiduciary relation thereto, and where such promoters and directors urge the sale of property to the corporation at three times its real value, and vote for its purchase, with full knowledge as to its actual value, there is such a lack of good faith toward the corporation, its stockholders and creditors as to constitute fraud *per se*, and the fact that other directors assisted in the deal and voted with them affords no defense in an action against them for the amount the company has lost by such conduct: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198.

Where a promoter, having made a secret arrangement with the owner of a patent right for the sale of the same for \$3,000, conceals such fact, and induces other persons to join with him in forming a corporation for its purchase for \$15,000, claiming that to be the lowest figure for which the patent right can be purchased, and investing them, by his conduct, with the belief that he is interested in the enterprise with no other expectation of profit to himself than such as shall accrue to all stockholders therein, while in fact he is making a large profit by the sale, he is liable as a trustee for the profits thus fraudulently obtained: *Bank v. Post Co.*, 3 O. C. C. (N.S.) 372, 13 O. C. D. 274. See also CORPORATIONS.

A mere reputation for wealth known to a contemplated wife, will not relieve the contemplated husband from making full disclosure of his property in making an antenuptial contract. The fact that the wife was a forewoman in her husband's shoe factory and knew that he had an interest therein and that he had other property, is not notice suffi-

cient to sustain an antenuptial agreement for an amount greatly disproportionate to his means: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 741. See also HUSBAND AND WIFE.

A creditor, who is induced to act as the channel through which the insolvent transfers his property to his wife to avoid creditors, is not estopped to attack the conveyance, if the debtor stood in *loco parentis*. By reason of such relation and difference of sex and disparity of age, their relation will be deemed fiduciary, and the act the result of undue influence, and they are not in *pari delicto*: *Schmeltz v. Michelson*, 8 Dec. Rep. 538, 8 Bull. 304. See also FRAUDULENT CONVEYANCES.

An action for the real value against one who has obtained plaintiff's property for an inadequate price by the influence of a fiduciary relationship and misrepresentation that plaintiff's ancestors had acquired it with defendant's money, is demurrable. The plaintiff must affirm or repudiate the contract, but can not do both, nor assert a vendor's lien. The facts do not amount to a sale. The grantee is a constructive trustee. But leave to amend will be given: *Stewart v. Marsham*, 2 O. C. C. 471, 11 O. C. D. 594. See also RESCISSION.

The presumption that a legatee or devisee who occupied a fiduciary position toward testator, exercised undue influence over him, only arises where the will was executed in the last sickness or in *extremis*, and not where it was executed a number of years before and was allowed to stand until testator's death: *Hall v. Hall*, 15 O. D. (N.P.) 161. See also WILLS, LEGACIES AND DEVISES.

A contract after the relationship has begun, for an extortionate compensation will not be enforced, though before it has begun the parties may make what bargain they choose: *Carlton v. Dustin*, 9 Dec. Rep. 51, 10 Bull. 294. See also ATTORNEY AND CLIENT.

Transactions between persons between whom there is a continuance of an influence of a formerly existing fiduciary relation of guardian and minor ward, unless resulting in benefit to the ward, will be examined with the closest scrutiny, and unless shown to have been had under conditions of strict justice and unquestionable fairness, and with contemplative benefit to the ward, will be set aside as far as the former guardian has derived any unjust benefit therefrom. The statute of limitations, if applicable to an action to set aside such a transaction, does not begin to run until there is full knowledge of the facts and conditions, and such knowledge does not exist until after the influence of the former relation has completely ceased:

Lamkin v. Robinson, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13. See also UNDUE INFLUENCE.

C. OTHER CASES.

A conveyance by a widow of 69, of vigorous mind, to her physician of property worth \$5,000, in consideration of his paying her \$60 per month for life, there being no undue influence, and she living for 14 months afterwards, during which time the grantee had paid to and for her over \$1,000 more than the rents he had got out of the property, is not void for inadequacy of consideration or as a gambling contract, and her heirs can not obtain rescission: *Stump v. Carver*, 1 O. S. U. 59, 22 Bull. 365 (supreme court). See also RESCISSION.

A mother who signs a contract with her son, correctly read to her, although she could not read writing, and by reason of confidence in her son did not carefully weigh or fully understand the import thereof, is bound thereby and can not alter or contradict it by parol, except in a proceeding to reform or rescind and not when set up as a defense by the son to her action at law against him: *Cassilly v. Cassilly*, 57 O. S. 582, IV Longsdorf's Notes, 728 [reversing *Cassilly v. Cassilly*, 2 O. N. P. 387, 4 O. D. (N.P.) 62]. See also EVIDENCE.

In an action contesting a will, it is error to charge that the law scrutinizes with greater care the acts of a son or daughter who is remembered in a will to a larger extent than are others bearing the same kinship, if such son or daughter is in a close relationship of trust or confidence, or upon whom a testatrix would implicitly rely, than it would on others bearing no such relationship: *Hall v. Hall*, 78 O. S. 415, IV Longsdorf's Notes, 1042. See also WILLS, LEGACIES AND DEVISES.

IV. INCOMPETENCY.

A person will be considered not fit, suitable or competent to represent an estate in a fiduciary capacity, when, on hearing exceptions to his inventory and account as guardian of an imbecile, it appears that he has mixed and mingled the funds of said estate with his own, has paid claims without question or investigation, has converted his ward's funds to his own use by buying real estate and taking the title in his own name, etc.: *In re Guardianship of Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed, by circuit court and dismissed by supreme court, *In re Guardianship of Oliver*, 55 Bull. 336]. See also GUARDIAN AND WARD.

V. FIDUCIARY DEBT.

A person who receives the money of another to apply on the latter's debt to a third person does not hold in a fiduciary capacity, and a discharge in bankruptcy covers it: *Bissell v. Couchaine*, 15 O. 58, I Longsdorf's Notes, 697.

Fiduciary debt does not include one due as factor or commission merchant, which is therefore dissolved by discharge: *Keeler v. Snodgrass*, 8 Dec. Rep. 490, 8 Bull. 219 [overruling *Gay v. Farran*, 13 Dec. Rep. 989, 2 C. S. C. R. 426]. See also BANKRUPTCY.

VI. PLEADING.

A. AVERMENTS.

A person occupying a fiduciary relation to another, if he relies on a contract with such other, must not only plead the contract, but also aver it to be fair, just and reasonable, the burden being on him to show its validity: *Corrigan v. Rockefeller*, 5 O. N. P. 338, 8 O. D. (N.P.) 14. See also TRUSTS.

If the petition anticipates and avers matter that would have been new matter in defense, the defendant's general denial reaches such new matter, and he need not aver the contrary facts. Thus, if a petition averring that defendant held shares in trust for plaintiff, and then, instead of leaving defendant to plead that he had bought the shares from plaintiff, and that the agreement was just and fair towards the *cestui*, and denying the fairness by reply, the petition itself sets out the purchase and charges that it was fraudulent towards plaintiff, the defendant's general denial of the fraud is sufficient: *Corrigan v. Rockefeller*, 5 O. N. P. 338, 8 O. D. (N.P.) 14. See also PLEADINGS.

A plaintiff's fiduciary capacity is not shown by the descriptive words "assignee of," unless preceded by the word "as" or unless there is a proper averment of such capacity in the bill of particulars, and if not so shown, he can not perfect an appeal without bond: *Brown v. Larkin*, 20 O. C. C. 663, 10 O. C. D. 829. See also APPEALS.

B. NOTICE OF APPEAL.

Appeals from the common pleas to the circuit court are to be taken as provided in G. C., §§ 12226 and 12227. G. C., § 11207, requiring notice does not apply: *McClure v. Fergus*, 84 O. S. 319 [reversing *Fergus v. McClure*, 12 O. C. C. (N.S.) 87, 21 O. C. D. 207].

G. C., §§ 11382, 11383, regulate appeals generally in civil cases from justice's courts to the court of common pleas, but G. C., § 11207, applies when a person who is a

party in a fiduciary capacity appeals without giving an appeal bond, and in such case the party appealing must give a separate written notice to the court of his intention to appeal within the time limited for giving bond. Oral notice to the justice and the entry of notice of appeal by him on his docket or in the transcript is not sufficient: *McCormick v. Sells Co.*, 76 O. S. 83, IV Longsdorf's Notes, 1022.

To perfect an appeal under G. C., § 11207, by a party in a fiduciary capacity who appeals in the interest of the trust, a separate written notice to the court of an intention to appeal is necessary. A recital in a journal entry of an intention to appeal, or that the party gives, or has given notice of an intention to appeal, is not a compliance with the statute: *Browne v. Wallace*, 66 O. S. 57, IV Longsdorf's Notes, 896.

It is not sufficient to cause the notice of appeal by an administrator to be incorporated in the journal entry, but the administrator must file a written notice, the object of that provision of the statute being to fix with certainty the liability of the administrator upon his bond in that behalf. But fiduciary character must appear in the petition entitling him to appeal without bond: *Willis v. Willis*, 20 O. C. C. 664, 10 O. C. D. 798 [affirmed, *Willis v. Willis*, 57 O. S. 668, IV Longsdorf's Notes, 730; *Browne v. Wallace*, 21 O. C. C. 417, 12 O. C. D. 1; distinguishing *Hirsh v. Kilsheimer*, 12 O. C. C. 291, 5 O. C. D. 551].

VII. EVIDENCE.

In an action by the grantor in a deed to reform the instrument upon the ground that the grantee fraudulently concealed and misstated the contents of the deed to the grantor, when it appears that the grantee is a son of the grantor and an attorney at law, and was entrusted with the drafting of the instrument upon his own suggestion, such facts raise a presumption of the existence of relations of trust and confidence between the parties and put upon the grantee the burden of showing that no undue advantage was taken of the grantor in the execution of the deed: *McAdams v. McAdams*, 80 O. S. 232, IV Longsdorf's Notes, 1051. See also REFORMATION.

The presumption of undue advantage in the execution of a deed by reason of confidential relations, is rebutted and the burden rests upon the grantor to show by clear and convincing proof that the deed is fraudulent, where it clearly appears that the deed is in apparent accord with previous declarations of the grantor as to his intentions and his subsequent declaration as to what he

has done, and that he could read and had ample opportunity before, at, and after signing the deed to read the same: *McAdams v. McAdams*, 80 O. S. 232, IV Longsdorf's Notes, 1051.

If the parties are not on equal terms by mental infirmity of the grantor and the grantee's influence over him, and the grantee has acquired an advantage, as where the consideration is inadequate, the burden of proof to show fairness and absence of undue influence, and that the grantor understood, is on the grantee, though otherwise it is on the one alleging the fraud and undue influence: *Baugh v. Buckles*, 2 O. C. C. 498, 1 O. C. D. 607.

In an action by a sister to set aside for want of consideration, fraud and breach of confidential relations, a paper writing wherein she agrees to convey certain property to her brother, the burden of proof is upon her brother to show that the transaction was fair and equitable, and was executed with full understanding: *Goodhue v. Goodhue*, 3 O. N. P. (N.S.) 225, 15 O. D. (N.P.) 635. See also RESCISSION.

FIDUCIARY RELATIONS.

See FRAUD AND DECEIT; NON-DISCLOSURE; UNDUE INFLUENCE.

FIELD NOTES, ETC.

Where the exterior lines of a township were surveyed and the section corners established officially and the United States sold land to the state therein and the state sold sections thereof, the section lines are to be determined, as the law required, by drawing straight lines from the section corners, and can not be controlled by the map of a subofficer marked "rejected as incorrect" by his superior, though the sales were by the quantities shown on a copy of such map: *Hamil v. Carr*, 21 O. S. 258, III Longsdorf's Notes, 27. See also BOUNDARIES.

FIERI FACIAS.

See EXECUTION, WRIT OF.

FIGHTING.

See ASSAULT AND BATTERY; ASSAULT WITH INTENT; PRIZE FIGHT.

FILIATION.

See ADOPTION.

FILING.

Handing a notice to the clerk at his home is not filing it, and his entering it afterwards on the appearance docket as of that day is not conclusive and will not give jurisdiction if the time for filing had expired: *Taylor v. Wallace*, 7 Dec. Rep. 328, 2 Bull. 115 [affirmed, on other grounds, *Taylor v. Wallace*, 31 O. S. 151].

Handing a paper, in notice of appeal, to the janitor cleaning up the clerk's office after it is closed for the day is not entering it with the clerk: *Kiehborth v. Bernard*, 7 Dec. Rep. 359, 2 Bull. 171. See also ELECTIONS, POLITICAL.

Where a paper was filed with the township clerk, but returned by him to the person filing it as a mere convenience in carrying it to a meeting of the township trustees, it is a legal filing: *State v. Mitchell*, 22 O. C. C. 208, 12 O. C. D. 288. See also TOWNSHIPS AND TOWNSHIP TRUSTEES.

Handing the chattel mortgage to the township clerk while he is in another township (he was serving as a juror, in the city and the mortgagor assigned for creditors five minutes later) does not make it a lien before it reaches the proper place for filing: *In re Assignment of Jones*, 7 O. N. P. 225, 8 O. D. (N.P.) 708, 34 Bull. 263. See also CHATTEL MORTGAGES.

Delivery to the recorder at a place other than his office, and his endorsement of the hour, creates no lien as against intervening interests acquired before the instrument is actually placed on file. The words "delivered to the recorder," in G. C., § 8542, and a presentation for record in G. C., § 8543, mean in his office, where notice thereof can be had. Where a mortgage was handed to the recorder away from his office, and the hour endorsed, and before he takes it to his office an assignment for creditors of the mortgagor is filed, the latter prevails: *Kalb v. Wise*, 5 O. N. P. 5, 5 O. D. (N.P.) 533. See also RECORDING ACTS.

FILING CLAIM.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES; GUARDIAN AND WARD; RECEIVERS.

FILING PAPERS.

The term "file" has a popular and fixed signification when used in connection with a public office, and imports that the paper filed is to be placed permanently in the records of the officer with whom filed: *Krickenberg*

v. Wilson, 3 O. N. P. (N.S.) 179, 15 O. D. (N.P.) 779.

The clerk's indorsement, though the ordinary and most convenient evidence that a paper has been filed, is not essential. File marks are but evidence: *Haines v. Lindsey*, 4 O. 88; *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667; *King v. Penn*, 43 O. S. 57, IV Longsdorf's Notes, 146.

Though no entry on the appearance docket shows filing of a demurrer, yet if the demurrer bears a file mark and the journal shows it was argued and decided, it will be held to have been filed: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849.

Where a paper was filed with the township clerk, but returned by him to the person filing it as a mere convenience in carrying it to a meeting of the township trustees, it is a legal filing: *State v. Mitchell*, 22 O. C. C. 208, 12 O. C. D. 288.

The clerk of a township is also the clerk of its board of trustees, and when the board is not in session, papers should be filed with the clerk, in order to constitute a legal filing with the trustees: *State v. Mitchell*, 22 O. C. C. 208, 12 O. C. D. 288. See also TOWNSHIPS AND TOWNSHIP TRUSTEES.

Neglect of the justice to file the papers within thirty days (under G. C., § 12117) with the clerk of the common pleas does not necessarily defeat the prosecution. His duty is directory only: *Hoff v. Fisher*, 26 O. S. 7, III Longsdorf's Notes, 280. See also BASTARDY.

The recorder's duty to enter on an instrument the time of its presentation is ministerial, and is presumptive evidence only, and the true date may be shown by oral evidence: *Kalb v. Wise*, 5 O. N. P. 5, 5 O. D. (N.P.) 533. See also RECORDING ACTS.

A petition in error was handed to the clerk in time and he mislaid it. Plaintiff in error having ascertained this, filed a new one one day late, on which summons in error was served. It was held that the court obtained no jurisdiction: *Heingartner v. McLean*, 38 Bull. 182 (supreme court). See also ERROR.

A statute to take effect from after its passage required leave of court to file a petition in error in all cases hereafter. On the same day, but at what time does not appear, a petition in error was filed without leave. On motion to dismiss, it was held: (1) The act took effect on the day of its passage and by presumption of law on the commencement and not end of the day. (2) This presumption will not prevail to conflict with any right acquired on that day before the actual passage of the act, and in such case the exact time may be shown. (3) The plaintiff in

error not showing the time, the presumption of law will prevail that the act took effect from the beginning of the day: *Arrowsmith v. Hameling*, 39 O. S. 573, III Longsdorf's Notes, 1049. See also STATUTES.

G. C., § 10216, unlike the old code, applies to magistrates. Accordingly, if the last 30th day for filing a transcript for appeal is Sunday, it may be filed the next day: *Redus v. Green*, 6 Dec. Rep. 1034, 9 Am. L. Rec. 634. See also APPEALS.

The file marks not showing in what court the bill was filed is no ground for striking it from the files. The court will not find that it was not filed in the common pleas: *Gilbert v. Gilbert*, 10 O. C. D. 823, 42 Bull. 153. See also BILL OF EXCEPTIONS.

If the thirtieth day (G. C., § 10384) falls on Sunday, the time to file a transcript from a justice is not extended to the next day. G. C., § 10216, only applies to cases provided for in the code itself: *McLees v. Morrison*, 29 O. S. 155, III Longsdorf's Notes, 452.

Striking from the files amendments filed out of time, without leave, is not reviewable unless the discretion was abused: *Newburg Petroleum Co., v. Weare*, 44 O. S. 604, IV Longsdorf's Notes, 237. See also AMENDMENT.

FILIUS NULLIUS.

See BASTARDY; DESCENT AND DISTRIBUTION.

FILLING BLANKS.

See ALTERATION OF INSTRUMENTS; NEGOTIABLE INSTRUMENTS.

FILLING VACANCIES.

See OFFICE.

FILUM AQUAE.

See BOUNDARIES; WATERS AND WATERCOURSES.

FINAL ACCOUNTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES; GUARDIAN AND WARD; RECEIVERS.

FINAL DECREE OF DISTRIBUTION.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

FINAL JUDGMENT.

See JUDGMENT; ERROR; APPEALS.

FINAL ORDERS.

For final order in appeal, see APPEALS.

For final order in error, see ERROR.

A final decree is one that settles the rights of the parties: *Hey v. Schooley*, 7 O. (pt. 2) 48.

A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for further decision: *Teaff v. Hewitt*, 1 O. S. 511.

The sustaining of a motion to dismiss for the reason that the court has no jurisdiction over the person of the defendant is a final order to which error will lie, but it not a final judgment from which an appeal can be taken: *Castle v. Finley*, 12 O. N. P. (N.S.) 111.

An order of a court of common pleas, that a case be stricken from its docket for want of service, and for the payment of costs, is not a final judgment from which an appeal lies to the district court, but is a final order for error, on which a petition in error is the proper remedy: *Evans v. Iles*, 7 O. S. 233, II Longsdorf's Notes, 293.

FINAL PROCESS.

See EXECUTION, WRIT OF.

FINAL RECORD.

See RECORDS.

FINANCIAL CONDITION.

For false statement concerning financial condition, see FRAUD AND DECEIT.

In an action for personal injuries the admission of questions as to whether defendant employed "child labor"; concerning his financial responsibility; as to subsequent prom-

ises of employment made to plaintiff; as to his conduct toward plaintiff, etc., is prejudicial to defendant, and is error: *Bowe v. Bowe*, 5 O. C. C. (N.S.) 233, 16 O. C. D. 409. See also NEGLIGENCE.

Where, in making a contract one party gives the other references as to his financial standing and credit, but the other party concludes the contract without inquiring of such references, a subsequent inquiry, because unsatisfactory in results, will not avail him to rescind the contract: *Graff v. Book Concern*, 8 O. N. P. 240, 11 O. D. (N.P.) 152. See also RESCISSION.

FINDER OF LOST PROPERTY.

For finder of lost property, see LARCENY; LOST PROPERTY.

FINDING OF FACT.

For finding of fact, see also FINDINGS BY COURT; VERDICT.

The finding of facts required on the reservation of a cause, is a positive finding in which a final judgment may be rendered, and not a provisional one: *Patterson v. Lamson*, 44 O. S. 487, IV Longsdorf's Notes, 226.

If the record of a cause which was tried upon the evidence in the circuit court shows that that court stated its conclusions of fact separate from its conclusions of law, and the defendant in error desires to secure an affirmation of the judgment upon the ground that a bill of exceptions which was taken in the circuit court shows, when considered with other portions of the record, that the judgment was justified by facts not stated in the entry of the circuit court's judgment, it is incumbent upon him, within the time fixed for filing his brief, to print the bill of exceptions: *Meyer v. Beck*, 87 O. S. 182.

FINDING OF INDICTMENT.

See INDICTMENT.

FINDINGS BY COURT.

Scope Note.—Includes special findings of law or facts by court upon request, under G. C., § 11470; construction and effect of such findings, and procedure relating thereto. Excludes judgments and verdicts generally.

Cross References.

For findings of facts by master, referee, etc., see REFERENCE—SUBMISSION OF QUESTIONS.

For review of findings on weight of evidence, see ERROR.

For the subjects of judgment and verdict, see JUDGMENT; VERDICT.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Scope and Effect of Statutory Provisions.
- III. Request for Separate Findings.
- IV. Form.
- V. Construction and Effect.
- VI. Presumptions.
- VII. Error.
- VIII. Bill of Exceptions.

I. DEFINITION.

The finding by the court of the amount due is a judicial determination of the question: *Doyle v. West*, 60 O. S. 438, IV Longsdorf's Notes, 791.

The finding by the court of the amount due is a debt of record: *Males v. Murray*, 3 O. C. C. (N.S.) 671, 13 O. C. D. 396.

A special finding of fact must contain the facts, to which the law gives a determinate effect, conclusive upon the issue: *Leach v. Church*, 10 O. S. 148, II Longsdorf's Notes, 422; *Albright v. Hawk*, 52 O. S. 362, IV Longsdorf's Notes, 576.

II. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

The probate court has authority to make a finding of facts separately from its conclusions of law: *Kittredge v. Miller*, 12 O. C. C. 128, 5 O. C. D. 391.

A single judge of the circuit court can not make a finding of facts: *Deglow v. Kruse*, 57 O. S. 434, IV Longsdorf's Notes, 724.

Inasmuch as the provision of G. C., § 11470, with reference to findings when the court tries the case, is limited to the court of common pleas, a separate finding of facts and law can not be asked as a matter of right in connection with a preliminary hearing in a condemnation proceeding in the court of insolvency: *Railroad v. Cincinnati*, 10 O. N. P. (N.S.) 594, 9 O. L. R. 105, 56 Bull. 353.

G. C., § 11212, which provides that the provisions of law governing civil actions in the court of common pleas shall as far as applicable govern like proceedings in the probate court, does not make G. C., § 11470, which provides for findings of fact applicable to a preliminary hearing in a proceeding in eminent domain; since this is not a proceeding like any in the court of common pleas: *Railroad v. Cincinnati*, 10 O. N. P. (N.S.) 594, 9 O. L. R. 105, 56 Bull. 353.

III. REQUEST FOR SEPARATE FINDINGS.

Requests for findings must be made at, or immediately after, the trial, and a request that the court state in writing its conclusions of fact separately from its conclusions of law, made eight days after the trial but before the journal entry was filed, came too late: *Toledo v. Barnes*, 1 O. N. P. 188, 2 O. D. (N.P.) 590.

Where no request has been made for a finding under G. C., § 11470, a party against whom an issue is found, can not stand by when the journal entry is made, make no objection to its form or entry and afterwards avail himself of inconsistencies in the statement of the steps by which the court reached its conclusion: *Franks v. State*, 12 O. S. 1, II Longsdorf's Notes, 545.

If the parties request it under G. C., § 11470, it would be the court's duty to state both conclusions of fact and those of law separately: *Railroad v. Johnson*, 10 O. S. 591, II Longsdorf's Notes, 468.

A request to state separately conclusions of law and fact is sufficiently complied with if after finding the facts a final judgment is rendered: *Levi v. Daniels*, 22 O. S. 38, III Longsdorf's Notes, 56.

IV. FORM.

A written opinion of a court, which does not state the conclusions of all vital facts separately from the conclusions of law, is not a compliance with G. C., § 11470: *Gray v. Field*, 10 Dec. Rep. 170, 19 Bull. 121.

When the court, being requested to state separately its conclusions of law and fact, makes a sufficient finding of the facts, and renders a final judgment thereon, the judgment itself is to be regarded as a statement of the court's conclusions of law within the meaning of G. C., § 11470: *Levi v. Daniels*, 22 O. S. 38, III Longsdorf's Notes, 56.

Whether the remarks of a court at the end of a case, either oral or in writing, are

its decision, should be stated by the court. If these remarks are merely the court's opinion, as the basis of a finding, they are not the court's decision and no entry is necessary. If such remarks are intended as a decision under the code, the court should say so and cause immediately an entry to that affect to be made of record, so that counsel may thus be advised definitely that time has begun to run: *Building & Loan Co. v. Hosea*, 13 O. N. P. (N.S.) 244.

V. CONSTRUCTION AND EFFECT.

Where a finding of facts fairly admits of two constructions, one of which calls for the affirmance, and the other for the reversal of the judgment, the finding should receive that construction which will sustain the judgment: *Springer v. Avondale*, 35 O. S. 620, III Longsdorf's Notes, 813.

A finding of facts on request, under G. C., § 11470, is deemed to include all the facts proved. Hence, if a fact material to the judgment is not in the finding, the judgment is erroneous: *Springer v. Avondale*, 35 O. S. 620, III Longsdorf's Notes, 813.

The special finding of fact is analogous to a special verdict: *Leach v. Church*, 10 O. S. 148, II Longsdorf's Notes, 422.

When a fact is admitted by the pleadings, and no evidence is offered to disprove it, it is error for the court, when special findings are requested, to state the fact contrary to the admission: *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

Matters in an answer expressly admitted to be true by the reply must be taken as true, notwithstanding the finding of the trial court that they are not true and the case stands as if they were found by the court in addition to the finding made: *Harris v. Oil Co.*, 57 O. S. 118, IV Longsdorf's Notes, 708.

Oral admissions of certain facts on the trial will not empower the court to make a finding that such facts are correct and render judgment. The party has the right to contest the fact of the admission. Thus, plaintiff's oral admission that the amounts claimed in the cross-petition are true, providing the transactions were not gambling, will not authorize judgment thereon, the jury having found they were not gambling transactions: *Miller v. Southworth*, 10 O. C. 572, 5 O. C. D. 101.

A special finding of fact must contain the facts, to which the law gives a determinative effect, conclusive upon the issue: *Leach v. Church*, 10 O. S. 148; *Albright v. Hawk*, 52 O. S. 362, IV Longsdorf's Notes, 576.

If the finding of facts admits of a construction which will support the judgment,

that construction will be adopted: *Jack v. Hudnall*, 25 O. S. 255, III Longsdorf's Notes, 227.

Facts not found are presumed not to exist: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

In an action on a promissory note a special finding of fact that the maker can not read or write, is not equivalent to a finding that he was free from fault or negligence: *Perkins v. White*, 36 O. S. 530, III Longsdorf's Notes, 874.

Incomplete findings can not be aided by intendment or presumption to insert findings which are omitted: *Bullock v. Mitchell*, 9 Dec. Rep. 687, 16 Bull. 354.

Where a result is stated as one of the conclusions of law, and other conclusions of fact strongly tend to contradict it, it will be considered as a conclusion of law: *Phipps v. Ratterman*, 10 O. C. C. 205, 6 O. C. D. 488.

The probate judge, requested to state his conclusions separately, performs his duty by finding on the points mentioned in the statute, and need not find on others: *Railway v. Railway*, 6 O. C. C. 362, 3 O. C. D. 493 [affirmed, *Railway v. Railway*, 50 O. S. 603, IV Longsdorf's Notes, 517].

A finding of facts being requested, finding evidential facts and not the ultimate fact is not sufficient to authorize judgment; thus, it being necessary to prove the death of the ancestor, the court's finding that she had been absent, unheard of for seven years, is a finding the evidence of death and not of death, and judgment is therefore erroneous: *Albright v. Hawk*, 52 O. S. 362, IV Longsdorf's Notes, 576.

Probative facts found instead of finding an ultimate fact, if the latter necessarily results from them, may be treated by the reviewing court as a finding of the ultimate fact, unlike a mere recital of evidence not conclusively establishing the ultimate fact: *Cook v. Niehaus*, 8 Dec. Rep. 505, 8 Bull. 259.

The rules applicable to findings made by a trial judge, a jury being waived, are the same as those applicable to a finding by a jury. Among which is the rule that it must be presumed that the existence of facts necessary to sustain the judgment was found by the court, if such facts were involved in the issue and the evidence may be found to fairly sustain such finding. And the further rule that to justify the reviewing court in the conclusion that such finding is against the weight of the evidence, it must appear so clearly opposed thereto as to indicate distinctly prejudice, blundering, perversity or improper influence producing such finding:

Banking Co. v. Banking Co., 20 O. C. C. 591, 10 O. C. D. 755.

A judgment by the court without the intervention of a jury is to be treated, on review as to weight of evidence, according to the same rules that apply to a verdict by a jury, that is, the judgment can not be reversed unless manifestly against the weight of the evidence: *Gebaur v. Vesper*, 20 O. C. C. 711, 10 O. C. D. 820.

A finding of facts on which the judgment is based, although not made on request of either party, will be considered reversing the judgment: *Harner v. Batdorf*, 35 O. S. 113, III Longsdorf's Notes, 763.

A construction supporting the judgment should be preferred by the reviewing court; but if, after applying this principle, there is still great doubt as to the grounds on which the judgment was founded, a more specific finding should be required from the trial court: *Peter v. Manufacturing Co.*, 56 O. S. 181, IV Longsdorf's Notes, 687.

A finding of fact by the court that an executor omitted to return certain property for taxation with intent to evade taxation, whereas all the facts found strongly tend to show that the executor omitted to return it because he had ground to believe it not taxable, will be regarded as a conclusion of law, and not as a finding of fact, or if the latter, then it is against the weight of evidence: *Phipps v. Ratterman*, 10 O. C. C. 205, 6 O. C. D. 488 [reversed, without opinion, *Ratterman v. Phipps*, 57 O. S. 682].

The finding of facts required on the reservation of a cause by G. C., § 2251, as it originally stood, is a positive and not a provisional one, such as a finding on demurrer that allegations are true, "for the purpose of hearing on demurrer only": *Patterson v. Lamson*, 44 O. S. 487, IV Longsdorf's Notes, 226. See also COURTS.

A special finding of facts being made by the trial court and an erroneous judgment upon it, the reviewing court need not render the proper judgment merely, but has the right to set aside the finding of facts also, and remand for a new trial *de novo*: *Insurance Co. v. Shillito*, 15 O. S. 559, II Longsdorf's Notes, 748.

If the judgment below was erroneous on the facts as found, the court could look into the evidence on which they were based to determine whether to render the proper judgment or grant a new trial: *Insurance Co. v. Shillito*, 15 O. S. 559, II Longsdorf's Notes, 748. See also ERROR.

If the court, a jury being waived, finds "the issues joined with the defendant," this means all the issues, and the plaintiff can not show by parol that the court in fact was governed by one alternative: *Topliff v.*

Topliff, 8 O. C. C. 55, 4 O. C. D. 312 [affirmed, without opinion, *Topliff v. Topliff*, 31 Bull. 367].

If in an action for the recovery of money only, the defendant sets up a counterclaim or set-off, there may be a finding in favor of each party, but only one judgment is proper, and that for the difference between the amounts of the findings in favor of the party entitled to the greater amount and when not otherwise provided by statutes for cost: *Gordon v. Steinmetz*, 71 O. S. 372, IV Longsdorf's Notes, 983.

In an action for the recovery of money only in a justice's court, if the plaintiff recovers judgment and the defendant appeals, and in the court of common pleas sets out as a counterclaim a promissory note which was not due at the time of trial below, and there is a finding in his favor on such note and for the plaintiff for a less amount on his cause of action, the defendant is entitled to a judgment in his favor for the difference and for all of his costs in both courts: *Gordon v. Steinmetz*, 71 O. S. 372, IV Longsdorf's Notes, 983. See also COUNTERCLAIM.

A defendant having interposed a cross-petition praying for the reformation of a written instrument on which the plaintiff's action is founded, the finding and judgment thereon while it remains in force is, in the further progress of the case, conclusive as to the allegations of mistake: *Reiff v. Mullholland*, 65 O. S. 178, IV Longsdorf's Notes, 883. See also REFORMATION.

A finding of service or of default is conclusive even where the record otherwise affirmatively shows the contrary in all cases where the judgment is collaterally attacked: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130 [affirmed, without opinion, by circuit court, see *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130]. See also JUDGMENT.

The finding of a court that a certain amount is due from an unincorporated church is not a judgment, but a debt of record: *Males v. Murray*, 3 O. C. C. (N.S.) 671, 13 O. C. D. 396.

A finding by the probate court of an amount due by one estate to the other can not be treated as an award, there being nothing to show a submission to its arbitrament as distinguished from invoking its judicial capacity: *Curtis v. Lynch*, 19 O. S. 392, II Longsdorf's Notes, 953. See also ARBITRATION.

VI. PRESUMPTIONS.

There is a presumption, in absence of all showing to the contrary, that the general finding and judgment include all issues made in the cause not specially passed on: *Kilgore*

v. *Emmitt*, 33 O. S. 410, III Longsdorf's Notes, 680.

There is a presumption that no evidence was offered from which any other material facts could be found than those set forth in the finding; and where the record does not contain the evidence, and the finding is within the issue, that presumption is, on error, generally conclusive: *Springer v. Avondale*, 35 O. S. 620, III Longsdorf's Notes, 813.

Where a finding of facts fairly admits of two constructions, one of which calls for the affirmance, and the other for the reversal of the judgment, the finding should receive that construction which will sustain the judgment: *Springer v. Avondale*, 35 O. S. 620, III Longsdorf's Notes, 813.

Where the order of sale shows due notice to have been given to interested parties, it is to be presumed that infant heirs received proper notice and the court had jurisdiction: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130 [affirmed, without opinion, by circuit court, see *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130].

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

Misrepresentations as to solvency, as that he owed but \$800, whereas he owed \$1,400, will not sustain attachment where there is no finding that the debtor knew it to be false or had reason to know the creditor would rely on it. Nor will these findings be supplied by intentment. Nor will a general finding that the debt was fraudulently contracted help the special finding for it is not substantive, but a mere summary or inference from the detailed finding: *Bullock v. Mitchell*, 9 Dec. Rep. 687, 16 Bull. 354. See also ATTACHMENT.

VII. ERROR.

When the request for a special finding of fact is not complied with, a judgment against the party requesting should be reversed unless it appear from the record that he was not prejudiced by the refusal: *Trustees v. Columbia*, 38 O. S. 87, III Longsdorf's Notes, 958; *Reid v. Mathers*, 3 O. N. P. 13, 4 O. D. (N.P.) 81.

To object to a judgment on a finding of facts, as contrary to the weight of evidence, the motion should object to the finding on this ground, and not to the judgment based on the finding; but the court may regard this as a clerical error in the attorney: *Pipe Line Co. v. Fee*, 15 O. C. C. 637, 8 O. C. D. 727.

Where a court is requested to find and state the facts and law separately, and no

objection is made at the time to the sufficiency of the facts found, a party can not avail himself of a defect in the findings, in a court of error: *Carpenter v. Warner*, 38 O. S. 416, III Longsdorf's Notes, 980.

Where the finding of facts is imperfect but it is not excepted to on that ground, the judgment will not be reversed on that account: *Levi v. Daniels*, 22 O. S. 38, III Longsdorf's Notes, 56.

A motion for new trial is not necessary to have the decision reviewed on a question of law, where there is a separate finding of facts: *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693; *Miller v. Douglass*, 13 O. C. C. 439, 14 O. C. C. 14, 7 O. C. D. 96.

If it appears from the record that the judgment upon a special finding of facts was warranted by the facts so found, and by the evidence, it will not be reversed because the court erred in its statement of the law applicable to a state of facts not found by the court or shown by the evidence: *Levi v. Daniels*, 22 O. S. 38, III Longsdorf's Notes, 56.

Though the finding of facts was made on request, the judgment on the findings of law based on it are reviewable on error: *Miller v. Douglass*, 13 O. C. C. 439, 14 O. C. C. 14, 7 O. C. D. 96.

A wrong inference drawn from the primary facts, though stated by the circuit court as a primary finding of fact, as where an agency was inferred from undisputed facts, is reviewable by the supreme court: *Rumsey v. Lentz*, 59 O. S. 189, IV Longsdorf's Notes, 762.

A construction supporting the judgment should be preferred by the reviewing court, but if, after applying this principle, there is still great doubt as to the grounds on which the judgment was founded, a more specific finding should be required from the trial court: *Peter v. Manufacturing Co.*, 56 O. S. 181, IV Longsdorf's Notes, 687.

A judgment rendered on a special finding of facts made by the court may be reviewed on error, although such finding was not made at the request of either party: *Harner v. Batdorf*, 35 O. S. 113, III Longsdorf's Notes, 763.

Where a motion for a new trial on the ground that such findings are contrary to the evidence has been overruled, and exceptions taken, and the whole testimony embodied in a bill of exceptions, the reviewing court having found the error complained of to exist, will look into the whole record to ascertain whether the error was prejudicial to the party complaining: *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

The finding of facts by the circuit court is controlling in a proceeding in error in the

supreme court: *State, ex rel., v. Commissioners*, 84 O. S. 447.

If there is evidence tending to prove the facts in issue, the findings of fact by the circuit court will not be reviewed by the supreme court in a proceeding in error: *State, ex rel., v. Insurance Co.*, 84 O. S. 459.

The general findings of fact common in equity decrees can not be considered as special findings of fact on which a reviewing court will enter a new judgment, but a new trial will be ordered: *Cavanaugh v. Jenkins*, 9 Dec. Rep. 34, 10 Bull. 109.

A written opinion not separating the vital facts from conclusions of law does not satisfy a demand to state separately, but if all the evidence is in the exceptions, it is not reversible error unless prejudice appears: *Gray v. Field*, 10 Dec. Rep. 170, 19 Bull. 121.

Findings of fact and conclusions of law, made in the court below, not made part of the record by journal entry or otherwise can not be considered on error: *Gildehaus v. Building Co.*, 3 O. C. C. (N.S.) 598, 14 O. C. D. 110.

Refusal in a special finding of facts to find certain facts which would not have necessitated a different judgment is not reversible error: *Cook v. Niehaus*, 8 Dec. Rep. 505, 8 Bull. 259.

If uncontradicted evidence warrants findings in addition to those made by the trial court, the reviewing court can look beyond the facts found and resort to such evidence to determine if the findings of law were correct or not, the party having excepted to the insufficiency of the findings: *Sturgeon v. Hull*, 8 O. C. C. 269, 4 O. C. D. 457.

The circuit court is not required by G. C., § 12250, to make a finding of facts on error though all the evidence is brought up: *Seuff v. Pyle*, 46 O. S. 102, IV Longsdorf's Notes, 314.

The circuit court is not required by G. C., § 12250, to make a finding of facts on error and if the fact is made it will present no question which the supreme court will review: *Young v. Pennsylvania*, 46 O. S. 558, IV Longsdorf's Notes, 347.

Oral admissions of certain facts on the trial will not empower the court to make a finding that such facts are correct, and render judgment. The party has a right to contest the fact of the admission. Thus, plaintiff's oral admission that the amounts claimed in the cross-petition are true, providing the transactions were not gambling, will not authorize judgment thereon, the jury having found they were not gambling transactions: *Müller v. Southworth*, 10 O. C. C. 572, 5 O. C. D. 101.

A foreign statute erroneously construed by the trial court can not be reconstructed on

error under pretense of rendering the judgment the trial court should have rendered, for, being a question of fact, to reconstruct is to make new findings of fact. Hence the reviewing court can only reverse and remand for new trial: *Specker v. Herzog*, 8 Dec. Rep. 561, 8 Bull. 339.

In a case submitted to the court waiving a jury, if the court err in applying the law to the facts, as by deducing the wrong legal result from the facts, the judgment will be reversed: *Bissell v. Couchaine*, 15 O. S. 58, I Longsdorf's Notes, 697.

If a fact is not found the presumption that it does not exist may sustain a judgment, but will not authorize a court on reversing to enter one for the opposite party. Thus, on reversing a judgment rendered on a draft payable in goods for want of a finding of consideration the court can not enter judgment for defendant, but must remand for retrial: *Ransom Co. v. Berne*, 9 Dec. Rep. 298, 12 Bull. 100.

If a party submits an issue of fact to the court instead of to a jury, its conclusions can not be reviewed any more than a verdict: *Utter v. Walker*, W. 46, I Longsdorf's Notes, 4; *Walworth v. Walworth*, W. 673, I Longsdorf's Notes, 52; *Reynolds v. Rogers*, 5 O. S. 169, I Longsdorf's Notes, 258; *Markle v. Akron*, 14 O. S. 586, I Longsdorf's Notes, 689; *Gest v. Kenner*, 7 O. S. 75, II Longsdorf's Notes, 270; *Erwin v. Shaffer*, 9 O. S. 43, II Longsdorf's Notes, 375; *Turner v. Turner*, 17 O. S. 449, II Longsdorf's Notes, 843.

Findings of fact being made on request in a submitted case, the sufficiency of the evidence to sustain them requires a bill of exceptions. Statements of the grounds on which they are based is improperly incorporated in them, and will not be considered as part of the record: *Ralston v. Kohl*, 30 O. S. 92, III Longsdorf's Notes, 518. See also ERROR.

VIII. BILL OF EXCEPTIONS.

A special finding of facts can not be made a substitute for a bill of exceptions: *Shinkle v. Bank*, 22 O. S. 516, III Longsdorf's Notes, 98; *Railway v. Thurstin*, 44 O. S. 525, IV Longsdorf's Notes, 230.

Where the conclusions of fact are found separately from the conclusions of law, a question as to the sufficiency of the evidence upon which findings of fact were made by the court, can only be raised by a bill of exceptions: *Ralston v. Kohl*, 30 O. S. 92, III Longsdorf's Notes, 518.

The practice of making the opinion of the court a substitute for a finding of facts, is irregular, and, where the law and facts are blended, the opinion will not be regarded as

a substantial compliance with G. C., § 11470: *Transportation Co. v. Blanchard*, 31 O. S. 650, III Longsdorf's Notes, 615; *Sanderson v. Iron & Nail Co.*, 34 O. S. 442, III Longsdorf's Notes, 728.

Opinion of court in deciding a case in which the facts and law are stated generally, can not by bill of exceptions be made a substitute for the statement of "the conclusions of facts found separately from the conclusions of law," as required by G. C., § 11470: *Transportation Co. v. Blanchard*, 31 O. S. 650, III Longsdorf's Notes, 615.

Where a judgment is based upon a special finding of facts by the court, the exception need only be taken to the judgment: *Miller v. Douglass*, 13 O. C. C. 439, 14 O. C. C. 14, 7 O. C. D. 96.

In the absence of a bill of exceptions, a finding of fact by the trial court is binding upon the reviewing court: *Case v. Johnson*, 19 O. C. C. 636, 10 O. C. D. 295.

A finding of facts by the court is part of the record, and no bill of exceptions is necessary, though made without request: *Harner v. Batdorf*, 35 O. S. 113, III Longsdorf's Notes, 763. See also BILL OF EXCEPTIONS.

When the record of a cause tried on evidence in the circuit court shows that the court stated its conclusions of fact separate from its conclusions of law, the defeated party may file a petition in error here for the reversal of the judgment upon the ground that it is not justified by the facts found, and G. C., § 12254, does not require him to print a bill of exceptions which he may have taken in the circuit court: *Meyer v. Beck*, 87 O. S. 182.

FINDINGS BY JURY.

For findings by jury, see VERDICT.

FINES.

Scope Note—Includes nature and scope of pecuniary punishment imposed by courts upon conviction for crime; the amount, enforcement and disposition thereof. Excludes particular offenses in which fines are imposed; and penalties recoverable by actions where statutes are violated.

Cross References.

- For fines, see also PENAL AND QUI TAM ACTIONS.
- For fines imposed upon building associations, see BUILDING AND LOAN ASSOCIATIONS.
- For fines in particular crimes, see crime in question.
- For failure of officer to pay over a fine, as ground for amercement, see AMERCEMENT.
- For legislative power as to fines, see INTOXICATING LIQUOR.
- For the enforcement of payment of license fee by fines, see LICENSES FROM STATE.
- For the enforcement of market stand fees by fine, see LICENSES FROM STATE.
- For fines under militia law, see MILITIA.
- For fines not being the exclusive remedy in case of violation of statutes as to blocking guard-rails of railroad, see STATUTORY RIGHTS AND REMEDIES.
- For the remitting of fines, see SENTENCE.

ANALYTICAL OUTLINE.

- I. Constitutional and Statutory Provisions.
- II. Amount.
- III. Enforcement.
 - A. In general.
 - B. By imprisonment.
 - C. By execution.
 - D. Indigent prisoner.
- IV. Disposition.
 - A. In general.
 - B. County treasury.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

G. C., § 5252, provides that in case of recovery of fines for violation of the militia act, the proceeding shall take place before a justice of the peace, but under a former statute, the parties to a proceeding for the recovery of fines were entitled to an appeal to the court of common pleas: *Wright v. Munger*, 5 O. 441, I Longsdorf's Notes, 299.

The power conferred by G. C., § 4561, to impose a forfeiture does not confer the right to seize property and sell the same without notice, hearing in court and an order of court for such sale: *Cotter v. Doty*, 5 O. 393, I Longsdorf's Notes, 294; *Rosebaugh v. Saffin*, 10 O. 31, I Longsdorf's Notes, 485.

G. C., § 13717, applies only to misdemeanors, and where an order committing the defendant until his fine and costs are paid where he is convicted of a felony, error will lie to a refusal to eliminate that portion of the sentence: *Smith v. State*, 4 O. C. C. (N.S.) 101, 14 O. C. D. 140.

G. C., § 13717, authorizes a commitment until fine and costs are paid; and if such were not the case, the right to complain would be waived by payment: *Oberer v. State*, 8 O. C. C. (N.S.) 93, 18 O. C. D. 620.

G. C., § 13718, providing for execution for fine and cost against the property and body of the offender is constitutional; and it applies to all cases where the party is adjudged to pay a fine, and it is not confined to cases where the party is adjudged to stand imprisoned until the fine and costs are paid: *In re Beull*, 26 O. S. 195, III Longsdorf's Notes, 298.

An ordinance was held not to be invalid because the penalty was prescribed in a separate section of such ordinance from the section in which the offense was described: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210..

A former statute (act of February 1, 1853, S. & C. 708) which gave to persons imprisoned for nonpayment of fines the benefit of laws for the relief of insolvent debtors (see G. C., §§ 11092 to 11180) was constitutional as it was not an attempt to place the pardoning power in the hands of any officer other than the governor of the state, but it was merely a modification of penalties prescribed for certain offenses: *In re Scott*, 19 O. S. 581, II Longsdorf's Notes, 972 (A person held in default of the payment of a fine can not now be released under the laws providing for the relief of insolvent debtors. See G. C., § 4129.)

Art. I, § 19, of the bill of rights, and the fifth and fourteenth amendments to the constitution of the United States, relating to de-

mands to take property and transfer it to a private corporation without the consent of the owner, referred to the right of eminent domain and have nothing to do with the imposition of a fine, or the subsequent disposition of it, by virtue of the police power: *Beamer v. State*, 21 O. C. C. 440, 12 O. C. D. 4.

Fines are debts due the state within the law authorizing sales of land without appraisalment for such debts. And the law applies where a debtor in custody surrenders land to obtain a release, for that is the same as a levy: *Walsh v. Ringer*, 2 O. 327, I Longsdorf's Notes, 130.

II. AMOUNT.

Increase of a fine after the original fine has been imposed and the defendant taken to prison is not within the power of the police judge: *In re Habeas Corpus*, 7 O. N. P. 604, 5 O. D. (N.P.) 571.

An ordinance prescribing a fine of \$50 for a first violation of it, and \$100 for a repetition, though the unlawful thing is continuous in its nature, was valid under R. S. § 1862 (repealed 96 v. 96, § 231; for analogous statute see G. C., § 3628) which prescribe a maximum of \$10 per day where the thing is continuous, for the section contains alternatives: *Belle Center v. Welsh*, 11 Dec. Rep. 41, 24 Bull. 176.

Though an ordinance imposes a penalty in cases of successive offenses in excess of the power of a city to give, a sentence within the limit is valid under R. S., § 1862 (repealed, 96 v. 96, § 231; for analogous statute see G. C., § 3628): *O'Brien v. Cleveland*, 4 Dec. Rep. 189, 1 Clev. L. Rep. 100.

A fine of \$25 for keeping a place where liquor is sold is not unreasonable under R. S., § 1862 (repealed, 96 v. 96, § 231; for analogous statute see G. C., § 3628), providing that \$10 a day is not unreasonable for a continuous thing, for the act is not continuous in its nature. But if unreasonable, the ordinance is not invalid, for the tribunal may under that section impose a lower fine: *McCrea v. Washington*, 10 Dec. Rep. 29, 18 Bull. 66.

A fine of \$25 and requiring a peace bond under a city ordinance imposing \$10 for discharging firearms is erroneous. A peace bond can not be required in a prosecution under an ordinance, and the sentence will be reversed, though no exception was taken: *Pope v. Cincinnati*, 3 O. C. C. 497, 2 O. C. D. 285.

A fine of \$50 for failure to conform with the requirement of G. C., §§ 6370, 6371, as to the keeping on hand of goods for thirty days is not excessive or an abuse of discretion on the part of the trial court: *Phillips v. State*, 4 O. N. P. (N.S.) 398, 16 O. D. (N.P.) 763

[affirmed, *Phillips v. State*, 77 O. S. 214, IV Longsdorf's Notes, 1031.

An ordinance which imposed a fine of one hundred dollars for the first violation of a prohibition against the storage of nitroglycerine within the limits of a municipal corporation, was held not to be unreasonable: *Walter v. Bowling Green*, 5 O. C. C. (N.S.) 516, 16 O. C. D. 756.

A former statute (R. S., § 1862) provided that fines, etc., which did not exceed the sum of fifty dollars for any specified offense should not be deemed unreasonable (G. C., § 3628), was held not to fix a limit for the amount of a fine, and, accordingly, a fine of from fifty to two hundred dollars for the first offense was held not to be unreasonable: *Alliance v. Joyce*, 49 O. S. 7, IV Longsdorf's Notes, 437.

A fine of one hundred dollars for the first offense was held to be error for which the judgment would be reversed (R. S., § 1862). *Sigler v. Cleveland*, 3 O. N. P. 119, 4 O. D. (N.P.) 166 (but under G. C., § 3628, such a fine would not be error).

A provision in an ordinance inflicting a fine of one hundred dollars for the first offense was held not to make such ordinance invalid; but the court was to reduce the fine to such amount as should be reasonable; and a reduction of a fine from one hundred to fifty dollars was held to be valid: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210.

The imposition of a fine of from one hundred and fifty dollars to four hundred dollars for the first offense, and from four hundred to eight hundred dollars for the second offense for soliciting orders for intoxicating liquor contrary to law, is not an imposition of an excessive fine within the meaning of the constitution: *Hayner v. State*, 83 O. S. 178.

In an adulteration case a fine of \$600 was imposed by a justice and was sustained: *Myer v. State*, 10 O. C. C. 226, 6 O. C. D. 477, 3 O. D. (N.P.) 198 [affirming *Meyer v. State*, 1 O. N. P. 241, 2 O. D. (N.P.) 233; and motion for leave to file petition in error overruled, *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

Where a judgment of a lower court in a criminal prosecution is reversed on error because of the imposition of an excessive sentence, the case will be remanded for proper sentence only: *Dalrymple v. State*, 5 O. C. C. (N.S.) 185, 16 O. C. D. 562.

Where several defendants violate an injunction, each must respond for himself for the wrong, and the limit of fine under G. C., §§ 11887, 11888, may be applied to each: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

In determining the punishment for beating an editor the court will consider the provocation, and, if it be a low and vicious publication, and a repetition of it under pretense of a retraction, a nominal fine only would be imposed: *State v. Levi*, 3 Dec. Rep. 40, 2 Gaz. 253.

Several charges of distinct sales of liquor contrary to the statute may be made in one affidavit and a fine assessed for each offense, even though the aggregate of such fines exceeds the limit of punishment for one offense: *Nubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488; citing *Bailey v. State*, 4 O. S. 440, II Longsdorf's Notes, 113; *Boose v. State*, 10 O. S. 575, II Longsdorf's Notes, 465; *Eldridge v. State*, 37 O. S. 191, III Longsdorf's Notes, 904.

III. ENFORCEMENT.

A. IN GENERAL.

A justice of the peace has no authority to issue a *capias* as of course for the collection of a fine imposed for an assault and battery, on a plea of guilty. A *capias* can only be issued on the same terms as in a civil action and this relates to the law as of the date of execution and not of the date of the statute: *Bayard v. State*, 2 Dec. Rep. 15, 1 W. L. M. 89.

The statutory provision that a convicted person may be imprisoned until his fines and costs are paid, applies only to misdemeanors, and where such a provision is made a part of the sentence of one convicted of a felony, error will lie to a refusal to eliminate that portion of the sentence: *Smith v. State*, 4 O. C. C. (N.S.) 101, 14 O. C. D. 140.

It is not error in a proceeding in *habeas corpus* to direct a mayor to amend his mittimus by providing that the fine and costs may be secured and paid: *In re Stanfeal*, 9 O. C. C. (N.S.) 553, 19 O. C. D. 664 [affirmed, *Stanfeal v. State*, 78 O. S. 24, IV Longsdorf's Notes, 1037].

A civil suit to recover license fees from owners of vehicles is not excluded by the statutory provision for collecting them by criminal process of arrest and fine, or imprisonment, or both: *Cincinnati v. Beuhausen*, 10 Dec. Rep. 652, 22 Bull. 421.

Under a militia law requiring notice of the list of delinquents acted on by the court of inquiry to be posted, no action lies for a fine until such advertisement: *Knight v. Payne*, W. 369, I Longsdorf's Notes, 30.

To obtain a civil judgment for a militia fine, its due assessment and confirmation by the military tribunals must be proved: *Wright v. Munger*, W. 614, I Longsdorf's Notes, 48.

B. BY IMPRISONMENT.

An order that the defendant stand committed until fine and costs be paid is erroneous unless authorized by statute: *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542; *Bonsal v. State*, 11 O. 72, I Longsdorf's Notes, 543.

The defendant can not be imprisoned for costs unless a fine is imposed as part of the penalty: *Luetzler v. Perry*, 18 O. C. C. 826, 9 O. C. D. 778.

Imprisonment is not part of the penalty, where it is imposed only to enforce payment of a fine and costs under a police regulation: *Schlagel v. State*, 3 O. N. P. (N.S.) 429, 16 O. D. (N.P.) 295 [affirmed, without opinion, *Schlagel v. State*, 3 O. N. P. (N.S.) 438, 16 O. D. (N.P.) 295].

Where one is sentenced to pay the fine and costs of prosecution, he can not be committed to the workhouse unless the sentence so provides, even though the writ issued to the constable directs such confinement; but under G. C., § 13718, he may be committed to the county jail: *Young v. State*, 11 O. C. C. (N.S.) 466, 21 O. C. D. 1.

Where the sentence omits the clause, "or secured to be paid," such omission does not render the sentence void: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780.

A sentence providing that the accused stand committed to the workhouse "until the fine and costs are paid" without adding thereto the further words of the statute "or until he be discharged therefrom by allowing a credit of sixty cents per day," etc., while not wholly void is incomplete and erroneous, and where such sentence has not been executed it will be reversed: *Hamilton v. State*, 78 O. S. 76, IV Longsdorf's Notes, 1038.

The sentence under G. C., § 13717, should contain the words "or secured to be paid or he be otherwise legally discharged," otherwise the judgment is equivalent to a life sentence and illegal: *Ex parte Mullaney*, 10 O. D. (N.P.) 419.

A sentence of court that the defendant be imprisoned and pay a fine and stand committed "until the fine and costs of prosecution are paid" is not void because it fails to add the words of the statute, "or secured to be paid or the offender is otherwise discharged by law." This last quoted clause will be read into and considered a part of every sentence whether expressly named or not and no prejudice can arise by reason of such omission: *Backenstoe v. State*, 2 O. N. P. (N.S.) 178, 14 O. D. (N.P.) 580.

A judgment on conviction of misdemeanor for a fine and imprisonment until paid omitting the words "or otherwise discharged" is not reversible, although *habeas corpus* might

lie: *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129.

Where a constable has taken possession of the body of the defendant by virtue of an execution for the collection of a judgment for a fine and the costs of prosecution, rendered by a magistrate for the violation of a state law, *habeas corpus* will not lie at least until the constable has had a reasonable time in which to convey him to the county jail: *Young v. State*, 11 O. C. C. (N.S.) 466, 21 O. C. D. 1.

Imprisonment for nonpayment of costs in a criminal case is illegal unless there was a fine imposed, in which case only the costs part of the sentence (excepting only G. C., §§ 12386, 12387, as to sending a person to the workhouse of an adjoining county): *Luetzler v. Perry*, 18 O. C. C. 826; *sub nomine*, *Smith v. Perry*, 9 O. C. D. 778.

A court has no authority to pronounce, as a part of the sentence of a prisoner convicted of failing to provide a proper home, support and care for his child, that he stand committed until fine and costs are paid: *Smith v. State*, 4 O. C. C. (N.S.) 101, 14 O. C. D. 140.

A statute punishing a quasi criminal offense by fine only, although authorizing imprisonment as a means of enforcing the fine, is in conflict with Const., Art. I, §§ 5 and 10, on the ground that no provision for a jury trial is made: *Inwood v. State*, 42 O. S. 186, IV Longsdorf's Notes, 103.

C. BY EXECUTION.

Under a statute similar to G. C., § 4563, it was held that a fine for the violation of a penal ordinance of a municipal corporation could be collected either by committing the person of the defendant or by execution against his chattels: *Huddleson v. Ruffin*, 6 O. S. 604.

An execution for costs in a criminal proceeding may be levied upon the body of the defendant only in cases in which a fine is imposed as a part of the penalty: *In re Luetzler v. Perry*, 18 O. C. C. 826, 9 O. C. D. 778.

The provision of the act of April 7, 1863 (S. & S. 610, § 2), authorizing the arrest on execution of a party against whom a fine has been adjudged, and his imprisonment until such fine is paid or he be otherwise discharged according to law, is not unconstitutional, and the provision applies to all cases where the party is so adjudged to pay a fine and it is not confined to cases where the party is adjudged to stand imprisoned until the fine and costs are paid: *In re Beall*, 26 O. S. 195, III Longsdorf's Notes, 298.

D. INDIGENT PRISONER.

It is the duty of the auditor under G. C., § 2576, when it is made to appear that a person imprisoned until a fine and costs are paid is unable to pay, to at once discharge such person; and he is not excused from such duty on the grounds "that the petitioner had friends or relations who are able and should be willing to help him in the emergency": *In re Mullaney*, 8 O. N. P. 49, 10 O. D. (N.P.) 419.

Where a prisoner is indigent and has served his sentence, but not paid his fine or costs, and they can not be collected from him, a discharge by the auditor under G. C., § 2576, should not be refused on the ground that some of the prisoner's friends are able to help him, and may do so if he is kept in jail: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575.

Where it is made to appear that accused is sentenced to pay the fine and costs and he has no money to pay same he is entitled to be discharged at once. The public prosecutor, or any other officer has no authority to supplement such judgment by an order of imprisonment: *In re Mullaney*, 8 O. N. P. 49, 10 O. D. (N.P.) 419.

Where a constable has taken possession of the body of the defendant by virtue of an execution for the collection of a judgment for a fine and the costs of prosecution, rendered by a magistrate for the violation of a state law, *habeas corpus* will not lie at least until the constable has had a reasonable time in which to convey him to the county jail: *Young v. State*, 11 O. C. C. (N.S.) 466, 21 O. C. D. 1.

Where an indigent convict is sentenced to remain in the county jail until fine and costs are paid, the refusal of the county auditor to order a discharge from imprisonment does not furnish a legal ground for discharge of the convict upon *habeas corpus*: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780.

The county auditor has jurisdiction under G. C., § 2576, to release an indigent prisoner sentenced to a workhouse in another county after serving his term, it being shown that his fine and costs can not be collected by further imprisonment, and on the auditor's refusal the prisoner will be discharged on *habeas corpus*. Mandamus will not lie as the section is not mandatory: *State v. Martin*, 1 Dayton Term Rep. (Iddings) 16.

Upon a finding of inability to pay a fine, etc., imposed, the person so imprisoned is entitled under Art. I, § 8 of the constitution of Ohio, to a writ of *habeas corpus*: *In re Mullaney*, 8 O. N. P. 49, 10 O. D. (N.P.) 419.

IV. DISPOSITION.

A. IN GENERAL.

If fines, and costs are not paid to the municipal corporation in money, but the persons perform labor for the benefit of the municipal corporation and thus work out such fines and costs, the mayor is not entitled to receive his fees and costs from the municipal corporation: *Gibson v. Zanesville*, 31 O. S. 184, III Longsdorf's Notes, 573.

The objection to the disposition of a fine imposed for a misdemeanor can only be presented by a taxpayer in a suit for that purpose: *Beamer v. State*, 21 O. C. C. 440, 12 O. C. D. 4.

It is within the discretion of the council of a village in a "dry" county to provide that a percentage of all fines and forfeited bonds thereafter paid into the village treasury by violators of the local option statute shall constitute a separate fund, to be known as the secret service fund and used in the employment of detectives and attorneys for the prosecution of violators of said law; and an allegation that the motive behind said ordinance is to enrich the village treasury by fines collected from violators of said law in a neighboring city does not state a ground that affects the validity of the ordinance nor does it afford reason for complaint by a taxpayer: *Powell v. Ashville*, 11 O. N. P. (N.S.) 369, 21 O. D. (N.P.) 434.

G. C., § 4270, providing for the disposition of fines and other moneys received by the mayor in his official capacity is said to apply to mayors in villages, and not to mayors in cities: *Cambridge v. Smallwood*, 6 O. C. C. (N.S.) 230, 17 O. C. D. 302 [affirmed, in *Smallwood v. Cambridge*, 75 O. S. 339]; *Bellefontaine v. Haviland*, 3 O. N. P. (N.S.) 99, 15 O. D. (N.P.) 482.

In an action brought by a municipal corporation against the mayor to recover fines, costs and the like which have been collected by him, the mayor can not set off the uncollected costs taxed on his docket: *Deatrick v. Defiance*, 1 O. C. C. 340, 1 O. C. D. 189.

Fines imposed by a municipal court against persons prosecuted and convicted therein for a violation, either of G. C., §§ 6137, 13050 to 13052, or the municipal local option law, must, when collected, be paid into the treasury of the municipal corporation wherein such fine was imposed, agreeably to the provisions of G. C., § 13247: *Mt. Vernon v. Mochwart*, 75 O. S. 529, IV Longsdorf's Notes, 1019.

B. COUNTY TREASURY.

Fines received by the clerk of the court of common pleas from persons indicted and

convicted in that court for violation of G. C., §§ 13050, *et seq.*, punishing the sale of liquor on Sunday, or for violation of the municipal local option law, must under G. C., § 12378, be paid by him into the county treasury: *Mt. Vernon v. Mochwart*, 75 O. S. 529, IV Longsdorf's Notes, 1019.

Although a fine is payable into the county treasury to the credit of the general county fund the commissioners can not compromise or release the same: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 576.

If prosecutions are instituted in the name of the state, the fines and costs which are received from the persons who are convicted of misdemeanors, which are forbidden by statute, must be paid into the county treasury; and if such fines and costs are paid into the treasury of the municipal corporation, the municipal corporation is liable therefor to the county: *Cleveland v. Jewett*, 39 O. S. 271, III Longsdorf's Notes, 1025.

Where the directors of a workhouse have received fines and costs from persons convicted of misdemeanors under the statutes of this state and committed to such workhouse for the failure to pay the same, such fines and costs must be paid into the county treasury; and when they have been paid into the city treasury, the county commissioners may bring an action therefor against the city upon its refusal to pay the same into the county treasury: *Cleveland v. Jewett*, 39 O. S. 271, III Longsdorf's Notes, 1025.

FINES AND FORFEITED BONDS.

See BAIL AND RECOGNIZANCE; BONDS, SURETY.

FIREARMS.

For firearms, see also ASSAULT AND BATTERY; WEAPONS.

The word "firearm" includes a pistol capable of being loaded with powder and ball and it is not necessary that such pistol be loaded to bring the offense within the provisions of G. C., § 12422: *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141; *Lamb v. State*, 7 O. N. P. 224, 8 O. D. (N.P.) 282.

A tramp found carrying firearms or other dangerous weapon may be arrested, without warrant, by any person or officer: *State v. Pate*, 7 O. N. P. 543, 5 O. D. (N.P.) 732.

Where death results from the discharge of a pistol intentionally pointed at the deceased, the indictment should be for manslaughter and not for the offense described in G. C., § 12422: *Williamson v. State*, 2 O. C. C. 292, 1 O. C. D. 492.

One who discharges firearms on his own premises is not guilty of a violation of G. C., § 12817, and if in so discharging a gun one unintentionally shoots and kills another, he is not guilty of manslaughter: *Martin v. State*, 70 O. S. 219, IV Longsdorf's Notes, 972.

In an indictment founded on G. C., § 12422, it is not necessary to aver that the firearm "was loaded, and that the defendant knew that it was loaded," and such averment, if made, may be considered surplusage: *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141.

Negative averments that the firearm was not being used by the accused in self-defense, or in the discharge of official duty, or in a case of justifiable homicide are not necessary: *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141.

A mere trespass on real estate does not justify the owner in the use of firearms in driving the trespassers from the premises, and where a jury has found from the testimony of the owner himself that he had no reason to fear the trespassers would do him great bodily harm a judgment for damages in favor of one of the trespassers who was shot and injured will be sustained: *Cordes v. Mason*, 14 O. C. C. (N.S.) 70, 32 O. C. D. 530.

FIRE-DAMP.

See MASTER AND SERVANT; MINES AND MINING.

FIRE DEPARTMENT.

For fire department, see MUNICIPAL CORPORATIONS.

An ordinance giving to the fire department of a municipality the right of way on streets, street car crossings and railway crossings while running to fires may be pleaded in an action for negligence of a street or steam railway company resulting in injury to a member of the fire department while running with his company to a fire: *Green v. Railway Co.*, 11 O. N. P. (N.S.) 220, 21 O. D. (N.P.) 190. See also NEGLIGENCE.

FIRE-ESCAPE.

The duty to provide convenient exits, prescribed by G. C., §§ 4658 and 4659, is not confined to buildings within municipalities, but is of general application. The language of the act interpreted in the light of its history leads to the conclusion that it is primarily for the benefit and protection of the dwellers in the buildings wherever located and not in the nature of a police regulation:

Rose v. King, 49 O. S. 213, IV Longsdorf's Notes, 449.

A tenant in a tenement house, situated within a city or village, who, without fault on his part, receives injury because of the neglect of the owner to comply with the requirements of G. C., § 4658, may maintain against such owner, a civil action for damages and his right of recovery will not be affected by the fact that the mayor has not given to the owner the notice required by G. C., § 4660: *Rose v. King*, 49 O. S. 213, IV Longsdorf's Notes, 449.

"Owner," in G. C., § 4659, does not mean one not in possession or control, he having leased the building, but to the tenant who uses the building as a factory or workshop: *Lee v. Smith*, 42 O. S. 458, IV Longsdorf's Notes, 123 [affirming *Lee v. Kirby*, 9 Dec. Rep. 99, 10 Bull. 449; *Lee v. Kirby*, 9 Dec. Rep. 184, 11 Bull. 166].

A four story building, occupied by three families on the second floor, and by two families on the third floor, all living in separate apartments, and all tenants of one owner, is a "tenement house" within the meaning of G. C., § 4658: *Rose v. King*, 49 O. S. 213, IV Longsdorf's Notes, 449.

G. C., § 4658, making it the duty of any owner of any tenement house of more than two stories high, to provide a convenient exit from the different upper stories, etc., is intended, primarily, to secure safe egress by tenants of the upper stories in case of fire, and applies as well to those who occupy the second story: *Rose v. King*, 49 O. S. 213, IV Longsdorf's Notes, 449.

The terms "factory" and "workshop" in G. C., § 4660, which provides for fire escapes and exits includes store buildings which are more than two stories high and in which a large number of employes work and an employer is liable to an employe for injuries sustained in a fire which could have been prevented by compliance with the statutory requirements concerning fire escapes and exits: *Hagedorn v. Windhorst Co.*, 21 O. D. (N.P.) 364, 9 O. L. R. 120.

A large dry goods store falls under G. C., § 4658, relating to exits from factories, workshops, etc., and where the access to fire escapes is obstructed by display cabinets, and no instructions as to their use are given to employes, a finding of negligence as the proximate cause of injury to an employe who jumped from a window is not against the weight of evidence: *Hagedorn v. Windhorst Co.*, 21 O. D. (N.P.) 364, 9 O. L. R. 120.

A law requiring owners of certain kinds of buildings to provide fire escapes on thirty days' notice, and empowering a court to enjoin use of the building until he complies, is

not depriving him of property without a jury nor depriving him of due process of law, but is a proper exercise of a police power: *Cincinnati v. Steinkamp*, 54 O. S. 284, IV Longsdorf's Notes, 635 [reversing *Cincinnati v. Steinkamp*, 9 O. C. C. 178, 6 O. C. D. 85].

A statute requiring fire escapes on certain buildings in cities of the first class, first grade (85 v. 34), being for safety of persons, is not a local matter, and is unconstitutional as a law of a general nature without uniform operation: *Cincinnati v. Steinkamp*, 54 O. S. 284, IV Longsdorf's Notes, 635 [reversing *Cincinnati v. Steinkamp*, 9 O. C. C. 178, 6 O. C. D. 85].

FIRE INSURANCE.

For fire insurance, see INSURANCE.

FIRE-LADDERS AND FIRE-ESCAPES, STANDARD.

See BUILDINGS AND BUILDING REGULATIONS.

FIRE LANDS.

For fire lands company, see WESTERN RESERVE.

FIRE-LIMITS.

For construction of statute as to fire limits, see MUNICIPAL CORPORATIONS.

A building which has been constructed before the passage of an ordinance regulating the erection of structures may be moved from one part of the territory within the specified limits to another part of such territory: *Cleveland v. Lenze*, 27 O. S. 383, III Longsdorf's Notes, 365.

A council may appoint a building inspector to safeguard the interests of the public: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416.

Under proper circumstances a municipal corporation may provide by ordinance that in certain districts buildings must be constructed with fire walls of specified thickness and without openings; and an owner of land who has secured a building permit by showing plans in which such wall appears, can not enjoin the revocation of such permit if he alters such plans and constructs such wall with windows therein: *Tenbusch Realty Co. v. Vorce*, 9 O. C. C. (N.S.) 85, 19 O. C. D. 145.

For the power of a municipal corporation to regulate the removal of buildings, see *Traction Co. v. Sterling*, 9 O. C. C. (N.S.) 200, 19 O. C. D. 227.

FIREMEN'S PENSION FUND.

For firemen's pension fund, see MUNICIPAL CORPORATIONS.

FIRES.

For fires along railroads, see RAILROADS.

Danger from fire to buildings, fences, timber, etc., arising from the operation of a railroad, situated on the remaining portion of a tract of land appropriated by a railroad company, is to the extent the property is thereby depreciated a proper element of damages, and a charge which eliminates this element from the consideration of the jury is improper, notwithstanding the liability of the company for such losses: *Hayes v. Railway Co.*, 6 O. C. C. (N.S.) 281, 16 O. C. D. 395 [affirmed, without opinion, *Railway Co. v. Hayes*, 70 O. S. 425.]

The value of existing crops, or of crops which may be raised upon the lands in the future, or of other property which may be placed thereon, that may be destroyed by fire, can not be considered by the jury in arriving at its award of damages to the residue of a tract appropriated for a railroad: *Hayes v. Railway Co.*, 6 O. C. C. (N.S.) 281, 16 O. C. D. 395 [affirmed, without opinion, *Railway Co. v. Hayes*, 70 O. S. 425.] See also EMINENT DOMAIN.

The owner of property destroyed by fire through the failure of a water company to furnish water and fire apparatus to the municipality in which it is situated and to the inhabitants thereof in accordance with its contract with the municipality, can not maintain an action against the company to recover damages resulting therefrom, there being no legal obligation resting upon the municipality to afford him protection against fire, he is not privy to the contract by substitution: *Blunk v. Supply Co.*, 71 O. S. 250, IV Longsdorf's Notes, 981. See also WATER COMPANIES.

An owner of a dry goods store is guilty of want of ordinary care in permitting a window trimmer to connect electric lights in a show window with the electric circuit by a cord of not the standard type required by the board of underwriters, which cord was skinned too far, forming a closed circuit and starting a fire in the window, which rapidly spread over the entire store, injuring plaintiff, an employee: *Hagedorn v. Wm. Wind-*

horst Co., 21 O. D. (N.P.) 364, 9 O. L. R. 120. See also MASTER AND SERVANT.

FIRM ASSETS.

See PARTNERSHIP.

FIRM LIABILITIES.

See PARTNERSHIP.

FIRM NAMES.

See PARTNERSHIP.

FIRM POWERS.

See PARTNERSHIP.

FIRM PROPERTY.

See PARTNERSHIP.

FIRMS.

See PARTNERSHIP.

FIRST IN TIME PREVAILS.

See EQUITY; MARSHALLING ASSETS, LIENS AND SECURITIES; TRUSTS.

FIRST MORTGAGE BONDS.

See BONDS, NEGOTIABLE; MORTGAGES.

FIRST NAME UNKNOWN.

For first name unknown, see NAMES; PARTIES; JUDGMENT.

FIRST OFFENSE.

See EVIDENCE; SUBSEQUENT OFFENSE, and specific crimes under respective titles.

FISCAL OFFICERS.

See AUDITOR OF STATE; TREASURER; COUNTY AUDITOR; COUNTY TREASURER; MUNICIPAL CORPORATIONS; SCHOOLS, PUBLIC; TOWNSHIP TREASURER.

FISH AND GAME.

Scope Note.—Includes regulations for the protection of fish and game; ownership thereof; rights of fishing and hunting by owner of land and by another; licenses to fish and hunt; criminal offenses, their prosecution and punishment. Excludes regulations affecting domestic animals and offenses relating thereto.

Cross References.

For general questions, see **AIDERS, ABETTERS AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; INFORMATION; JURISDICTION; SENTENCE; VENUE; VERDICT.**

For responsibility for crime in case of infants, insane persons, etc., see **CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.**

For costs of prosecutions under fish and game laws, see **COSTS.**

For fish as subject of larceny, see **LARCENY.**

For questions relating to domestic animals, see **ANIMALS.**

ANALYTICAL OUTLINE.

- I. **Power of State, 7867.**
- II. **Statutes, 7869.**
 - A. **Constitutionality, 7869.**
 1. Of fish and fishing statutes, 7869.
 2. Of bird and game statutes, 7870.
 - B. **Construction, 7871.**
- III. **Ownership of Fish and Game, 7872.**
- IV. **Right to Hunt and Fish, 7873.**
- V. **Licenses, 7874.**
- VI. **Game Warden, 7875.**
- VII. **Criminal Offenses, 7875.**
 - A. **Hunting and fishing on another's land, 7875.**
 - B. **Offenses relating to fish, 7875.**
 - C. **Catching, etc., game birds, 7876.**
- VIII. **Criminal Procedure, 7877.**

I. POWER OF STATE.

The ownership of game animals and birds is in the state in its sovereign capacity, and the question of possession or ownership by an individual is one not of public right, but of public policy, and may be regulated and restrained by legislation enacted for the common good: *Fitton v. State*, 1 O. N. P. (N. S.) 133, 14 O. D. (N.P.) 156.

The ownership of fish and game, so far as they are capable of ownership, until reduced to actual possession, is in the state, and their protection and preservation is within the proper domain of its police power: *State v. Hanlon*, 77 O. S. 19, IV Longsdorf's Notes, 1029.

The right of the state in the exercise of its police power to regulate and control the taking of fish in all the public waters within its jurisdiction, is a right so universally rec-

ognized and so uniformly affirmed that it may not now be questioned: *State v. Hanlon*, 77 O. S. 19, IV Longsdorf's Notes, 1029.

The legislature may provide for the protection of fish, and to that end may declare nets set or used contrary to law a public nuisance and that they may be destroyed by wardens and other executive officers: *State v. French*, 71 O. S. 186, IV Longsdorf's Notes, 981 [distinguishing *Edson v. Crangle*, 62 O. S. 49, IV Longsdorf's Notes, 824].

The legislature may, in some cases, pass laws which destroy the right of property. The protection of game is a public advantage, to which private interests may be made to yield to some extent: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156; *Roth v. State*, 51 O. S. 209, IV Longsdorf's Notes, 537 [affirming *Roth v. State*, 7 O. C. C. 62, 3 O. C. D. 663].

The power of the legislature to protect game is as ample over land covered by water, whether navigable or nonnavigable, as it is over dry land: *State v. Shannon*, 36 O. S. 428, III Longsdorf's Notes, 865.

II. STATUTES.

A. CONSTITUTIONALITY.

1. Of Fish and Fishing Statutes.

While the right to fish may be a common or general right, laws regulating the exercise of this right must of necessity be local rather than general in their character: *State v. Hanlon*, 77 O. S. 19, IV Longsdorf's Notes, 1029.

The state has a right to require a license for the privilege of using nets to capture fish. Such statute is not unconstitutional: *State v. Hanlon*, 77 O. S. 19, IV Longsdorf's Notes, 1029.

The distinction between the Lake Erie fishing district and the other waters of the state rests upon distinctions of the fact which are sufficient to justify such distinction in law; and, accordingly, such statute is one of uniform operation: *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163.

R. S., § 6968-2 (repealed, 99 v. 382; for analogous section, see G. C., § 1446), as amended, 93 v. 303, relative to fish nets, etc., is not unconstitutional on the ground that it deprives the citizen of his property without due process of law: *State v. French*, 71 O. S. 186, IV Longsdorf's Notes, 981. *Contra*, *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181.

A former statute which provided for licenses which charged a higher rate for using a number of nets from rowboats than it did for the same number of nets from a tugboat or steamboat, was held to be unconstitutional, as being in violation of Art. I, § 1, Art. I, § 2, and Art II, § 26, of the constitution of Ohio: *Yensen v. State*, 7 O. N. P. 18.

The Ohio statute as it now stands, providing for the issue of permits or licenses by the fish and game commission for the taking of carp from the waters of Lake Erie, is general in its nature and is a valid enactment: *Jackson v. State*, 13 O. C. C. (N.S.) 531, 22 O. C. D. 181, 55 Bull. 373 (editorial).

An earlier statute, similar to G. C., § 1398, which provided for summary confiscation without an opportunity for hearing, and which gave no right of action for damages, and which did not declare nets used in violation of the statute to be a public nuisance or to be abated as such, was held to be unconstitutional, as amounting to a taking of property without due process of law: *Edson*

v. Crangle, 62 O. S. 49; *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163; *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181; see also, *Yensen v. State*, 7 O. N. P. 18.

R. S., § 6968, as amended, 89 v. 26 (repealed, 97 v. 477), is in conflict with Art. I, § 16, of the constitution of this state, and is therefore void, for the reason that it confiscates property without due course of law: *Edson v. Crangle*, 62 O. S. 49, IV Longsdorf's Notes, 824. *Anonymous (seizure of fishing nets)*, 7 O. N. P. 666, 5 O. D. (N. P.) 553, 37 Bull. 294.

G. C., § 1398, providing for the forfeiture of property used in the unlawful catching of fish and game, in its present form, with provision for hearing and with a declaration that such nets are a public nuisance and are to be destroyed as such, this section is constitutional: *State v. French*, 71 O. S. 186, IV Longsdorf's Notes, 981.

Under an earlier form of G. C., § 1453, it was held that the exception of German carp from the operation of the statute and the arbitrary power conferred upon the commissioners of fish and game to grant or withhold written permission to catch carp, violated the fourteenth amendment to the constitution of the United States: *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181.

A former statute which required the owner of a dam across an unnavigable stream to construct and maintain at his own expense, a passageway or chute for fish, was held to be unconstitutional as applying to owners who had maintained such dams for a period of more than twenty-one years, and had acquired title by prescription: *Woolever v. Stewart*, 36 O. S. 146, III Longsdorf's Notes, 837.

2. Of Birds and Game Statutes.

G. C., § 1418, providing for the protection of wild birds other than game birds, is not rendered unconstitutional by reason of the fact that it is an interference with interstate commerce to the extent that it applies to birds killed outside of the state and imported into the state: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

The constitutionality of G. C., § 1418, has not been affected by the fact that it interfered with property rights as applying to birds killed and in possession prior to the passage of the act: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

G. C., § 1417, prohibiting the buying, selling or exposing for sale birds and squirrels named in the sections following is a valid and constitutional exercise of the police power of the state; and it applies to game which was killed outside of the state, such

killing being lawful at the time and place thereof: *Roth v. State*, 51 O. S. 209, IV Longsdorf's Notes, 537 [affirming *Roth v. State*, 7 O. C. C. 62, 3 O. C. D. 663].

R. S., § 6964, as amended, 79 v. 74 (repealed, 97 v. 477; for analogous section, see G. C., § 1417), prohibiting the purchase, sale, possession, etc., of quail during the closed season is constitutional: *Roth v. State*, 51 O. S. 209, IV Longsdorf's Notes, 537 [affirming *Roth v. State*, 7 O. C. C. 62, 3 O. C. D. 663].

A construction of G. C., § 1409, which would make it prohibit the sale or having in possession for sale plumage of the white heron would render the statute unconstitutional in that it would be in violation of the fourteenth amendment of the federal constitution: *Solomon v. State*, 11 O. N. P. (N.S.) 525, 21 O. D. (N.P.) 383 [affirmed, *State v. Solomon*, 14 O. C. C. (N.S.) 590, 23 O. C. D. 251].

B. CONSTRUCTION.

The white or snowy heron is a vagrant species of "water fowl," and as such is a game bird not within the protection of the Ohio statutes, and the sale of its plumage within the state is not unlawful: *State v. Solomon*, 14 O. C. C. (N.S.) 590, 23 O. C. D. 251 [affirming *Solomon v. State*, 11 O. N. P. (N.S.) 525, 21 O. D. (N.P.) 383]; *State v. Abt*, 15 O. C. C. (N.S.) 26 [affirming *Abt v. State*, 9 O. N. P. (N.S.) 311, 20 O. D. (N.P.) 517, and affirmed by supreme court without opinion, *State v. Abt*, 83 O. S. 451].

The phrase "any wild bird" as used in G. C., § 1409, as amended, means any wild bird native of Ohio and also migratory birds which cross the state at regular intervals: *Solomon v. State*, 11 O. N. P. (N.S.) 525, 21 O. D. (N.P.) 383 [affirmed, *State v. Solomon*, 14 O. C. C. (N.S.) 590, 23 O. C. D. 251].

Under G. C., § 1426, naming unlawful methods of catching fish, shooting fish is not forbidden: *State v. Moder*, 7 O. N. P. 514.

The first date named in G. C., § 1412, providing for open season for certain game birds and animals, is to be excluded and the last date included under a statute, which makes the open season extend "from" one date "to" another: *State v. Elson*, 77 O. S. 489, IV Longsdorf's Notes, 1034.

R. S., § 6968-7 (98 v. 197, repealed, 99 v. 382; for analogous section, see G. C., §§ 1457 and 1461), relative to the preservation, protection, etc., of fish, may not be so construed as to apply to devices in the possession of the owner of a part of a privately owned natural lake to be used by him for catching fish therein: *Weyrick v. State*, 80 O. S. 723.

Whether a written permission to catch carp in the waters flowing into Lake Erie

may limit the right to fish to certain of these waters and exclude the person receiving the permit from fishing in other waters flowing into the lake was questioned in *Jackson v. State*, 13 O. C. C. (N.S.) 531, 22 O. C. D. 181.

The words "bays, marshes, estuaries or inlets bordering upon, flowing into, or in any manner connected with Lake Erie" include the stream "Mud Creek"; the waters of which rise and fall as the waters of the lake rise and fall under the influence of the winds from the different directions; and which at the point in question was six hundred feet wide and six feet deep, and flowed into Lake Erie: *Jackson v. State*, 13 O. C. C. (N.S.) 531, 22 O. C. D. 181.

For an apparent conflict in penal statutes for violation of former game laws, see *Derby v. State*, 6 O. C. C. (N.S.) 91, 14 O. C. D. 304.

III. OWNERSHIP OF FISH AND GAME.

Fish, while roaming at will in public waters, are animals *ferae naturae*: *State v. Thomas*, 8 O. N. P. 653, 11 O. D. (N.P.) 753.

Actual bodily seizure is not necessary to acquire property in food fish. It may be acquired by confinement in nets or other contrivances where they may be taken at the pleasure of the owner, but such confinement must be actual and such as to deprive the fish of their natural liberty and render escape impossible: *State v. Thomas*, 8 O. N. P. 653, 11 O. D. (N.P.) 753.

To acquire property in fish the purchaser must bring them into his power and control and so maintain his control as to show that he does not intend to abandon them again to the world at large: *State v. Shaw*, 67 O. S. 157, IV Longsdorf's Notes, 927 [reversing *State v. Thomas*, 8 O. N. P. 653, 11 O. D. (N.P.) 753].

G. C., § 1466, makes fish lawfully caught subject of larceny. This statute is merely declaratory of the common law: *State v. Shaw*, 67 O. S. 157, IV Longsdorf's Notes, 927.

The ownership of game animals and birds is in the state in its sovereign capacity; and ownership of such by an individual is not a matter of private right but of public policy, and the legislature may regulate such individual ownership: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

R. S., § 6968-7 (repealed, 99 v. 382; for analogous section, see G. C., §§ 1457 and 1461), relative to the preservation, protection, etc., of fish, may not be so construed as to apply to devices in the possession of the owner of a part of a privately owned natural

lake to be used by him for catching fish therein: *Weyrick v. State*, 80 O. S. 723.

IV. RIGHT TO HUNT AND FISH.

An owner may hunt game upon his own land, and G. C., § 12523, protects him in such right: *State v. Shannon*, 36 O. S. 423, III Longsdorf's Notes, 865.

The right reserved to the owner of premises by the act of 71 v. 32 (R. S., § 6967, repealed, 97 v. 477, for analogous section, see G. C., § 1414), to use and employ ferrets to catch rabbits thereon, is personal to himself and those acting for him. His mere permission to another to use and employ ferrets for such purpose, on his premises does not relieve the latter from the penalty prescribed by the statute for its violation: *Hart v. State*, 29 O. S. 666, III Longsdorf's Notes, 509.

Land covered by the water of a navigable land-locked bay, or harbor, connected with Lake Erie may be held by private ownership, subject to the public rights of navigation and fishing, provided the holder derives his title from an express grant made, or sanctioned, by the United States: *Hogg v. Beerman*, 41 O. S. 81, IV Longsdorf's Notes, 51.

The public have no right to hunt on the waters of a navigable land-locked bay where the land covered by the waters is private property: *Sportsman's Club v. Kelting, et al.*, 37 Bull. 259 [supreme court, without report].

If the bed of a lake is private property the public have no right to fish in and boat upon its waters: *Lembeck v. Nye*, 47 O. S. 336, IV Longsdorf's Notes, 376.

The public have the right to fish and hunt on Lake Erie and Sandusky bay: *Sloan v. Biemiller*, 34 O. S. 492, III Longsdorf's Notes, 732; *Bodi v. Shooting Club*, 57 O. S. 226, IV Longsdorf's Notes, 713.

Lake Erie is a free and common fishery and one can not be enjoined from fishing therein: *Dwelle v. Williams*, 14 O. C. C. 551, 7 O. C. D. 611.

The owners of the land covered by overflow waters of river tributary to lake, etc., have exclusive dominion over the same, subject only to the right of public navigation and fishing. The rights of navigation and fishing go together in such waters: *Winous Point Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 544 [following and approving *Sloan v. Biemiller*, 34 O. S. 493, III Longsdorf's Notes, 732].

The rights of private ownership and every beneficial interest in a river tributary to a lake, etc., including the right of trapping and hunting, extend to its mouth: *Winous*

Point Shooting Club v. Bodi, 20 O. C. C. 637, 10 O. C. D. 544.

A free fishery is a profit in the land, a right to take a part of its products, and is termed a "*profit a prendre*" and as such is assignable and inheritable: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

Whether a particular free fishery is assignable or inheritable depends upon the terms of its creation, etc.: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

A reservation for free fishing by a lessor to himself and another, the lessee agreeing to keep other persons off the lake or bordering land is a mere personal right and can not be transmitted by assignment or inheritance: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

V. LICENSES.

When an applicant to fish for carp has satisfied the commission that he will not violate the law, he is entitled to a permit to fish in any of the marshes, inlets, bays, or waters connected with Lake Erie and is not subject to prosecution for placing his seine in the waters of Mud creek: *Jackson v. State*, 13 O. C. C. (N.S.) 531, 22 O. C. D. 181, 55 Bull. 373 (editorial).

Whether a written permission to catch carp in the waters flowing into Lake Erie may limit the right to fish to certain of these waters and exclude the person receiving the permit from fishing in other waters flowing into the lake was questioned in *Jackson v. State*, 13 O. C. C. (N.S.) 531, 22 O. C. D. 181, 55 Bull. 373 (editorial).

R. S., § 6968-2 (93 v. 303, repealed 99 v. 382; for analogous section, see G. C., § 1435), in so far as it provides for a license for engaging in the business of fishing in the waters of Lake Erie, etc., is a valid enactment and not in violation of the fourteenth amendment of the constitution of the United States, nor repugnant to Art. II, § 26, of the constitution of Ohio: *State v. Hanlon*, 77 O. S. 19, IV Longsdorf's Notes, 1029.

The phrase "any wild bird" as used in G. C., § 1409, as amended, means any wild bird native of Ohio and also migratory birds which cross the state at regular intervals: *Solomon v. State*, 11 O. N. P. (N.S.) 525, 21 O. D. (N.P.) 383.

The white or snowy heron is a vagrant species of "water fowl," and as such is a game bird not within the protection of the Ohio statutes, and the sale of its plumage within the state is not unlawful: *State v. Solomon*, 14 O. C. C. (N.S.) 590, 23 O. C. D. 251; *State v. Abt*, 15 O. C. C. (N.S.) 26 [affirming *Abt v. State*, 9 O. N. P. (N.S.) 311, 20 O. D. (N.P.) 517, and affirmed by

supreme court, without opinion, *State v. Abt*, 83 O. S. 451].

VI. GAME WARDEN.

Under a former statute, which provided for a county game warden, such office was a county office and could not be filled by appointment: *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181; *State, ex rel., v. Lewis*, 5 O. N. P. 394, 5 O. D. (N.P.) 371; *State, ex rel., v. Halliday*, 61 O. S. 171, IV Longsdorf's Notes, 803.

VII. CRIMINAL OFFENSES.

A. HUNTING AND FISHING ON ANOTHER'S LAND.

Under a former statute, § 33, chapter 8, title 1 (74 v. 237), it was unlawful to shoot at or kill wild ducks on the lands of another person, although within the channel of a navigable river, when the owner had set up, in a conspicuous place on the shore, a board inscribed in legible English characters, thus, "No shooting or hunting allowed on these premises": *State v. Shannon*, 36 O. S. 423, III Longsdorf's Notes, 865.

In an indictment under G. C., § 12523, no particular description of the land is necessary: *Fogarty v. State*, 6 O. N. P. 248, 9 O. D. (N.P.) 477.

One in possession of land as a lessee is an owner of the land within the meaning of the fish and game law: *Fogarty v. State*, 6 O. N. P. 248, 9 O. D. (N.P.) 477.

Under G. C., § 12526, only that party whose rights have been violated (see G. C., § 12525), can prosecute, but under former statutes prosecutions were begun by the game wardens or deputy game wardens, as well as by owners and possessors of the premises on which the offense was committed: *State v. Halliday*, 61 O. S. 171, IV Longsdorf's Notes, 803; *Ex parte Hamilton*, 15 O. D. (N.P.) 706, 3 O. L. R. 3.

Under a statute similar to G. C., § 1414, the right reserved to the owner or lessee of lands or to his employe to use ferrets to catch rabbits is personal to such owner and to those acting for him. His mere permission to another to use and employ ferrets for such purpose on his premises does not relieve the latter from the penalty prescribed by the statute for its violation: *Hart v. State*, 29 O. S. 666, III Longsdorf's Notes, 509.

B. OFFENSES RELATING TO FISH.

Where a defendant is charged with having in his possession a fishing net contrary to the provisions of G. C., § 1426, a justice of the peace has jurisdiction to hear and determine the case himself and it is not error

for him to refuse to grant a jury trial: *State v. Humble*, 11 O. N. P. (N.S.) 177.

In a criminal prosecution under G. C., § 1426, charging defendant with having in his possession a fishing net contrary to statute, it is not necessary that the affidavit charge or the evidence establish that the defendant had the net in his possession for the purpose of catching fish: *State v. Humble*, 11 O. N. P. (N.S.) 177.

An indictment under R. S., § 6968, as amended, 89 v. 26 (repealed 97 v. 477; for analogous statute, see G. C., § 1439), charging that defendant unlawfully maintained a certain fish net in the waters of Lake Erie within one half mile of the mouth of Grand river, a river flowing into Lake Erie, but not charging that it was set, opened out or maintained in such condition that fish could be caught in it, or that it was maintained there to catch fish, does not state all the criminal facts which the state must prove and consequently does not state an offense: *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163.

G. C., § 1426, does not forbid the shooting of fish: *State v. Moder*, 7 O. N. P. 514.

G. C., § 1465, makes fish lawfully caught subject of larceny. This statute is merely declaratory of the common law: *State v. Shaw*, 67 O. S. 157, IV Longsdorf's Notes, 927.

C. CATCHING, ETC., GAME BIRDS.

Where the prosecution under R. S., § 6960, as amended 95 v. 374 (repealed 97 v. 477; for analogous statute, see G. C., § 1409), comes under the general phrase "any other wild bird, other than a game bird," it is incumbent upon the state to prove that the bird taken, sold, or had in possession, was a wild bird other than a game bird: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

Under a former statute, similar to G. C., § 1411, relating to the catching, killing, injuring and pursuing certain game birds and animals during certain periods, it was held that the question whether one accused of violating the statute for the protection of wild birds, had been authorized by the proper officials to take birds for scientific purposes was a matter of defense to be proved by him: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

The white or snowy heron is a vagrant species of "water fowl," and as such is a game bird not within the protection of the Ohio statutes, and the sale of its plumage within the state is not unlawful: *State v. Abt*, 15 O. C. C. (N.S.) 26 [affirming *Abt v. State*, 9 O. N. P. (N.S.) 311, 20 O. D. (N.P.) 517; circuit court affirmed by the supreme court, without opinion, *State v. Abt*, 83 O. S. 451. This opinion is cited in *State v. Solo-*

mon, 14 O. C. C. (N.S.) 590, 23 O. C. D. 251, as an opinion unreported at that date, and the holding therein is followed].

The white heron is a game bird; and an affidavit which charges that the accused had in his possession for the purpose of sale one aigrette, the plumage of a heron, does not state an offense under G. C., § 1409: *Abt v. State*, 9 O. N. P. (N.S.) 311, 20 O. D. (N.P.) 517.

VIII. CRIMINAL PROCEDURE.

Though prosecutions are by G. C., § 12526, to be only on complaint of the owner of the premises or his agent, the affidavit made by the arresting officer at the owner's request need not show on the face that he acted as agent for the owner: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

G. C., § 12526, that prosecutions shall be instituted only on complaint of the owner of the premises or his agent, does not prevent an officer arresting on view, especially if requested by the owner, and he is not required to wait for an affidavit and warrant, for the offender would have flown by that time: *Williams v. Morris*, 14 O. C. C. (N.S.) 353, 22 O. C. D. 453.

A justice of the peace has jurisdiction to hear a prosecution for having possession of a fishing net contrary to G. C., § 1426, without a jury: *State v. Humble*, 11 O. N. P. (N.S.) 177.

Mere possession of a fishing net contrary to G. C., § 1426, constitutes the offense without regard to an intent to use it; hence the affidavit need not aver intent, and hence also evidence of the possession of other nets to prove intent is incompetent but if admitted is not prejudicial: *State v. Humble*, 11 O. N. P. (N.S.) 177.

The requirement of G. C., § 1426, that the justice shall grant a change of venue if satisfied that he is a material witness, leaves it to his discretion which will not be reviewed if reasonable as where the only testimony he could give would have been cumulative: *State v. Humble*, 11 O. N. P. (N.S.) 177.

FISHERY.

The right of fishery anywhere in Lake Erie being public, if the owner of the shore runs out a pound and stakes, and another person runs a parallel line and extends it beyond him and around the end of his line, thus cutting him off, he has no action: *Dwelle v. Wilson*, 14 O. C. C. 551, 7 O. C. D. 611.

A several fishery is that which belongs to the party who owns both the land and the water right in nonnavigable streams: *Lake*

Co. v. Hollenbeck, 11 O. C. C. 508, 5 O. C. D. 242.

A free fishery arises when one who owns in severalty, conveys an interest in the property, or in the right to fish to another: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

A free fishery is a profit in the land, a right to take a part of its products and is termed a "*profit a prendre*" and as such is assignable and inheritable: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

Whether a particular free fishery is assignable or inheritable depends upon the terms of its creation, etc.: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

A reservation of free fishery by a lessor to himself and one other, the lessee agreeing to keep other persons off the lake or bordering land is a mere personal right and can not be transmitted by assignment or inheritance: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

The owner of a nonnavigable inland lake, with an inlet and outlet stream, may lease his interest in such lake for a term of years and reserve to himself the right of fishing therein during such term: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

If an owner leases for ninety-nine years his land covered by a pond, and also a strip along its margin two rods wide, but reserving to himself and his heirs and assigns the right to use the strip for agricultural purposes, and to pass over to the pond at will from his remaining land, and to fish in the water over the land leased, the lessor's right to subdivide his land and the strip, and thus distribute the right of fishing among many, is limited by the purpose of the lease read in the light of circumstances referred to in it. And if such purpose of the lessee is to establish a summer hotel with fishing attractions and this purpose would be frustrated by such assignments of the right to fish, the assignees will be enjoined from entering on the waters of the pond: *Lake Co. v. Hollenbeck*, 11 O. C. C. 508, 5 O. C. D. 242.

Where a deed for land bounding on Lake Erie and Sandusky bay contained a reservation to the effect that the "grantee shall not have the right of fishing in either the lake or bay, the same being expressly reserved by the grantor," the attempted exclusion from the right, disconnected from the shore, of fishing in either the lake or bay is inoperative: *Sloan v. Biemiller*, 34 O. S. 492, III Longsdorf's Notes, 732.

Under a reservation in a deed to lands on Lake Erie and Sandusky bay of the right of fishing and of landing to take fish and of carrying to and from, seines and fishing tackle, the grantee being inhibited from so

doing, the right reserved is the exclusive right of landing on either shore to take fish or to carry to and from the shore seines and fishing tackle to be used in the adjacent waters in direct connection with the shore: and the inhibition against the carrying of fishing tackle to and from the shore, has reference to tackle to be used in connection with the shore in contravention of the right reserved and does not forbid the storing of tackle on the premises, which is not thus used: *Sloan v. Biemiller*, 34 O. S. 492, III Longsdorf's Notes, 732.

A nonnavigable inland lake is the subject of private ownership, and if so owned, neither the public nor adjacent proprietors owning only to the margin can boat or fish in it. But such riparian can use water for domestic or agricultural purposes connected with his land: *Lembeck v. Nye*, 47 O. S. 336, IV Longsdorf's Notes, 376.

The owners of the land covered by overflow waters of river tributary to lake, etc., have exclusive dominion over the same, subject only to the right of public navigation and fishing. The rights of navigation and fishing go together in such waters: *Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 544 [following and approving *Sloan v. Biemiller*, 34 O. S. 493, III Longsdorf's Notes, 732; modified *Bodi v. Shooting Club*, 57 O. S. 226, IV Longsdorf's Notes, 713].

The rights of navigation and fishing go together in the lakes and navigable bays in this state, and the public can not be excluded from fishing in waters which form part of an open bay of Lake Erie by the owners of both shores: *Bodi v. Shooting Club*, 57 O. S. 226, IV Longsdorf's Notes, 713 [following and approving *Sloan v. Biemiller*, 34 O. S. 492, III Longsdorf's Notes, 732; modifying *Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 541].

Land under the water of a navigable landlocked bay or harbor connected with Lake Erie may be held by private ownership subject to the public rights of navigation and

fishery, if the holder derives title from an express grant made or sanctioned by the United States: *Hogg v. Beerman*, 41 O. S. 81, IV Longsdorf's Notes, 51.

Land under a navigable land locked bay or harbor connected with Lake Erie may be held by private ownership, but is subject to a public right of navigation and fishery. (This is the same land as in question in *Hogg v. Beerman*, 41 O. S. 81, IV Longsdorf's Notes, 51, which is followed). Fishing parties may drive stakes into the soil to anchor nets thereon: *Sportsman's Club v. Kelting*, 37 Bull. 259. See also WATERS AND WATERCOURSES.

FISHING BILL.

See DISCOVERY; BILLS OF DISCOVERY, AND INTERROGATORIES; DEPOSITIONS.

FISTICUFFS.

See ASSAULT AND BATTERY.

FIXED OPINION.

See JURY.

FIXING COMPENSATION.

See CONTRACTS; DAMAGES; SERVICES.

FIXING DATE.

See EVIDENCE.

FIXING LIABILITY.

See NEGOTIABLE INSTRUMENTS.

FIXING WATER RATES.

See MUNICIPAL CORPORATIONS.

FIXTURES.

Scope Note—Includes definition and nature; specific illustrations; effect of special contract, as between parties, as to third parties with or without notice, and a waiver of such rights; parties between whom question may arise; pleading and evidence. Excludes distinction between real and personal property; appropriation for public use.

Cross References.

For fixtures, see also EMBLEMENTS.

For removal of fixtures to injury of security, etc., see MORTGAGES.

For the application of the statute of frauds, see FRAUDS, STATUTE OF.

For descent, see DESCENT AND DISTRIBUTION; EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

ANALYTICAL OUTLINE.

- I. Definition and Nature.
- II. Elements.
- III. Specific Illustrations.
 - A. Machinery.
 - B. Buildings.
 - C. Gas-fixtures.
- IV. Effect of Special Contract.
 - A. As between parties.
 - B. As to third parties.
 - 1. Parties with notice.
 - 2. Parties without notice.
 - 3. Remainder-men.
 - C. Waiver.
- V. Parties Between Whom Question May Arise.
 - A. Grantor and grantee.
 - B. Mortgagor and mortgagee.
 - C. Landlord and tenant.
 - 1. Agriculture.
 - 2. Trade lease.
 - 3. Residence lease.
 - D. Owner of fee and owner of easement.
- VI. Pleading.
- VII. Evidence.

I. DEFINITION AND NATURE.

A fixture is an article which was a chattel, but which, by being affixed to the realty became accessory to it, and parcel of it: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

Quicquid plantatur solo, solo cedit is an ancient maxim of the law to the effect that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties and can not be severed and removed without the consent of the owner: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

Articles merely accessory to a business and put on the premises for this purpose and not as accessions to the real estate retain their personal character. But articles which have been annexed as accessory to the premises and not particularly for the benefit of the present business become subservient to the realty: *Wagner v. Railway*, 22 O. S. 563, III Longsdorf's Notes, 103.

The criterion of a fixture applicable to machinery in a mill or manufactory, is not different from that which applies to articles affixed to the freehold in any other situation: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

Fixtures can not be removed without consent of the owner of the freehold: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

Chattels constructively annexed to realty are subjects of larceny: *Jackson v. State*, 11 O. S. 104, II Longsdorf's Notes, 485.

The use to which property is applied is not decisive of its legal character as fixtures or personalty; a manufacturing establishment, including all its essential parts, may unite in the same pursuit and for producing the same results, portions of real estate with articles of personal property, retaining all the essential qualities of chattels: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

II. ELEMENTS.

In determining whether or not a certain article is a trade fixture, the intention of annexation is a primary consideration: *Distillery Co. v. Mihalovitch-Fletcher Co.*, 9 O. N. P. (N.S.) 218, 20 O. D. (N.P.) 161, 7 O. L. R. 77.

Intention as relates to trade fixtures does not mean tenant's secret intention, but is to be deduced from mode of attachment to the realty, the character of the article and the purpose for which it was put in place: *Distillery Co. v. Mihalovitch-Fletcher Co.*, 9 O.

N. P. (N.S.) 218, 20 O. D. (N.P.) 161, 7 O. L. R. 77.

The intention to make the chattel a fixture is inferred from the nature of the article affixed, the relation and situation of the party making it, the structure and mode of annexation and the purpose or use for which it was made: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

The true criterion of a fixture, apart from established usages or special agreement, is the united application of the following requisites: (1) Actual annexation to the realty, or something appurtenant thereto. (2) Application to the use, or purpose, to which that part of the realty with which it is connected, is appropriated. (3) The intention of the party making the annexation, to make a permanent accession to the freehold: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

In order to determine whether a chattel, by annexation, has been incorporated into the realty so as to become a part of it, the purpose of annexation must be considered, as well as the relation of the parties concerned to the property, both before and after annexation. An article for some purposes and as between certain parties may be regarded as part of realty, while as respects other parties and objects they may be considered as personalty: *Wagner v. Railway*, 22 O. S. 563, III Longsdorf's Notes, 103.

It is not alone the mode of annexation that determines the character of property annexed but the appropriateness of the articles and their necessity to the completeness of the structure, are to be looked to: *Brennan v. Whitaker*, 15 O. S. 446, II Longsdorf's Notes, 739.

III. SPECIFIC ILLUSTRATIONS.

A. MACHINERY.

As between the owner of the fee and his mortgagee, the boilers, engines, saws, gearing and other machinery for applying the power in a steam saw mill so attached and adapted to the structure in which used as to show they were designed to be permanent, and without which the mill would be incomplete, are to be regarded as fixtures: *Brennan v. Whitaker*, 15 O. S. 446, II Longsdorf's Notes, 739.

A sale and conveyance of a mill or manufacturing establishment by any general name or description which embraces all its essential parts, passes the machinery and all the necessary parts of the establishment whether affixed to the freehold or not; but otherwise if the language is merely descriptive of the realty and its appurtenances, as "on which is erected a factory": *Teaff v.*

Hewitt, 1 O. S. 511, I Longsdorf's Notes, 1002.

The engine and boiler, together with the appliances attached and connected with them, used for the purpose of propelling machinery in a planing mill are realty and are covered by a real estate mortgage: *Stone v. Morris*, 4 Dec. Rep. 101, 1 Clev. L. Rep. 28.

The machinery of a manufactory that supplies the motive power, as the engine, boiler and their usual attachments, as contradistinguished from that propelled by it, where permanently annexed to foundations resting upon the freehold, is generally held to be a fixture, though susceptible of being removed without any material injury to the same or the freehold: *Manufacturing Co. v. Garven*, 45 O. S. 289, IV Longsdorf's Notes, 274 [modifying and affirming *Garven v. Hogue*, 9 Dec. Rep. 501, 14 Bull. 175].

Kettles set in a salt boiling furnace are not fixtures, but may be seized and sold on execution as personalty: *Cutler v. Brinker*, T. 291.

A pressed brick machine of such size and weight that it can not be taken out of the building without being taken apart, but can be so taken out, annexed by bolts to a brick foundation, and always returned as taxable personalty by the tenant, will not be deemed a permanent accession to the freehold. That a privilege of purchase is in the lease does not overcome the presumption that permanency was not intended: *Barker v. Brick Co.*, 3 O. N. P. 230, 4 O. D. (N.P.) 270, 5 O. D. (N.P.) 571.

The machinery in a woolen factory, consisting of carding machines, spinning machines, power looms, etc., connected with the motive power of the steam engine by bands and straps, but in no wise attached to the building in which used except by cleats or other means to confine them to their proper places for use, and subject to removal whenever convenience or business may require without injury, are not fixtures, but chattel property: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

An ice machine, boiler, engine, and machinery, connected with a brewery, part in separate buildings and connected by piping, and part bolted in the brewery, but removable without injury, are not fixtures and not covered by a real estate mortgage: *In re Brewing Co.*, 1 Goebel, 193.

Partitions, platform, tables and furnace registers are fixtures and can not be removed; but the portable furnace connected only by pipes to the registers, counters nailed to the floor, shelving and drawers, are chattels: *Paine v. Coffin*, 4 Dec. Rep. 351, 2 Clev. L. Rep. 1.

In a brewery the steam pumps, large frumentum tubs, copper and iron bottoms, copper grant and pfaf, a copper strainer, a large steam kettle, the large vats in the cellar, and the fermenting tubs, though cumbersome and extremely difficult to remove and other like articles so attached as to be removable, and though parts of the general scheme of brewing, are accessory to the business only and not to the building, and are not part of the realty: *Schneider v. Schneider*, 4 O. N. P. 144, 6 O. D. (N.P.) 106.

Spur railway tracks and a track scale, so as to be removable with comparative ease from the freehold, are trade fixtures which may be removed by the lessee installing them there, or by the receiver of said lessee, where the lease contains no provision with reference to such fixtures and no provision that such installations shall become a part of the realty, and a privilege of purchase was given the lessee: *Bank v. Iron Co.*, 13 O. N. P. (N.S.) 27, 22 O. D. (N.P.) 633 [affirmed, in memorandum opinion, by the circuit court, 13 O. N. P. (N.S.) 27].

B. BUILDINGS.

A livery barn built by H and B on B's land, with a stone foundation a foot or more in the ground, under a verbal agreement for a joint ownership of the building and land, is *prima facie* part of the land, and an execution sale of H's interest in it as personalty conveys nothing: *Histe v. Buckley*, 8 O. C. C. 470, 4 O. C. D. 490.

A partition constructed across a room for the purpose of subletting a part thereof, the upper part being of glass and the lower part of wood fitting into the groove of a cleat nailed to the floor, the edges and top being wedged but not otherwise being fastened to the walls or ceiling, is not a permanent addition to the freehold: *Building Co. v. Electrottype Co.*, 11 O. C. C. (N.S.) 488, 21 O. C. D. 361 [affirmed *Building Co. v. Electrottype Co.*, 81 O. S. 521].

A school house erected on ground leased for a school is a trade fixture, though it be a frame on a stone foundation with brick chimneys. Being a trade fixture there is a right to remove it within a reasonable time after expiration of the lease: *Wittenmeyer v. Board of Education*, 10 O. C. C. 119, 6 O. C. D. 258, 2 O. D. (N.P.) 555.

A substantial frame office building erected by a lessee under a five year lease for use in his business, but capable of other uses, and other businesses, and firmly attached to posts let into the ground, is not a trade fixture, but passes under a mortgage made by the lessor antedating the lease: *Burkhardt v. Hopple*, 5 O. N. P. 388, 6 O. D. (N.P.) 127.

C. GAS-FIXTURES.

Gas brackets and chandeliers annexed with the intention of making them part of the building, pass with the realty as between vendor and vendee: *Trust Co. v. Hotel Co.*, 11 Dec. Rep. 348, 26 Bull. 149.

Chandeliers and other gas fixtures and a mantel mirror, held to the wall by iron clasps, are not fixtures, but personalty, as between an execution creditor and a real estate mortgagee. *Contra* of bookcases, to remove which would remove part of the wash-board around the floor, or a hat rack built into the room: *Insurance Co. v. Kneisley*, 9 Dec. Rep. 432, 13 Bull. 437.

IV. EFFECT OF SPECIAL CONTRACT.

A. AS BETWEEN PARTIES.

There is undoubtedly a limitation on the right of parties to change, by their agreements, the status of property, affixed to the freehold, from that which the law would assign to it in the absence of a special agreement: *Fortman v. Goepper*, 14 O. S. 558, 11 Longsdorf's Notes, 690.

An article attached to the land may be a fixture or a chattel according to the special agreement of the parties; its legal quality may also be controlled by an established custom: *Teaff v. Hewitt*, 1 O. S. 511, 1 Longsdorf's Notes, 1002.

B. AS TO THIRD PARTIES.

1. Parties With Notice.

Expressly reserving a right to remove fixtures at the end of the term, all rent being paid, limits the tenant's implied right to the end of the term and the lessor's right to prevent removal until rent is paid is superior to a chattel mortgage on the fixtures: *Winslow v. Hart*, 2 Clev. L. Rep. 387.

A provision in a sale of machinery put into a factory as a fixture, requiring a mortgage to secure deferred purchase money, preserves the chattel character of the property as against a subsisting mortgage of the realty: *Hine v. Morris*, 7 Dec. Rep. 482, 3 Bull. 515.

2. Parties Without Notice.

Where the annexation of boilers, engines, saws, gearing and other machinery, for a steam saw mill was made by the owner with the consent of the holder of a chattel mortgage on such property, such mortgage, though duly filed and renewed, is inoperative, as against a subsequent *bona fide* mortgagee of the real estate, without notice: *Brennan v.*

Whitaker, 15 O. S. 446, II Longsdorf's Notes, 739.

While by agreement of the parties, property attached to the freehold may be made to preserve its character of personality, yet, when it is so attached, that, but for the agreement, it would be a fixture, such agreement will be of no avail against a subsequent mortgage of the realty without notice of it: *Manufacturing Co. v. Garven*, 45 O. S. 286, IV Longsdorf's Notes, 274 [modifying and affirming *Garven v. Hogue*, 9 Dec. Rep. 501, 14 Bull. 175].

3. Remainder-men.

A life tenant's agreement with his lessee that the latter might remove any barns he should build does not bind the infant remainder man: *Haflick v. Stober*, 11 O. S. 452, II Longsdorf's Notes, 522.

C. WAIVER.

A lessee of vacant land for a stock yard, with a right to remove a fence to be put up by him, has the same right of removal under a second lease not mentioning such right, although the posts are imbedded in the earth. The original lease shows that fence was not intended to be a fixture: *Chaffee v. Fish*, 1 O. N. P. 211, 2 O. D. (N.P.) 89.

The right to removal is not surrendered by taking a subsequent lease from the owner of the fee two months after expiration of the original, not stipulating as to the right, but also not covenanting to yield possession in the present condition of the premises: *Wittenmeyer v. Board of Education*, 10 O. C. C. 119, 6 O. C. D. 258, 2 O. D. (N.P.) 555.

A tenant's right to remove trade fixtures (a boiler and engine) is lost if his further occupancy is under a new letting without an understanding as to them: *Cook v. Scheid*, 6 Dec. Rep. 867, 8 Am. L. Rec. 493, 4 Bull. 1123.

Doubt as to whether certain articles are fixtures is resolved in favor of the landlord, where the articles are not removed within the term of the tenancy, or within a reasonable period thereafter: *Johnston v. Wooding*, 4 O. C. C. (N.S.) 160.

V. PARTIES BETWEEN WHOM QUESTION MAY ARISE.

A. GRANTOR AND GRANTEE.

A grantee of the land from the lessor by deed reciting the existence of the lease, has no greater right than the lessor to prevent removal of a school house which is a trade fixture: *Wittenmeyer v. Board of Education*, 10 O. C. C. 119, 6 O. C. D. 258, 2 O. D. (N.P.) 555.

B. MORTGAGOR AND MORTGAGEE.

After giving a real estate mortgage, no subsequent transaction, intention or purpose on the part of the mortgagor can affect the character as realty of an engine and boiler covered thereby: *Stone v. Morris*, 4 Dec. Rep. 101, 1 Clev. L. Rep. 28.

Stills in a glycerine factory resting partly on a brick foundation in the building, and partly screwed to the ceiling, and connected to the boiler outside, are not fixtures, although of little value if detached, and necessary to the factory. Hence, the assignee for creditors takes them as against a real estate mortgage: *Hyman v. Gordon*, 10 Dec. Rep. 447, 21 Bull. 179, 1 Goebel, 189.

Where F conveyed his brewery property to H by real estate deed, naming a consideration, and received back a purchase money mortgage, and conveyed the brewery machinery by bill of sale, naming a consideration, and H made chattel mortgages on the machinery to others, it was held that the deed and bill of sale, being parts of one transaction, would be construed together, and the machinery would therefore be treated as personality as to the mortgagees thereof: *Portman v. Goepfer*, 14 O. S. 558, II Longsdorf's Notes, 690.

C. LANDLORD AND TENANT.

1. Agriculture.

A lessee may lawfully remove before the expiration of the lease, improvements, whether moveable or fixtures, placed upon the land by him during the term: *Bates v. Neski*, 6 Dec. Rep. 1064, 10 Am. L. Rec. 50.

Hay and straw are treated as fixtures in farm leases. A subsequent contract terminating the lease and providing for harvesting and removing crops gives the right to remove them: *Garrett v. Brant*, 6 O. C. C. (N.S.) 509, 17 O. C. D. 463.

2. Trade Lease.

Covenants restricting the tenant's ordinary right to remove trade fixtures are always construed strictly and not extended by implication: *Distillery Co. v. Mihalovitch-Fletcher Co.*, 9 O. N. P. (N.S.) 218, 20 O. D. (N.P.) 161, 7 O. L. R. 77.

A lessee can not repudiate his lease and tear out the new bar fixtures which the lessor installed at his request in the saloon: *Brewing Co. v. Konst*, 12 O. C. C. (N.S.) 577, 20 O. C. D. 782 [affirmed, without opinion, *Konst v. Brewing Co.*, 79 O. S. 469].

Tubing, casing, pipe, etc., of oil and gas wells are trade fixtures and may be removed: *Siler v. Glass Co.*, 21 O. C. C. 284, 11 O. C. D. 784.

A partition constructed across a room for the purpose of subletting a part thereof, the upper part being of glass and the lower part of wood fitting into the groove of a cleat nailed to the floor, the edges and top being wedged but not otherwise being fastened to the walls or ceiling, is not a permanent addition to the freehold: *Building Co. v. Electrotrope Co.*, 11 O. C. C. (N.S.) 488, 21 O. C. D. 361 [affirmed, without opinion, *Building Co. v. Electrotrope Co.*, 81 O. S. 521].

Nonpayment of rent does not *ipso facto* end the term, but that the tenant can remove fixtures if he is in possession: *Paine v. Coffin*, 4 Dec. Rep. 351, 2 Clev. L. Rep. 1.

An automatic fire sprinkler system installed by the lessee at his own expense in pursuance to a covenant in the lease of factory buildings, "a wholesale liquor and rectifying house," is a trade fixture properly removable by the receivers on surrender of the premises: *Distillery Co. v. Mihalovitch-Fletcher Co.*, 9 O. N. P. (N.S.) 218, 20 O. D. (N.P.) 161, 7 O. L. R. 77.

3. Residence Lease.

Reservation of a lien for rent on the lessee's interest in the term does not reserve a lien on his improvements, though fixtures. Hence, a judgment against the lessee ordering the removal of a wall of a building erected by him and encroaching on a neighbor's lot binds the lessor though not a party to the action: *Bates v. Neski*, 6 Dec. Rep. 1064, 10 Am. L. Rec. 50.

D. OWNER OF FEE AND OWNER OF EASEMENT.

That a railroad company on abandoning the enterprise allows the land owner to take possession of his land for less than twenty-one years, does not alone show the abandonment to him of the company's right to remove its improvements, such as piers: *Wagner v. Railway*, 22 O. S. 563, III Longsdorf's Notes, 103.

VI. PLEADING.

An objection that pieces of machinery are not fixtures is too late after the pleadings, appraisal and sale, in foreclosure, have treated them as part of the realty: *Choteau v. Thompson*, 3 O. S. 424, II Longsdorf's Notes, 43.

VII. EVIDENCE.

Whether certain articles of personal property added to a brewery after giving a real estate mortgage could be removed without material injury to the freehold or destroying their own qualities or value is a question of fact: *Fortman v. Goepper*, 14 O. S. 558, II Longsdorf's Notes, 690.

In determining the question of whether, in providing facilities for carrying on business on leased property the intent was that they should be regarded as trade fixtures or otherwise, testimony as to an oral agreement between the landlord and an officer of the lessee company that such fixtures were to be regarded as a part of the realty is inadmissible, in the absence of any rule of the company or action by the board of directors which authorized such an agreement, or of any such provision in the written lease: *Bank v. Iron Co.*, 13 O. N. P. (N.S.) 27, 22 O. D. (N.P.) 633 [affirmed by the circuit court, in memorandum opinion, 13 O. N. P. (N.S.) 27].

FLAGMAN.

The requirement that a flagman be stationed at a railway crossing can only be made when it is found that the crossing is dangerous to the public; and where a railroad company obtains the right to run its trains over a given street crossing at a greater speed than theretofore allowed by the ordinances of the municipality, on condition that a flagman be stationed there, the expense thus incurred can not be thrown upon a traction company occupying the street, under an agreement to pay all expenses which might be lawfully required by the municipality or the state, for maintaining a flagman at said crossing: *Transit Co. v. Railroad Co.*, 7 O. C. C. (N.S.) 199, 18 O. C. D. 36.

The requirement as to a flagman having been obtained for the benefit of a steam railroad alone, there is no consideration moving to a traction company using the crossing, and payment of the expenses incurred can not be enforced against the traction company: *Transit Co. v. Railroad Co.*, 7 O. C. C. (N.S.) 199, 18 O. C. D. 36. See also RAILROADS.

FLAVORING EXTRACTS.

See FOODS AND DRUGS.

FLEEING FROM JUSTICE.

See EXTRADITION.

FLIGHT.

For flight as evidence of guilt, see EVIDENCE.

FLOODS.

See WATERS AND WATERCOURSES.

FOETICIDE.

See ABORTION.

FOLLOWING PROPERTY.

See BONA FIDE BUYER; FRAUD AND DECEIT.

FOLLOWING STATUTE OF LIMITATIONS.

See LACHES.

FOLLOWING THE LAW.

See EQUITY; TRUSTS.

FOLLOWING TRUST FUNDS.

If a trustee deposits trust funds in a bank taking as evidence thereof a certificate of deposit showing that he as trustee has deposited such fund payable to himself upon a return of the certificate properly endorsed, the same not being subject to check, and the bank fails and makes an assignment for the benefit of creditors before such fund is withdrawn, and it appears that the bank, upon receiving such deposit, had mingled the trust money with its own funds, money paid out from such fund for its own purposes will be presumed to have been paid

from its own money, and not from the trust fund. If it be shown that at all times from the making of the deposit to the time of the assignment by the bank, there was in its vaults money of amount and value equal to the amount so deposited, a court of equity may engraft a trust upon such money, and the trustees will become a preferred creditor to the amount of such deposit: *Smith v. Fuller*, 86 O. S. 57.

The rule, applicable in certain cases, that the *cestui que trust* must bear the loss occasioned by the malfeasance or misfeasance of the trustee, or that where the property is disposed of by the trustee, he is without remedy except against the trustee or his bondsmen, is not applicable to a case where the person withholding the property parted with nothing to obtain it, and has not even consciously asserted a claim adverse to the rights or interests of the *cestui que trust*: *Ward v. Ward*, 12 O. C. D. 59.

An executor, or administrator under the circumstances stated, holds the property and asserts the rights in *autre droit* and courts should consider primarily the rights of the *cestui que trust*, though the rule might be otherwise if the executor or administrator were endeavoring to recover in his own personal right: *Ward v. Ward*, 12 O. C. D. 59. See also TRUSTS.

FOOD COMMISSIONERS.

See FOODS AND DRUGS; DAIRY AND FOOD COMMISSIONER.

FOODS AND DRUGS.

Scope Note.—Includes regulations relating to foods, liquors, and drugs; their manufacture and sale; and the prosecution of offenses relating thereto. Excludes poisons; intoxicating liquor; fertilizers and inspection laws.

Cross References.

For general questions, see AIDERS, ABETTERS AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; INFORMATION; JURISDICTION; SENTENCE; VENUE; VERDICT.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For poisons, see POISONS.

For inspection of foods and drugs, see INSPECTION LAWS.

For officers for the enforcement of statutes against adulterations, see INSPECTION LAWS.

That the liability of corporation for crime is not a defense to *quo warranto*, see QUO WARRANTO.

For questions relating to former jeopardy, see AUTREFOIS ACQUIT AND CONVICT.

That use of drugs by witness is not ground for new trial, see NEW TRIAL.

For the habitual use of drugs as ground for discharge of employe, see SERVICES.

For inspection of fertilizers, see OHIO STATE BOARD OF AGRICULTURE.

ANALYTICAL OUTLINE.

- I. Statutes and Ordinances, 7893.
 - A. Constitutionality, 7893.
 - B. Purpose and scope, 7894.
- II. Persons Liable, 7895.
- III. What Constitutes a Sale, 7896.
- IV. Offenses Relating to Foods and Drugs, 7897.
 - A. Oleomargarine, 7897.
 - B. Other foods, 7897.
 - C. Liquors and drugs, 7898.
- V. Defenses, 7899.
 - A. Ignorance, 7899.
 - B. Other defenses, 7900.
- VI. Jurisdiction, 7900.
- VII. Affidavit and Indictment, 7901.
- VIII. Evidence, 7903.
- IX. Injunction, 7905.

I. STATUTES AND ORDINANCES.

A. CONSTITUTIONALITY.

The police power of the state is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people, and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution: *State, ex rel., v. Dairy Co.*, 62 O. S. 350, IV Longsdorf's Notes, 835 [affirmed, *Dairy Co. v. Ohio*, 183 U. S. 238, 14 O. F. D. 12].

The pure food laws of Ohio, G. C., §§ 5777, *et seq.*, punishing the coloring, coating or polishing of an article of food whereby damage or inferiority is concealed, are a valid exercise of the police power of the state and do not interfere with the right of congress to regulate commerce: *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 13 O. F. D. 44 [appeal dismissed, *Arbuckle v. Blackburn*, 191 U. S. 405].

The pure food laws are valid in so far as they apply to sales made within the state of food products manufactured there; but they can not be enforced in the regulation of interstate commerce, against the sale of oleomargarine colored to look like butter, in the original packages in which it was imported from other states: *In re Worthen*, 6 O. F. D. 683, 58 Fed. 467.

G. C., § 5786, relating to the sale of vinegar, is a valid exercise of the police power of the state and is not unconstitutional: *Weller v. State*, 53 O. S. 77, IV Longsdorf's

Notes, 593 [affirming *Weller v. State*, 8 O. C. C. 467, 6 O. C. D. 812, which affirmed, *Weller v. State*, 1 O. D. (N.P.) 196]; *Williams v. McNeal*, 7 O. C. C. 280, 4 O. C. D. 596.

The act to prevent deception in the sale of dairy products to preserve the public health is constitutional: *Holtgreive v. State*, 7 O. N. P. 389, 5 O. D. (N.P.) 166.

The provisions of G. C., § 12717, forbidding the sale of milk from cows fed on wet distilling waste are not unreasonable and the act is constitutional: *Herzog v. State*, 9 O. N. P. (N.S.) 349, 20 O. D. (N.P.) 458.

G. C., §§ 12734, *et seq.*, relating to the sale of oleomargarine, are not class legislation, and are constitutional: *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129.

An ordinance passed by a municipal board of health which forbids the sale of milk at retail except in sealed glass bottles is valid: *Staas v. State*, 15 O. C. C. (N.S.) 189, 23 O. C. D. 159 [affirmed, without opinion, *Staas v. State*, 81 O. S. 497].

A municipal ordinance which is reasonable and is authorized by legislative provisions will be upheld even though the court may not believe that such ordinance is the wisest regulation possible: *Staas v. State*, 15 O. C. C. (N.S.) 189, 23 O. C. D. 159 [affirmed, without opinion, *Staas v. State*, 81 O. S. 497].

B. PURPOSE AND SCOPE.

G. C., § 5774, and the following sections have been enacted by the legislature to protect public health; and also to prevent the public from being defrauded by purchasing imitations: *White v. State*, 12 O. D. (N.P.) 659.

The object of G. C., § 12734, which provides against the manufacture, sale, etc., of oleomargarine containing any coloring matter whatsoever, is not only to secure a pure food, but to prevent deception by the manufacture and sale of oleomargarine colored to resemble butter: *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129.

The act (G. C., §§ 6033, *et seq.*), forbidding the sale of adulterated liquors applies to a sale here by an agent of a Philadelphia house, of a poisonous compound for cognac brandy: *Peacock v. Grannan*, 2 Dec. Rep. 465, 3 W. L. M. 155.

The pure food law of Ohio (G. C., §§ 5774, *et seq.*), places a duty on the seller of meats in effect amounting to a warranty that they are not diseased: *Allen v. Marvin*, 46 Bull. 208.

The act against the adulteration of liquors, requiring inspection of liquors made or brought into the county not having inspector's brand of some other county, did not compel a second inspection when the bulk was broken: *Woodworth v. State*, 4 O. S. 487, II Longsdorf's Notes, 123.

The chapter on adulterations does not apply to the United States Soldiers' Home at Dayton: *In re Thomas*, 82 Fed. 304, 10 O. F. D. 237.

An inspector employed by the food commissioner can not have an injunction to compel the dealer to furnish him a sample as required by G. C., § 5776. The remedy for refusal is prosecution under succeeding sections and is exclusive: *State v. Dairy Co.*, 62 O. S. 123, IV Longsdorf's Notes, 826.

II. PERSONS LIABLE.

One who sells or delivers an adulterated article for analysis is guilty of a violation of the pure food laws: *State v. Rippeth*, 71 O. S. 85, IV Longsdorf's Notes, 980.

The provisions of G. C., § 12676, relating to the sale of adulterated liquors are not limited in their application to sales by druggists and pharmacists, nor to sales for medicinal or pharmaceutical use; and a saloon keeper who sells whisky below the standard of alcoholic strength laid down in the United States Pharmacopoeia, has violated this section: *State v. Hutokinson*, 56 O. S. 82, IV Longsdorf's Notes, 683.

The manager of a mercantile corporation may be prosecuted even though the adulterated article is sold or offered for sale by an agent of such corporation, and the offense is triable in the county in which such article is sold or offered for sale: *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633.

One who sells impure and adulterated wine is subject to fine, although at the time of the

sale he is agent of a principal who resides without this state: *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633.

The principal is bound at his peril to see that the pure food law is complied with; and he is liable for violations of such law by his employees: *Williams v. State*, 4 O. C. C. (N.S.) 193, 15 O. C. D. 673 [affirmed, without opinion, *Williams v. State*, 69 O. S. 570].

Where a boy, who is left in temporary charge of a milk wagon without any authority to sell milk, without the knowledge of the owner, sells milk from cans which contained the supply intended for customers, which milk contains only 10.63 per cent of solids, the owner can not be prosecuted under G. C., § 12717: *Diersing v. State*, 9 O. C. C. (N.S.) 214, 19 O. C. D. 469.

Under a former statute, R. S. § 7458-13, a complaint which charged a principal with an improper sale of milk was insufficient where the sale was made by an agent: *Heider v. State*, 4 O. D. (N.P.) 227.

Under a prior statute (R. S., § 4200-11), punishing the same offense as in G. C., § 12720, the word "dealer" was held to include one selling milk obtained from his own cows, as well as one who bought and sold milk: *Guilder v. State*, 4 O. C. C. (N.S.) 73, 16 O. C. D. 221.

G. C., § 12754, punishing purchasers of impure food in a public institution, does not apply to violations committed on premises owned by the United States government: *United States Circuit Court*, 37 Bull. 294 (editorial).

The governor of the soldiers' home at Dayton, Ohio, is not subject to the statute prescribing the manner in which oleomargarine shall be used in eating houses, since his act in this matter is the act of the United States government: *In re Thomas*, 82 Fed. 304, 10 O. F. D. 237 [affirmed, on the reasoning of the lower court, *In re Thomas*, 12 O. F. D. 82].

III. WHAT CONSTITUTES A SALE.

A sale is not complete under the pure food laws until payment is made, and where a restaurant keeper refused payment from an inspector he could not be prosecuted for a sale: *Heider v. State*, 4 O. D. (N.P.) 227.

It is not a sale where a dealer accepts payment for an article only after persuasion by a food inspector, who is procuring such article for chemical analysis: *Dinkelbühler v. State*, 4 O. N. P. 96, 6 O. D. (N.P.) 99.

A person who sells or delivers oleomargarine containing coloring matter to any person interested, on demanding the same for analysis, as required by G. C., § 5776, is

liable, nevertheless, for prosecution under G. C., § 12733: *State v. Rippeth*, 71 O. S. 85, IV Longsdorf's Notes, 980.

IV. OFFENSES RELATING TO FOODS AND DRUGS.

A. OLEOMARGARINE.

G. C., § 12735, provides that the word "oleomargarine" as used in G. C., §§ 12733 and 12734, means any substance, not pure butter of not less than eighty per cent. of butter fats, which is made as a substitute for, in imitation of, or to be used as butter.

"Oleomargarine" does not include butter made from pure milk or cream without any adulteration, though it is deficient in butter fats. The law does not purport to regulate the sale or grade of butter: *State v. Ransick*, 62 O. S. 283, IV Longsdorf's Notes, 834.

The sale of oleomargarine which contains coloring matter is an offense under the pure food laws, even if such coloring matter is not of itself injurious: *State v. Ruedy*, 57 O. S. 224, IV Longsdorf's Notes, 713.

One who sells or delivers oleomargarine containing coloring matter to any person interested or demanding the same for analysis as provided in G. C., § 12758, and also in G. C., § 5776, may be prosecuted therefor under G. C., § 12734: *State v. Rippeth*, 71 O. S. 85, IV Longsdorf's Notes, 980.

B. OTHER FOODS.

Food includes all articles used for the nourishment of human beings, including both what is ordinarily known as food and also drink; and including articles which are simple and also those which are mixed or compounded: *White v. State*, 12 O. D. (N.P.) 659.

Milk containing 10.61 per cent. of solids, and no more, is adulterated milk: *State v. Smith*, 69 O. S. 196, IV Longsdorf's Notes, 956.

Molasses to which glucose has been added is an article of adulterated food: *State v. Kelly*, 54 O. S. 166, IV Longsdorf's Notes, 628 [reversing *Kelly v. State*, 1 O. N. P. 238, 2 O. D. (N.P.) 239].

"Breakfast cocoa", in the preparation of which the manufacturer took the cocoa bean and extracted a considerable portion of the oil therefrom, and put the product thus prepared in packages, for sale, is not a violation of G. C., § 5778, providing "that an article of food shall be deemed to be adulterated if any valuable or necessary constituent or ingredient has been wholly or in part extracted from it": *Rose v. State*, 11 O. C. C. 87, 5 O. C. D. 72 [reversing *Rose v. State*, 2 O. N. P. 270, 4 O. D. (N.P.) 44].

To offer for sale, as an article of food, liquid chicory and coffee, as "liquid coffee," is an offense punishable by the pure food laws of the state: *State v. Dreher*, 55 O. S. 115, IV Longsdorf's Notes, 654.

The pure food laws probably forbid the sale of coffee which is coated with a glaze of sugar and the white of egg: *Arbuckle v. Blackburn*, 191 U. S. 405, 14 O. F. D. 321 [dismissing appeal from *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 13 O. F. D. 44].

Roasted coffee which is coated or glazed with a mixture of sugar and eggs, put up in packages distinctly labeled with the name and per cent. of each ingredient therein, and the same is not injurious to health, is within the proviso contained in G. C., § 5778, and a sale of the same is not unlawful: *White v. State*, 12 O. D. (N.P.) 659.

Where, in the manufacture of vinegar, low wine, formed from fermented grain, is, previously to its acetification, passed through roasted malt, not for the purpose of adding any substantial ingredient to the vinegar, but for the purpose of giving it color as well as aroma and flavor, and without this treatment it would be colorless, the vinegar so produced contains artificial coloring matter within the meaning of G. C., §§ 5786, *et seq.*, and its possession for the purpose of sale is an offense: *Weller v. State*, 53 O. S. 77, IV Longsdorf's Notes, 611; *Williams v. McNeal*, 7 O. C. C. 280, 4 O. C. D. 596.

C. LIQUORS AND DRUGS.

Whiskey is recognized as a drug in the United States Pharmacopoeia, and a sale of adulterated whiskey is an offense under G. C., § 12758, though it be sold as a beverage or commercial commodity, and by one who is neither a druggist nor pharmacist: *State v. Hutchinson*, 56 O. S. 82, IV Longsdorf's Notes, 683.

If beer contains salicylic acid and the presence of such acid is shown to be poisonous or injurious to health if used continuously or indiscriminately, the sale of such beer without a label notifying the purchaser of the presence of such acid is unlawful: *State v. Hutchinson*, 55 O. S. 573, IV Longsdorf's Notes, 673 [followed and approved *Ward v. State*, 58 O. S. 704].

Benzoic acid added to blackberry wine as an antiseptic takes it out of the exception of wines made from fruits and labeled as such, and the statute applies; the state need not show that this acid was injurious to health: *State v. Haynes*, 7 O. N. P. 624, 8 O. D. (N.P.) 678, 35 Bull. 94 (editorial).

An analogous statute (R. S., § 6957, repealed, 95 v. 282), prohibited the sale of

poison to any person, without labeling it as required by the statute. The phrase "except upon the prescription of a physician" applied to the sale of poisons to minors and did not apply to the sale of poison to other persons: *Marvin v. State*, 5 O. N. P. 209, 7 O. D. (N.P.) 204.

In the absence of a specific statutory reference to a designated edition of the Pharmacopoeia, a statute which adopts the Pharmacopoeia as a standard refers to that edition which is in use when the statute is enacted; and a subsequent edition which adopts a higher standard is not to be applied as a standard, in the absence of a showing that such edition established the same standard as the earlier edition with reference to the drug in question: *State v. Emery*, 55 O. S. 364, IV Longsdorf's Notes, 664; *Emery v. State*, 3 O. N. P. 204, 5 O. D. (N.P.) 121.

V. DEFENSES.

A. IGNORANCE.

Ignorance of the adulterated character of the article sold is not a defense: *State v. Kelly*, 54 O. S. 166, IV Longsdorf's Notes, 628 [reversing *Kelly v. State*, 1 O. N. P. 238, 2 O. D. (N.P.) 239]; *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129. *Contra*, *Haas v. State*, 1 O. N. P. 248, 2 O. D. (N.P.) 177.

In prosecutions under the pure food laws guilty knowledge is not an essential element of the crime: *Strong v. State*, 2 O. N. P. 93, 3 O. D. (N.P.) 284; *Bissman v. State*, 9 O. C. C. 714, 6 O. C. D. 712, 3 O. D. (N.P.) 576 [affirmed, *Bissman v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

Guilty knowledge is not an essential element of the crime of selling adulterated wine under G. C., § 12767: *Altshul v. State*, 8 O. C. C. 214, 4 O. C. D. 402 [approved in *State v. Fromer*, 7 O. N. P. 172, 6 O. D. (N.P.) 374].

A druggist is required at his peril to know that the drug offered for sale was within the rule laid down in the Pharmacopoeia as provided in G. C., § 5777, clause 1: *Emery v. State*, 3 O. N. P. 204, 5 O. D. (N.P.) 121 [affirmed, *State v. Emery*, 55 O. S. 364, IV Longsdorf's Notes, 664].

The defendant can not show want of knowledge in defense. Accordingly an agent who procures orders which his principal fills by sending direct to the buyer can not show that he did not know the principal kept or would send an adulterated commodity: *Meyer v. State*, 10 O. C. C. 226, 6 O. C. D. 477 [affirming *Meyer v. State*, 1 O. N. P. 241, 2 O. D. (N.P.) 233, and affirmed, *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

B. OTHER DEFENSES.

It is no defense to a prosecution for selling skimmed milk with intent to defraud, that the purchaser, and manufacturer of cheese had failed to post a copy of the statute in the receiving room of his factory, as required by law: *Bainbridge v. State*, 30 O. S. 264, III Longsdorf's Notes, 528.

Where, in violation of G. C., § 12731, oleomargarine is sold for butter, by a clerk in the store of the defendant in the ordinary course of business it is no defense that he had instructed such clerk not to sell oleomargarine, except under its true name, marked and labeled as required: *Williams v. State*, 4 O. C. C. (N.S.) 193, 15 O. C. D. 673 [affirmed, without opinion, *Williams v. State*, 69 O. S. 570].

The defendant in a prosecution for refusal to sell a sample for analysis has the right to show that he did not expose or offer the articles for sale: *Margolin v. State*, 1 O. N. P. 264, 4 O. D. (N.P.) 354.

The fact that the article sold was manufactured under letters patent issued by the United States, constitutes no defense to an information or indictment for violating the provisions of a former statute similar to G. C., § 12731; the legislature has power to regulate, or forbid, the sale of patented articles to the same extent as articles not patented, if no discrimination is made: *Palmer v. State*, 39 O. S. 236, III Longsdorf's Notes, 1022.

Where a master is under contract to deliver to the proprietor of a cheese and butter factory, pure milk, and has knowledge that the milk so delivered is to be mixed with the milk of other patrons, and entrusts the delivery to a servant who, in the course of such employment, delivers adulterated milk, the master is liable for damages necessarily and directly resulting by reason of such delivery, and it is not a defense to show that the servant without authority and purposely, and to gratify his malice towards his employer and with intent to injure him, adulterated the milk so delivered by mixing with it water, and that the master had no knowledge of such adulteration. In such case the rule of damages is compensation for the injury: *Stranahan Co. v. Coit*, 55 O. S. 398, IV Longsdorf's Notes, 665.

VI. JURISDICTION.

The introduction of coloring matter into oleomargarine is the adulteration of an article of food punishable by law, and a justice of the peace has jurisdiction of such offense by G. C., § 13423: *State v. Ruedy*, 57 O. S. 224, IV Longsdorf's Notes, 713.

In cases of violation of the laws to prevent the adulteration of food and drink, the adulteration and deception in sale of dairy products, drugs and medicines, and any violation of the law for prevention of cruelty to animals, or under G. C., §§ 12968, 12428 and 12970, as enacted in G. C., § 13423, the jurisdiction of a police judge or mayor of any city or village is confined to offenses committed within his city or village: *State v. Peters*, 67 O. S. 494, IV Longsdorf's Notes, 934 [affirming *State v. Peters*, 8 O. N. P. 595, 11 O. D. (N.P.) 555].

The Soldiers' Home at Dayton being a federal institution, the police power of the state can not regulate any article of food approved by the officers of the home, and hence a prosecution against an officer for violation of the statute in relation to the use of oleomargarine will not lie: *State v. Thomas*, 173 U. S. 276.

The local agent of a nonresident principal who sells an article in violation of G. C., §§ 5795 and 5796, may be prosecuted and tried in the county where he sells the adulterated article or offers the same for sale: *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633 [affirming *Myer v. State*, 10 O. C. C. 226, 6 O. C. D. 477, which affirmed, *Meyer v. State*, 1 O. N. P. 241, 2 O. D. (N. P.) 233].

A principal in one county who sells adulterated food by traveling salesman in other counties may be prosecuted in any county where the sale was made: *Bissman v. State*, 9 O. C. C. 714, 6 O. C. D. 712, 3 O. D. (N. P.) 576 [affirmed, *Bissman v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

G. C., § 13423, giving justice's jurisdiction under the laws to prevent adulteration and deception in the sales of drugs, etc., does not give them jurisdiction of violations of R. S., § 6957 (repealed, 95 v. 282; for analogous statutes, see G. C., §§ 12665, *et seq.*), which regulates the sales of poisons: *Marvin v. State*, 5 O. N. P. 209, 7 O. D. (N.P.) 204.

In a prosecution under R. S., § 4405 (repealed, 99 v. 511; for present form of statute, see G. C., §§ 12705, *et seq.*), for the unlawful sale of drugs, poisons, etc., unless the accused waive a jury in writing, the magistrate has no authority to punish, and can only bind the prisoner over to the proper court: *Sickles v. State*, 7 O. N. P. (N.S.) 338, 19 O. D. (N.P.) 117.

VII. AFFIDAVIT AND INDICTMENT.

For the form of an affidavit, see *Peters v. State*, 8 O. N. P. 595, 11 O. D. (N.P.) 555 [affirmed, *State v. Peters*, 67 O. S. 494, IV Longsdorf's Notes, 934].

Where it is necessary to allege an intent to defraud G. C., § 13590, dispenses with the necessity of alleging an intent to defraud any particular person: *Bainbridge v. State*, 30 O. S. 264, III Longsdorf's Notes, 528.

An affidavit charging a violation of G. C., § 12757, need not aver that an adulterated article of food is to be used as human food: *State v. Kelly*, 54 O. S. 166, IV Longsdorf's Notes, 628.

The sale of milk containing 10.61 per cent. of solids, and no more, is punishable under G. C., § 12717, and the affidavit need not allege that milk is an article of human food: *State v. Smith*, 69 O. S. 196, IV Longsdorf's Notes, 956.

In a prosecution under the pure food laws it is not incumbent on the state to aver or prove in the first instance that the article was sold to be used as food, but this question is a matter of defense: *Peters v. State*, 8 O. N. P. 595, 11 O. D. (N.P.) 555 [affirmed, *State v. Peters*, 67 O. S. 494, IV Longsdorf's Notes, 934].

An affidavit charging the defendant with keeping for sale an article made "by compounding with and adding to milk, cream or butter, animal fats or animal or vegetable oils" is insufficient, since it alleges different offenses: *Ryan v. State*, 5 O. C. C. 486, 3 O. C. D. 238.

Unless an affidavit under G. C., § 12717, providing against the adulteration of milk charges the particular sale to be a second or subsequent offense, imprisonment can not be imposed as a part of the punishment, and a justice of the peace with whom the affidavit is filed, has jurisdiction to try the accused without the intervention of a jury: *State v. Smith*, 69 O. S. 196, IV Longsdorf's Notes, 956 [approved and followed, *Inwood v. The State*, 42 O. S. 186, IV Longsdorf's Notes, 103].

An affidavit for refusal to sell a sample of food for analysis which does not name the buyer nor the article of food nor designate the statute except by date, is fatally defective: *Margolius v. State*, 1 O. N. P. 264, 4 O. D. (N.P.) 354.

An affidavit charging the accused with selling "oleomargarine which contained coloring matter, to-wit, butter yellow," sufficiently charges a violation of G. C., § 12733: *State v. Arata*, 69 O. S. 211, IV Longsdorf's Notes, 957.

An affidavit based upon paragraph seven of G. C., § 5778, is fatally defective if it does not allege that the article sold contained, (1) an added substance or ingredient which was poisonous, or (2) any added substance or ingredient injurious to health: *Strong v. State*, 2 O. N. P. 93, 3 O. D. (N. P.) 284.

An affidavit charging an "unlawful sale of a certain quantity of wine in a package containing about 26 gallons, as and for blackberry wine, a certain compound and mixture consisting of wine, sugar, water, alcohol, salicylic acid and aniline red," is sufficient: *Myer v. State*, 10 O. C. C. 226, 6 O. C. D. 477 [affirmed, *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

An indictment charging the sale of adulterated wine must allege that the wine was sold as a beverage: *Vester v. State*, 1 O. N. P. 240, 2 O. D. (N.P.) 170.

An affidavit in the words of the statute is sufficient if the statute sets out the offense. Accordingly an affidavit charging sale of a drug below the standard laid down in the U. S. Pharmacopoeia, sufficiently defines the offense without stating what that standard is: *Emery v. State*, 3 O. N. P. 204, 5 O. D. (N.P.) 121 [affirmed, *State v. Emery*, 55 O. S. 364, IV Longsdorf's Notes, 664].

An affidavit which charges the accused with having for sale a drug "which differed from the standard of strength laid down in said United States Pharmacopoeia" and which does not show in what respect the said drug differed from said standard, is indefinite and insufficient: *Groenland v. State*, 4 O. N. P. 122, 6 O. D. (N.P.) 313 [affirmed, without opinion, *State v. Groenland*, 39 Bull. 2].

A negative averment covering the proviso in a section analogous to G. C., § 5785, is not necessary in the affidavit: *State v. Hutchinson*, 55 O. S. 573, IV Longsdorf's Notes, 673.

The affidavit need not negative the proviso, excluding mixtures labeled as such, in a section analogous to G. C., § 5785: *Haas v. State*, 1 O. N. P. 248, 2 O. D. (N.P.) 177.

VIII. EVIDENCE.

Fraud is not presumed from the fact that a temporary injunction against inspection is obtained: *Chemical Co. v. Calvert*, 8 O. N. P. (N.S.) 361, 19 O. D. (N.P.) 571 [affirmed, without opinion, *State, ex rel., v. Chemical Co.*, 80 O. S. 754].

Subsequent similar acts are competent to show intention, though not to show the act itself, as where the defense to an action for the price of milk was that it was diluted, the defendant may prove dilution of other milk about to be delivered under the same contract: *Phelps v. Smith*, 22 O. S. 189, III Longsdorf's Notes, 68.

On the trial of an indictment for knowingly delivering skimmed milk with intent to defraud, evidence of similar deliveries about the same time, is admissible to show guilty knowledge: *Bainbridge v. State*, 30 O. S. 264, III Longsdorf's Notes, 528.

On the trial of one charged with selling oleomargarine containing coloring matter, it is not error to permit a chemist experienced in the analysis of food products to testify that the article sold resembles, is a substitute for, or imitation of butter: *State v. Ehinger*, 67 O. S. 51, IV Longsdorf's Notes, 924.

It is discretionary with the court before which a criminal prosecution is pending under the pure food laws, to require the state to permit the defendant to have an analysis made of a portion of the alleged adulterated article; but the court has a sound judicial discretion with reference to ordering such analysis. The defendant must show that such inspection or analysis is material; that it will not impair the evidential value of the thing to be analyzed; and he must offer to have the inspection or analysis in the presence of the representative of the state, under supervision of the court, and in the presence of the expert witness of the state. If it appears that such opportunity for inspection and analysis is sought for mere curiosity or delay, it should be denied. The defendant can not dictate what chemist shall make such analysis; but such expert is to be selected by the court: *Breckinridge v. State*, 3 O. N. P. 313, 4 O. D. (N.P.) 389.

A statement to the officer by the driver of a milk wagon, from which the milk sample was taken, that it was A's (defendant's) wagon, is incompetent: *Cordes v. State*, 4 O. N. P. 14, 6 O. D. (N.P.) 5.

The filing of an affidavit in the courts of Pennsylvania charging that the goods did not come up to the requirements of the law of that state, does not prove that the goods did not comply with the law, and the fact that the plaintiff pleaded guilty to the charge does not prove the fact of the adulteration: *Mihalovitch-Fletcher Co. v. Bartlett*, 12 O. C. C. (N.S.) 160, 21 O. C. D. 568.

It is error to refuse evidence that defendant did not expose for sale any of the articles: *Margolius v. State*, 1 O. N. P. 264, 4 O. D. (N.P.) 354.

Exclusion of the defendant's offer to testify that he had no knowledge of the adulteration is not prejudicial error when his testimony and the circumstances and prices show beyond a reasonable doubt that he did have knowledge: *Meyer v. State*, 1 O. N. P. 241, 2 O. D. (N.P.) 233 [affirmed, *Myer v. State*, 10 O. C. C. 226, 6 O. C. D. 477, 3 O. D. (N.P.) 198, and affirmed, *Meyer v. State*, 54 O. S. 242, IV Longsdorf's Notes, 633].

Proof that the drug was sold from defendant's drug store is not proof that it was sold by defendant or any authorized agent: *Groenland v. State*, 4 O. N. P. 122, 6 O. D.

(N.P.) 313 [affirmed, without opinion, *State v. Groenland*, 57 O. S. 653, 39 Bull. 2].

A charge that defendant sold skimmed milk (G. C., § 12719), not charging that it was sold by agent, is not sustained by proof of sale by agent, for he is not advised of what he is to meet: *Heider v. State*, 4 O. D. (N.P.) 227.

Where the affidavit charges the defendant with unlawfully selling oleomargarine and the evidence shows that the sale was made by a clerk authorized to sell, this is not a variance: *Williams v. State*, 4 O. C. C. (N.S.) 193, 15 O. C. D. 673 [affirmed, without opinion, *Williams v. State*, 69 O. S. 570].

IX. INJUNCTION.

The federal courts have no authority to restrain the enforcement of the pure food laws by the dairy and food commissioner of Ohio: *Arbuckle v. Blackburn*, 113 Fed. 616, 51 C. C. A. 122, 13 O. F. D. 44.

A threatened prosecution of milk dealers to whom distillery waste is sold will not be enjoined: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

If a manufacturer refuses to furnish samples for analysis, an injunction will not lie at the suit of the dairy and food commissioner to compel him to furnish such samples; but the remedy is criminal prosecution for failure to comply with the terms of such statute (see G. C., § 12757): *State, ex rel., v. Dairy Co.*, 62 O. S. 123, IV Longsdorf's Notes, 826.

FORBEARANCE.

For forbearance as consideration, see CONTRACTS.

FORBIDDEN BUSINESS.

There is nothing in the constitution, common law, or decisions of the courts that would inhibit or prevent the taxing of a forbidden business, and the taxing of it does not grant it any privileges or rights, gives it no standing, nor clothes it with any power, but merely taxes it as it finds it, but merely tends to the same end as the prohibitory law, to-wit: the lessening of the evils resulting from its being carried on: *Reider v. Davis*, 10 O. N. P. (N.S.) 177, 20 O. D. (N.P.) 407.

FORCE.

See ASSAULT AND BATTERY; ASSAULT WITH INTENT, ETC.

FORCE OF EVIDENCE.

See EVIDENCE.

FORCED SALE.

See EXECUTION, WRIT OF; JUDICIAL SALES; MORTGAGE.

FORCIBLE BREAKING.

See BURGLARY.

FORCIBLE DEFILEMENT.

See RAPE.

FORCIBLE ENTRY AND DETAINER.

Scope Note—Includes when action will lie, notice, complaint, jurisdiction, trial, execution, review, effect of judgment and liability for malicious action. Excludes trespass, recovery by mortgagor, and specific performance.

Cross References.

For ejectment, see EJECTMENT.

For rights arising under leases, see LANDLORD AND TENANT.

For validity and effect of deeds, see DEEDS.

For rights arising under contract for the sale of realty, see VENDOR AND PURCHASER.

For rescission in equity, see RESCISSION.

For the subject of trespass, see TRESPASS.

For the recovery of mortgaged property by a mortgagor, see MORTGAGES.

For specific performance, see SPECIFIC PERFORMANCE.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 7907.
- II. Who may Bring, 7907.
 - A. Purchaser at judicial sale, 7907.
 - B. Purchaser of tax title, 7908.
- III. In What Cases Action Will Lie, 7908.
 - A. Effect of statutory provisions, 7908.
 - B. Defective lease, 7908.
 - C. Holding over, 7909.
 - D. Occupation without color of title, 7909.
 - E. Default in payment of rent, 7910.
 - F. Forfeiture of lease, 7910.
- IV. Notice, 7910.
- V. Complaint, 7912.
- VI. Jurisdiction, 7913.
- VII. Trial, 7914.
- VIII. Execution, 7916.
- IX. Review, 7917.
- X. Effect of Judgment, 7919.
- XI. Liability for Malicious Action, 7920.

I. DEFINITION AND NATURE.

Forcible entry and detainer may be committed by those who make unlawful and forcible entry into lands and tenements and detain them or those who have a lawful and peaceable entry into lands and tenements and unlawfully and by force hold them. (G. C., § 10447.)

An action for the forcible entry and detention, or the forcible or unlawful detention only, of property, is a summary remedy provided by statute in certain cases, intended to affect only the question of possession: *Smith v. Findlay*, 12 Dec. Rep. 334, 2 H. 69.

Pendency of a forcible entry and detainer suit is no defense to an ejectment, for the causes of action are not identical: *Smith v. Findlay*, 12 Dec. Rep. 334, 2 H. 69. See also ABATEMENT AND REVIVOR OF ACTIONS.

II. WHO MAY BRING.

A. PURCHASER AT JUDICIAL SALE.

A purchaser at a sale in partition is not entitled, under G. C., § 10449, to possession until the sale has been confirmed: *Schwartz v. Williamson*, 8 O. C. C. (N.S.) 532, 19 O. C. D. 78.

A buyer at sheriff's sale, under a decree, can get possession by forcible entry proceedings, and need not wait until the sheriff's deed is made, if the sale has been confirmed, for the deed relates back; hence, that the deed had no seal is immaterial: *Barto v. Abbe*, 16 O. 408, I Longsdorf's Notes, 771.

B. PURCHASER OF TAX TITLE.

Purchaser under a tax sale can not recover possession by proceeding under the statute for forcible entry and detainer against one having a deed in fee for the land: *Kelly v. Hunter*, 12 O. 216, I Longsdorf's Notes, 605.

III. IN WHAT CASES ACTION WILL LIE.

A. EFFECT OF STATUTORY PROVISIONS.

The extension of this remedy in 1823 and 1824 to certain cases of peaceable entry—as tenants holding over—did not repeal its prior application to all entries by force: *Yager v. Wilber*, 8 O. 398, I Longsdorf's Notes, 446.

To sustain the proceeding under G. C., § 10447, where the entry was peaceable, the detention must be proved to be by force and not merely by a refusal to go out: *Bridwell v. Banoroff*, 2 Dec. Rep. 697, 4 W. L. M. 617.

B. DEFECTIVE LEASE

Where a tenant has been in possession for a considerable period under an imperfectly executed lease, the writing will be treated as a contract for a lease, and as against a purchaser of the property having knowledge of the fact, who is seeking to oust the tenant, a decree will be granted directing that a valid lease be executed. An action in forcible entry and detainer in such a case, in which a judgment of ouster has been taken by the purchaser, is not a bar to injunction

proceedings brought by the tenant to prevent interference with his possession. The fact that the lease in its imperfect form was made to R, who subsequently with the knowledge of the lessor brought in another as a partner with him in the business, would not operate under the statute to invalidate the agreement for occupancy: *Raitz v. Dow*, 10 O. C. C. (N.S.) 249, 20 O. C. D. 284.

A lease given by a person of unsound mind may be avoided by forcible entry and detainer, without resorting to a suit in equity for rescission: *Express Co. v. Zimmerman*, 11 O. N. P. (N.S.) 609, 22 O. D. (N.P.) 203.

Where a lease is too indefinite and uncertain as to the commencement and duration of the term to constitute a valid and binding contract of rent for a term of years, a suit for unlawful detention may be maintained: *Pope v. Miller*, 4 O. C. C. (N.S.) 564, 14 O. C. D. 640.

C. HOLDING OVER.

The remedy extends to all cases of entry or maintenance of possession by actual force, and is not limited to the cases enumerated in § 19, of the statute: *Yager v. Wilber*, 8 O. 398, I Longsdorf's Notes, 446.

A lessor of a room in his building, who, by arrangement with the lessee, is to allow a present tenant to remain for a year, suspending the lessee's possession until then, has sufficient possession to prosecute forcible entry, after the year, against the tenant, in order to be able to give possession to the lessee, and the tenant is estopped to deny the landlord's possessory title, although the lessee could have assumed the burden of the action: *Cahn v. Building Co.*, 8 Dec. Rep. 568, 9 Bull. 112.

D. OCCUPATION WITHOUT COLOR OF TITLE.

Where a testator died seized of an estate in fee, and before his devisee entered, B, who had no right, made an entry and got possession of the lands devised, and continued to hold the same without right, this constituted him "an occupier without color of title" within the meaning of G. C., § 10449, and the devisee can maintain forcible detainer against him to obtain possession: *Brown v. Burdick*, 25 O. S. 260, III Longsdorf's Notes, 228.

A buyer of a lot from the United States, and of a log house situated wholly in the street, and to be removed when required, may maintain forcible entry for the house against an occupant. The latter can not question the buyer's title. The house is not personalty, and plaintiff owns the fee of the

street: *Mott v. Larick*, 1 Dec. Rep. 211, 4 W. L. J. 128.

E. DEFAULT IN PAYMENT OF RENT.

A tenant from month to month in default for payment of rent who tenders a part thereof after demand made for the whole, and requests an extension of time within which to pay the balance, which tender is declined and request refused, may be evicted from the premises in an action of forcible entry and detainer: *Battershall v. Jackson*, 14 O. D. (N.P.) 282.

F. FORFEITURE OF LEASE.

Where a tenant forfeits his rights to the demised premises, under G. C., § 6207 or G. C., § 6209, by using the premises for the unlawful sale of intoxicating liquors, and refuses to surrender the premises to the lessor, the latter may recover possession in an action of forcible detention: *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

And in such action it is no defense to show that the parties were *in pari delicto* in the unlawful use of the premises: *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

Nor is it necessary that a forfeiture should have been declared first by a court of superior jurisdiction: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

The defendant can not prevent such avoidance by showing a payment of rent in advance for the entire term: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

Where a lessor had resumed possession before a lease had expired, claiming its forfeiture for nonpayment of rent, the lessee can bring forcible entry and detainer to recover the premises. The unexpired lease shows a right to recover, and the lessor must show due forfeiture by demand, etc., just before sunset: *Smith v. Whitbeck*, 13 O. S. 471, II Longsdorf's Notes, 620.

It is a tacit condition annexed by law to all tenancies that the lessee or his assignee will not by his unlawful act cause a forfeiture of the landlord's estate, or by such act create an enforceable lien upon the landlord's interest in the leased premises, and for the breach of such condition the lessor or his grantee may by an action in forcible entry and detainer, enforce a forfeiture and recover possession: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

IV. NOTICE.

The notice required by G. C., § 10451, may be served as well before as after the expira-

tion of the term: *Leutzey v. Herchelrode*, 20 O. S. 334, II Longsdorf's Notes, 998.

Although notice to quit premises may be served while the tenant is lawfully in possession, the day designated for that purpose must be at or after the expiration of the term. Therefore, when the day designated occurs before the end of the term, the notice is not one with which the tenant is bound to comply: *Mone v. Pope*, 9 O. C. C. 168, 6 O. C. D. 384.

Notice was sufficient when signed "Edgar Stark, Assistant Secretary of the Union Savings Bank and Trust Company," the premises in question being in charge of this company as receiver: *Fitzgerald v. Bank*, 18 O. C. C. 608, 10 O. C. D. 49.

The requirement of the statute is met if written notice is served on defendant or at his place of abode at least three days before the bringing of the action; whether or not plaintiff retains a copy of the notice is of no moment to the defendant: *Heller v. Beal*, 3 O. C. C. (N.S.) 268, 13 O. C. D. 540.

The service of written notice to vacate premises, may be proved by parol, without any preliminary notice to produce such written notice made prior to the trial, where a demand is made in open court for its production and failure to comply therewith: *Heller v. Beal*, 3 O. C. C. (N.S.) 268, 13 O. C. D. 540.

Notice on the tenth, stating that compliance on the fourteenth will prevent legal measures, does not prevent the commencement of suit on the fourteenth: *Mack v. Eckerlin*, 2 O. L. R. 441, 17 O. C. D. 133 [affirmed, without opinion, *Mack v. Eckerlin*, 75 O. S. 627].

Where the term expired Oct. 20, and on Oct. 19, the landlord gave notice under G. C., § 10451, the term of the tenant was not extended by such notice until the expiration of three days from Oct. 19, but the landlord could not bring his action until such time had expired: *Hoveler v. Luhrmann*, 3 O. N. P. 224, 4 O. D. (N.P.) 149.

Notice on the thirteenth is proper, when the tenancy is from month to month and ended on the preceding day: *Battershall v. Jackson*, 14 O. D. (N.P.) 282.

The fact that three days' notice must be given under G. C., § 10451, does not extend the term of the tenant for that length of time. The giving of such notice does not make a holding, which was otherwise unlawful, lawful: *Hoveler v. Luhrmann*, 3 O. N. P. 224, 4 O. D. (N.P.) 149.

If demand is made at the time the rent is due, the forfeiture is absolute without notice to quit. This notice may be given afterwards. The fact that the tenant then enters upon a new quarter is no defense. But there

can be no forfeiture unless the lease reserves a right of re-entry: *Scott v. Wasson*, 2 Dec. Rep. 460, 3 W. L. M. 148.

Notice to quit is not necessary to terminate a tenancy from year to year when it arises out of a holding over after a defined term, as where a lessee for one year remained in for five years. For in such cases, unlike those of indefinite duration, each year is on a new contract, the landlord having the right to treat the tenant holding over after the end of each year either as a trespasser or as a tenant for another year; and unless there is an election as by receiving rent or otherwise, forcible detention lies on the three days' statutory notice: *Gladwell v. Holcomb*, 60 O. S. 427, IV Longsdorf's Notes, 790 [affirming *Gladwell v. Holcomb*, 14 O. C. C. 416, 7 O. C. D. 369].

A notice to quit the premises signed by "O. E. Miller, agent for Kathryn Miller," is sufficient to sustain an action commenced by O. E. Miller, who is the real owner of the premises and rented the same to the defendant. The words "agent for Kathryn Miller" will, in the absence of proof to the contrary, be treated as surplusage: *Pope v. Miller*, 4 O. C. C. (N.S.) 564, 14 O. C. D. 640. See also LANDLORD AND TENANT.

V. COMPLAINT.

A complaint in the language of the statute is sufficient without stating plaintiff's right, or how defendant is wrongfully in: *Barto v. Abbe*, 16 O. 408, I Longsdorf's Notes, 771.

The complaint, in forcible entry and detainer, must contain a specific description of the property: *Murphy v. Lucas*, 2 O. 255, I Longsdorf's Notes, 123.

The description of the premises not being certain enough to afford a guide to the defendant and to the sheriff, nor containing the means of arriving at certainty, the judgment will be reversed: *Murphy v. Lucas*, 2 O. 255, I Longsdorf's Notes, 123.

A complaint that "the said C. W. B. has, ever since the 1st day of January, 1870, unlawfully and forcibly detained, and still doth detain from the undersigned possession, etc.," of the premises, is sufficient to give a justice of the peace jurisdiction of the case: *Brown v. Burdick*, 25 O. S. 260, III Longsdorf's Notes, 228.

It is essential to the magistrate's jurisdiction that a complaint be filed, and a forged complaint is no complaint, and is sufficient cause to enjoin the judgment and execution if sought to be enforced: *Brennen v. Cist*, 6 O. N. P. 12, 9 O. D. (N.P.) 18.

Unless the transcript shows the complaint was in writing, the judgment must be reversed. It is also necessary that the com-

plaint should be brought up so that if this court affirms, the property to be restored will be described: *Russell v. McConahey*, T. 172.

VI. JURISDICTION.

Justices of the peace, by G. C., § 10449, have jurisdiction in cases of tenancy from year to year: *Hopkins v. Carroll*, 11 O. C. C. (N.S.) 605, 21 O. C. D. 388.

But in cases of sales by executors, when such sales were not examined by the proper court, and adjudged legal, a justice is without jurisdiction to entertain an action of forcible entry and detainer, for that would draw into question the title to real estate: *Schaupp v. Jones*, 8 O. N. P. 151, 10 O. D. (N.P.) 597; *Schwartz v. Williamson*, 8 O. C. C. (N.S.) 532, 19 O. C. D. 78.

A justice of the peace has no jurisdiction of an action in forcible entry and detainer in which it is necessary to draw the title to such realty into question in order to determine whether the tenant is in possession unlawfully: *Aubrey v. Almy*, 4 O. S. 524, II Longsdorf's Notes, 127; *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513]; *Bridwell v. Bancroft*, 2 Dec. Rep. 697, 4 W. L. M. 617.

That plaintiff to show his right to possession must prove a title by a certified copy of a will is no objection to the jurisdiction. G. C., § 10449 contemplates this: *Brown v. Burdick*, 25 O. S. 260, III Longsdorf's Notes, 228.

If a court has jurisdiction of one kind of action the jurisdiction is not ousted by proof that the action was misconceived and does not belong to that kind. Thus, if a forcible entry case is brought before a justice and the proof shows there is a case of controverted title, the justice is not to dismiss for want of jurisdiction, but should render a judgment for defendant, and if taken to the common pleas that court can retain and try the case: *Aubrey v. Almy*, 4 O. S. 524, II Longsdorf's Notes, 127.

G. C., § 10447, is limited by the justice's code forbidding jurisdiction, if title is involved. A mortgagee seeking to evict a lessee of the mortgagor holding over after his term, comes under this rule: *Bridwell v. Bancroft*, 2 Dec. Rep. 697, 4 W. L. M. 617.

A mortgagee can not evict a lessee holding over after his term, under G. C., § 10449, because the lessee is not his tenant: *Bridwell v. Bancroft*, 2 Dec. Rep. 697, 4 W. L. M. 617.

A judgment against the tenant on the ground that he holds only by the month, whereas he claims to have a parol lease for three years, can not be enjoined or collaterally attacked for want of jurisdiction as

involving title. The action is possessory only, and the justice must be deemed to have jurisdiction to determine the possessory rights of the parties: *Petsch v. Mowry*, 13 Dec. Rep. 401, 1 C. S. C. R. 36.

A justice's judgment that a lease has terminated and the defendant is holding after his term, if beyond his power to adjudicate, is nevertheless merely erroneous and not void for want of jurisdiction, and hence not enjoinable, for he had jurisdiction of the original case and the parties, and such evidence showing that the action was misconceived, merely shows an erroneous exercise of powers conferred: *Brennen v. Cist*, 6 O. N. P. 1, 9 O. D. (N.P.) 18.

Forcible entry need not be in township where the land is, but may be before any justice in the county: *Murphy v. Lucas*, 2 O. 255, I Longsdorf's Notes, 123.

G. C., § 10224 and § 10225, as amended 93 v. 146, by which the jurisdiction of justices of the peace in Cuyahoga and Franklin counties in attachment and forcible entry and detainer cases is limited to townships for which they are elected, are not unconstitutional, although in all other counties in the state their jurisdiction extends over the entire county: *Fisher v. Garey*, 11 O. D. (N.P.) 796, 44 Bull. 85. See also *COURTS*.

The transcript of a record from a justice of the peace in a forcible entry and detainer action, which shows no more with reference to notice to the defendant than that he was served "in person," is clearly insufficient to show that the justice obtained jurisdiction over the defendant: *Powder v. Neiss*, 7 O. N. P. (N.S.) 1, 18 O. D. (N.P.) 766. See also *SUMMONS*.

VII. TRIAL.

In an action for forcible entry and detainer by the grantee of the lessor of certain premises upon which gambling is conducted by the occupying lessee, the mortgagee of the term is not a necessary party defendant: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

In an action of forcible detainer, defendant may demand a jury on the appearance day, although it is subsequent to the return day of the summons: *Bonham v. Mills*, 39 O. S. 534, III Longsdorf's Notes, 1046; *Hill v. Hollister*, 8 Dec. Rep. 116, 5 Bull. 757.

In forcible entry and detainer cases, parties have the right to demand a trial by jury at any time before trial, as in civil actions generally. G. C., § 10456 construed: *Miller v. Schmidt*, 3 O. N. P. 296, 5 O. D. (N.P.) 4.

The provisions of G. C., § 10378, do not apply to this chapter: *Leutzey v. Herchelrode*, 20 O. S. 334, II Longsdorf's Notes, 998.

In an action in forcible detainer before a justice of the peace, it is competent for the defendant to offer in evidence a contract of purchase for the purpose of showing the nature of his possession: *Cowen v. McGoron*, 12 O. C. C. (N.S.) 431, 21 O. C. D. 590.

In forcible entry the tenant may show that the landlord had no title, had abandoned the lease, and assented to his attorning to another. The estoppel does not prevent showing abandonment or lapse of title: *Rooker v. Demerit*, 1 O. C. C. 156, 1 O. C. D. 89. See also ESTOPPEL.

In an action for forcible entry and detainer by the owner of the fee against one in possession of leased premises, other than the lessee, it will be presumed that the occupant is assignee of the lessee, unless the contrary be shown: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

Where it is shown that gambling was permitted or carried on upon the premises occupied by the defendant, with his knowledge, that he paid the rent, taking receipts therefor in the name of a prior lessee, that he bought the fixtures from his predecessor and gave a chattel mortgage upon them and that he owned the lease, the question of ownership of the lease is properly submitted to the jury to determine: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

A showing of possession under a contract of purchase is a complete defense to an action in forcible detainer; and for failure to perform some of the conditions of the contract the plaintiff must have resort to a suit in ejectment: *Cowen v. McGoron*, 12 O. C. C. (N.S.) 431, 21 O. C. D. 590.

An equitable title in defense can not be set up before the justice to divest him of jurisdiction, nor is proof thereof competent before him: *State, ex rel., v. Paul*, 9 Dec. Rep. 226, 11 Bull. 234.

An equitable title can not be set up in defense, hence, an unacknowledged lease for five years is no defense except in so far as after entry it creates a tenancy from year to year, or for such period as custom or time of paying rent may show. For the same reason, part performance being an equitable and not a legal doctrine, will not create a term: *Carey v. Richards*, 2 Dec. Rep. 630, 4 W. L. M. 251.

In a forcible entry and detainer, or forcible detainer proceeding, an equitable title can not be availed of defensively, unless it is discernible from the averments of the complaint, or from the facts shown by the complainant at the trial: *Schmidt v. Schmidt*, 1 O. N. P. (N.S.) 177, 13 O. D. (N.P.) 663.

The demanding and receiving of rent from defendant during the pendency of error proceedings to an action in forcible entry and detainer is not a bar to such proceedings: *Lover v. Canfield*, 7 O. C. C. (N.S.) 389, 18 O. C. D. 429.

Under the law, as it stood in 1846, a verdict on a complaint for forcible detainer alone need not find the fact of notice to quit as required by the act of 1831, in order to warrant costs against defendant. If notice is averred in the complaint, a verdict finding that the matters stated in the complaint are true does substantially find the fact of notice: *Williams v. McMillan*, 18 O. 167, I Longsdorf's Notes, 841.

The duty as to the time to enter judgment on the verdict was not governed by the general act requiring judgment immediately after verdict, but was as in submitted cases: *Leutzey v. Herchelrode*, 20 O. S. 334, II Longsdorf's Notes, 998.

VIII. EXECUTION.

The issuance and serving of the writ of restitution is governed by G. C., § 10460, and G. C., § 10461; the magistrate must issue the writ when requested; but such request does not have to be made within ten days from judgment. G. C., §§ 10399 and 10400 do not apply: *Bode v. Mungavin*, 2 O. N. P. 269, 4 O. D. (N.P.) 270.

The writ must be served by the constable within ten days from the time of its issuance. If he refuses to do so, he is liable to plaintiff for any injury the latter may have suffered therefrom: *Bode v. Mungavin*, 2 O. N. P. 269, 4 O. D. (N.P.) 270.

An injunction will not lie to restrain a constable from executing a writ of restitution in an action in forcible entry and detainer, where the defendants were without a defense except in a court of equity, and having notice to surrender the premises and full knowledge that they were in default for rent, yet made no effort to enjoin the proceedings, but permitted a judgment at law to be taken against them: *Katsampos v. Hull*, 17 O. D. (N.P.) 747, 5 O. L. R. 140.

A person who has filed a suit for rescission of deeds of exchange of real estate, possession not having changed, is entitled to an injunction against a forcible detainer suit until the right to a rescission is determined. Hence the defendant can not recover on the injunction bond, although the rescission failed because of plaintiff's noncompliance with the terms of the decree of rescission, for the injunction was rightful: *Worden v. Klag*, 13 O. C. C. 627, 6 O. C. D. 359. See also INJUNCTION.

A suit to quiet title brought by G against H will not prevent H from bringing forcible entry and detainer against G for the same premises. H can not be deprived of his summary remedy unless an injunction was granted against so doing. Execution of the judgment in the forcible entry may, however, be enjoined: *Gladwell v. Hume*, 18 O. C. C. 845, 9 O. C. D. 767. See also ABATEMENT AND REVIVOR OF ACTIONS.

IX. REVIEW.

Under a former statute, it was held in *Barto v. Abbe*, 16 O. 408, I Longsdorf's Notes, 771, that the justice had no authority to sign or enter a bill of exceptions in cases in forcible entry and detainer, and if he did, it would not be regarded by the higher court; but since that case G. C., § 10459 has been passed authorizing bills of exception in such cases.

The exceptions authorized to be taken by G. C., § 10459, are only such as relate to the competency of the evidence, and do not extend to, or include questions touching the weight or sufficiency thereof: *State v. Wood*, 22 O. S. 537, III Longsdorf's Notes, 100.

Where there is evidence to sustain the finding of the justice, and the only exception is that the finding is not sustained by the evidence, the justice is not bound to sign a bill of exceptions, setting forth all the evidence and the fact of such exception: *State v. Wood*, 22 O. S. 537, III Longsdorf's Notes, 100.

Evidence of the plaintiff in an action for forcible entry and detention of premises that he, "understood or had heard" that the occupant "was the owner of the lease," is hearsay evidence, but having been submitted to the jury without objection, upon review will be considered as some evidence of the ownership of the lease thereof: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456. See also EVIDENCE.

The question of the weight of the evidence can not be considered on error in action for forcible entry and detainer: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

G. C., § 10459, authorizing exceptions to the opinion of the justice of the peace upon questions of law and evidence in actions for forcible entry and detainer, has reference solely to the competency of the evidence and not to the weight of the evidence or sufficiency thereof. Thus the question whether the notice required by statute was or was not given, having been submitted to the jury, is not subject to review on the weight of the evidence: *Heller v. Beal*, 3 O. C. C. (N.S.) 268, 13 O. C. D. 540 [following *State v.*

Wood, 22 O. S. 537, III Longsdorf's Notes, 100].

When the judgment of a justice of the peace in an action of forcible entry and detainer, is reversed by the common pleas court and the cause retained for trial, it is the duty of the plaintiff to file a petition in that court; but if the parties proceed to trial, without objection, upon the bill of particulars filed in the magistrate's court, it is not error to found a judgment upon the statement contained in such bill of particulars: *Pope v. Miller*, 4 O. C. C. (N.S.) 564, 14 O. C. D. 640.

The forcible entry statute not having authorized a bill of exceptions to be allowed by the justice, such bill will not be regarded on error, though entered on his docket and incorporated in the transcript: *Barto v. Abbe*, 16 O. 408, I Longsdorf's Notes, 771.

A justice's judgment in forcible entry is a final order under G. C., § 12241, reviewable on error: *Kelly v. Nichols*, 10 O. S. 318, II Longsdorf's Notes, 439.

A bond in forcible entry, conditioned not only to pay for the use and occupation, but also the damages and costs, and not to commit or suffer waste, is a valid bond, under G. C., § 12242, as well to stay execution of the justice's judgment as to pay costs and rent on affirmance: *Kelly v. Nichols*, 10 O. S. 318, II Longsdorf's Notes, 439.

Application can not be made to the supreme court to review directly the proceedings of a justice of the peace in forcible entry and detention, or in forcible detention only, notwithstanding leave to file a petition in error in the common pleas may have been refused: *Carroll v. O'Conner*, 25 O. S. 617, III Longsdorf's Notes, 271.

The refusal of the court of common pleas to allow a petition in error in a forcible detainer proceeding is not reviewable in the district court, on a petition in error. The district court has no jurisdiction to review the judgment of a justice of the peace in a forcible detainer case: *Rothwell v. Winterstein*, 42 O. S. 249, IV Longsdorf's Notes, 109.

The silence of G. C., § 10459, as to how exceptions shall be procured and preserved, does not make G. C., § 11571 applicable, but G. C., § 10359 applies: *State v. Bickham*, 4 O. C. C. 246, 2 O. C. D. 526.

It was queried but not decided whether the circuit court has the power to reverse the judgment of a magistrate in a suit of forcible entry and detainer: *Dennis v. Hanson*, 12 O. C. C. 445, 5 O. C. D. 465.

The court in this case remanded to the common pleas with instructions to enter a reversal of the judgment of the justice of the peace: *Dennis v. Hanson*, 12 O. C. C. 445, 5 O. C. D. 465.

Under G. C., § 10459, a reviewing court is not authorized to reverse the judgment upon the ground that it is not sustained by sufficient evidence: *Mack v. Eckerlin*, 2 O. L. R. 441, 17 O. C. D. 133 [affirmed, without opinion, *Mack v. Eckerlin*, 75 O. S. 627].

The demanding and receiving of rent from defendant during the pendency of error proceedings to an action in forcible entry and detainer is not a bar to such proceedings: *Laver v. Canfield*, 7 O. C. C. (N.S.) 389, 18 O. C. D. 429.

A court of equity is not the place to establish but to relieve against a forfeiture. But it can not relieve against a forfeiture imposed by statute and not by mere convention of the parties: *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

Rents and damages could be assessed in the common pleas by the act of 1831, only if the justice's judgment was affirmed, and not where it was reversed: *Aubrey v. Almy*, 4 O. S. 524, II Longsdorf's Notes, 127.

The failure of the defendant to produce the notice to vacate upon demand therefore in open court, may be considered as evidence that its contents if produced would be against the contention of the defendant and in favor of the plaintiff, and when taken in connection with other evidence tends to support a verdict for the plaintiff which is not to be disturbed by the reviewing court: *Heller v. Beal*, 3 O. C. C. (N.S.) 268, 13 O. C. D. 540.

A bill of exceptions from a justice of the peace in a forcible entry and detainer case, certifying that plaintiff's husband, as her duly authorized agent, served written notice to vacate her premises upon the defendant personally, that plaintiff demanded in open court that the defendant produce such notice, which the defendant refused to do, and that "no other or further testimony on the question of written notice on the defendant to vacate said land," is not sufficient to authorize a review of the question upon the weight of the evidence: *Heller v. Beal*, 3 O. C. C. (N.S.) 268, 13 O. C. D. 540. See also BILL OF EXCEPTIONS.

X. EFFECT OF JUDGMENT.

But to the bringing of such "after action" the provisions of G. C., § 10451 apply as to an original action, and a party desiring to bring such action must give the notice which the section provides: *Mone v. Pope*, 9 O. C. C. 168, 6 O. C. D. 384.

G. C., § 10450, is not class legislation and unconstitutional because in the interest of landlords, and should be literally construed: *Laver v. Canfield*, 7 O. C. C. (N.S.) 389, 18 O. C. D. 429.

G. C., § 10450, constitutes an exception to the general rule that equity will not enjoin the enforcement of a judgment where a defense at law was available: *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513.

If the facts alleged by one praying for an injunction against the enforcement of a judgment in a forcible entry and detainer case, entitle him to a decree quieting his title or fixing the extent of his title, injunction which is merely ancillary to the main issue of title, will lie until the question of title has been determined: *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513 [affirming *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666]. See also INJUNCTION.

In an action in the common pleas for the reform of a lease, and for an injunction against a writ of restitution awarded by a justice to the defendants in an action of forcible entry and detainer theretofore prosecuted, it can not be objected that this later action may involve a review of the adjudication of the justice: *Schmidt v. Schmidt*, 1 O. N. P. (N.S.) 177, 13 O. D. (N.P.) 663.

But the very purpose of G. C., § 10450, is to allow a party such equitable relief as was sought in this case, and which could not avail, as a defense, in the prior action before the justice of forcible entry and detainer: *Schmidt v. Schmidt*, 1 O. N. P. (N.S.) 177, 13 O. D. (N.P.) 663.

Repeated forcible entry suits, to vex and harass, might afford ground to enjoin: *Smith v. Findlay*, 12 Dec. Rep. 334, 2 H. 69.

A judgment of ouster in an action in forcible entry and detainer is not a bar to injunction proceedings brought by the tenant to prevent interference with his possession: *Raitz v. Dow*, 10 O. C. C. (N.S.) 249, 20 O. C. D. 284.

XI. LIABILITY FOR MALICIOUS ACTION.

An action may be maintained for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer: *Pope v. Pollock*, 46 O. S. 367, IV Longsdorf's Notes, 330.

Notwithstanding the ruling in *Pope v. Pollock*, 46 O. S. 367, IV Longsdorf's Notes, 330, that an action may be maintained for maliciously and without probable cause instituting and prosecuting forcible entry and detainer, it is essential that the petition contain an averment that judgment in the forcible entry and detainer proceeding resulted in favor of the plaintiff in the action for damages therefor: *Athletic Club v. Meyer*, 12 O. D. (N.P.) 195.

A justice and constable who conspire to eject a person from his premises without

trial are liable individually. Thus, where they conspired with the owner to eject a tenant, and at a forcible entry trial the renter was present and waited three hours without trial, and after departing, the justice entered up judgment, issued the writ, and the constable ejected the renter, they are liable individually: *Myers v. Forney*, 1 Dayton Term Rep. (Iddings) 22. See also JUSTICE.

FORECLOSURE.

See MORTGAGES.

FOREIGN ACKNOWLEDGMENT.

See ACKNOWLEDGMENT; DEEDS; SUMMONS.

FOREIGN ADMINISTRATION.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES; CONFLICT OF LAWS; COMMITTEE.

FOREIGN ASSIGNMENTS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; CONFLICT OF LAWS.

FOREIGN ATTACHMENT.

See ATTACHMENT.

FOREIGN BILLS.

See NEGOTIABLE INSTRUMENTS.

FOREIGN COMMERCE.

See COMMERCE.

FOREIGN CONTRACTS.

See CONFLICT OF LAWS.

FOREIGN CORPORATIONS.

For foreign corporations, see CORPORATIONS.

FOREIGN DIVORCE.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

FOREIGN DOMICILE.

See DOMICILE.

FOREIGNERS.

For foreigners, see ALIENS.

For naturalization of foreigners, see ALIENS.

FOREIGN EXCHANGE.

See NEGOTIABLE INSTRUMENTS; INTEREST AND USURY.

FOREIGN EXECUTION DOCKET.

See EXECUTION.

FOREIGN EXECUTORS AND ADMINISTRATORS.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

FOREIGN GARNISHMENT.

See ATTACHMENT.

FOREIGN GUARDIANS.

See GUARDIAN AND WARD.

FOREIGN INSURANCE COMPANIES.

See CORPORATIONS; INSURANCE.

FOREIGN JUDGMENT.

For foreign judgment, see JUDGMENT.

FOREIGN JUDICIAL RECORDS.

See JUDGMENT; RECORDS.

FOREIGN LANGUAGE.

For slander in a foreign language, see LIBEL AND SLANDER.

For translation of a will written in a foreign language, see WILLS, LEGACIES AND DEVISES.

FOREIGN LAWS.

See CONFLICT OF LAWS; FOREIGN STATUTES.

For evidence of foreign law, see EVIDENCE; FOREIGN STATUTES.

FOREIGN MARRIAGE.

See MARRIAGE.

FOREIGN PAUPERS.

See PAUPERS, POOR AND POOR LAWS.

FOREIGN PRACTITIONERS.

See ATTORNEY AND CLIENT; PHYSICIANS AND SURGEONS.

FOREIGN RAILWAY COMPANIES.

See CORPORATIONS; RAILROADS.

FOREIGN RECEIVERS.

See RECEIVERS.

FOREIGN RECORDS.

See JUDGMENT; RECORDS.

FOREIGN RESIDENCE.

See DOMICILE.

FOREIGN SERVICE.

For service of summons in other state, see SUMMONS.

FOREIGN STATUTES.

Scope Note.—Includes the manner of pleading and proving foreign statutes; and their construction and effect. Excludes statutes in general.

Cross Reference.

For foreign statutes, see also STATUTES.

ANALYTICAL OUTLINE.**I. How Pleaded and Proved, 7923.****II. Construction and Effect, 7924.****I. HOW PLEADED AND PROVED.**

The existence of a law of another state of the Union or of a foreign jurisdiction, must be proved as matter of fact: *Evans v. Reynolds*, 32 O. S. 163, III Longsdorf's Notes, 624; *Ingraham v. Hart*, 11 O. 255, I Longsdorf's Notes, 553; *Smith v. Bartram*, 11 O. S. 690, II Longsdorf's Notes, 542; *Pelton v. Platner*, 13 O. 209, I Longsdorf's Notes, 634; *Wilhelm v. Parker*, 17 O. C. C. 234, 9 O. C. D. 724.

The laws of another state, where they come in question in the courts of this state, must be pleaded and proved as matters of fact: *Williams v. Finlay*, 40 O. S. 342, IV Longsdorf's Notes, 29.

In a suit in this state, a law of a foreign state is to be proved as a matter of fact: *Barr v. Closterman*, 2 O. C. C. 387, 2 O. C. D. 251.

The statute of limitations of another state of the Union, set up as a defense, and issue joined thereon, must be proved as other matter of fact: *Whelan v. Kinsley*, 26 O. S. 131, III Longsdorf's Notes, 292.

Printed statutes of a foreign state may be received to show that a certain act is made a crime by the laws of that state:

In re Sheldon, 34 O. S. 319, III Longsdorf's Notes, 719.

The statute law of another state can not be proved by parole, but in *Brady v. Palmer*, 19 O. C. C. 686, 10 O. C. D. 27, it was held that the statutes of other states may also be proved by oral testimony of persons learned in the law who testify as experts with respect thereto.

A transcript of register of a marriage ceremony in a foreign country is not *prima facie* evidence without proof of the laws of such country requiring such record to be kept: *Stanglein v. State*, 17 O. S. 453, II Longsdorf's Notes, 843.

The decisions of another state on an issue as to the law of that state are to be proved as facts: *Alexander v. Pennsylvania Co.*, 48 O. S. 623, IV Longsdorf's Notes, 432; *McCann v. Pennsylvania Co.*, 10 O. C. C. 139, 6 O. C. D. 610, 3 O. D. (N.P.) 444 [affirmed, *Pennsylvania Co. v. McCann*, 54 O. S. 10, IV Longsdorf's Notes, 621].

II. CONSTRUCTION AND EFFECT.

The existence, construction and legal effect of foreign statutes are rather matters of fact than of law, and when they have re-

ceived an authoritative construction where they are enacted, no inquiry into the correctness of such construction is allowable: *Bank v. Baker*, 15 O. S. 68, II Longsdorf's Notes, 706; *Smith v. Bartram*, 11 O. S. 690, II Longsdorf's Notes, 542.

The statutes of another state and also any peculiar construction which the courts of such state may have placed upon them, when they come in question in the courts of this state, must be proved by evidence as matters of fact: *Larwell v. Savings Society*, 40 O. S. 274, IV Longsdorf's Notes, 23.

When the law of another state is involved in some doubt, the decisions of the state not being uniform, it is not a question for the jury, but for the court to determine what the law of the other state on the question is: *Ott v. Railway Co.*, 18 O. C. C. 395, 10 O. C. D. 85 [affirmed, without opinion, *Ott v. Railway Co.*, 62 O. S. 661].

FOREIGN WILLS.

See WILLS, LEGACIES AND DEVISES.

FOREIGN WITNESSES.

See DEPOSITIONS; WITNESSES.

FOREIGNERS.

See ALIENS.

FOREMAN OF GRAND JURY.

See GRAND JURY.

FORFEITED LANDS.

See FORFEITURE; TAXATION.

FORFEITURE.

Scope Note.—Includes definition and general nature of forfeiture; validity of statutory provisions; specific grounds of forfeiture; construction; persons by and against whom forfeiture may be enforced; excuses; waiver; estoppel; relief in equity; remedies; notice and declaration of forfeiture; parties; pleading and evidence. Excludes provisions for penalties and liquidated damages; fines and amercements.

Cross References.

For the question, of fines, see FINES.
 For the subject of amercement, see AMERCEMENT.
 For forfeiture for waste, see also WASTE.
 For penalties and forfeitures in contracts, see also DAMAGES.
 For forfeiture clauses in leases, see also LANDLORD AND TENANT.
 For forfeiture clauses in oil and gas leases, see also OIL AND GAS.
 For forfeiture clauses in deeds, see also DEEDS.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 7927.
- II. Validity of Statutory Provisions, 7928.
- III. Grounds of Forfeiture, 7929.
 - A. Crime, 7929.
 - B. Waste, 7929.
 - C. Failure of life-tenant to pay taxes, 7930.
 - D. Failure of life-tenant to pay lien, 7931.
 - E. Failure of owner of fee to pay taxes, 7931.
 - F. Violation of fish and game laws, 7932.
 - G. Sale of intoxicating liquor contrary to law, 7933.
 - H. Gaming, 7934.
 - I. Failure to probate will, 7935.
 - J. Failure to pay license, 7935.
 - K. Default in payment for school lands, 7936.
 - L. Misconduct in office, 7936.
 - M. Violation of charter, 7936.

- N. *Forfeiture for change of use*, 7937.
- O. *Nonuser of franchise*, 7938.
- P. *Forfeiture of easement acquired by eminent domain*, 7938.
- Q. *Breach of express condition*, 7938.
- R. *Breach of implied condition*, 7940.
- S. *Breach of trust*, 7940.
- T. *Breach of covenant*, 7941.
- U. *Penalties in contracts*, 7941.

IV. Construction, 7941.

- A. *Statutory provisions*, 7941.
- B. *Provisions inserted by act of parties*, 7942.

V. Who Can Enforce Forfeiture, 7943.

VI. Against Whom Forfeiture Operates, 7944.

VII. Excuses, 7944.

VIII. Waiver, 7944.

IX. Estoppel, 7945.

X. Relief in Equity, 7945.

XI. Remedies, 7945.

XII. Notice and Declaration of Forfeiture, 7946.

XIII. Parties, 7946.

XIV. Pleading, 7946.

XV. Evidence, 7946.

I. DEFINITION AND NATURE.

A penalty in its original and legal sense means a penal punishment. Like corporal punishment, it is inflicted by or in right of the public, and a recovery inures in whole or in part to the public. A forfeiture is more comprehensive in its signification, yet it generally accrues to individuals, and may well be so limited in a statute requiring strict construction: *Hawkins v. Furnace Co.*, 40 O. S. 507, IV Longsdorf's Notes, 39.

The meaning of the word penalty is not necessarily confined to fines or corporal punishment. It has been held to include the forfeiture of interest for usury: *Ewing v. Bank*, 43 O. S. 31, IV Longsdorf's Notes, 143.

The term forfeiture is, undoubtedly, distinguishable from the term fines, inasmuch as it may mean the sequestration of property, and the other term does not necessarily carry that signification: *Rosebaugh v. Saffin*, 10 O. 31, I Longsdorf's Notes, 485.

A penal sum is an amount greater than the value of the consideration, a forfeiture: *Nelson v. Ford*, 5 O. 475, I Longsdorf's Notes, 304.

Abandonment is a forfeiture of the right to property, or it arises from the nonuse of the right with reference to the property:

Railroad v. Parmelee, 1 O. C. C. 239, 1 O. C. D. 31.

Bond or deposit, to secure the faithful performance of an obligation will be regarded as a penalty: *Hattersly v. Westerville*, 4 O. C. C. (N.S.) 242, 16 O. C. D. 226.

II. VALIDITY OF STATUTORY PROVISIONS.

It was said that the legislature could under the constitution of 1802, attach forfeitures to offenses, subject only to actual liens and provisions for the benefit of creditors and others: *Bond v. Sweeney*, 1 O. 395, I Longsdorf's Notes, 91.

In a trial against a turnpike company to declare its road abandoned for want of repair, and thereby make it a free road under R. S., §§ 4914 to 4918, a refusal of a jury was error and such statutes were unconstitutional as they made no provision for a jury: *Turnpike Co. v. Parks*, 50 O. S. 568, IV Longsdorf's Notes, 515. See also JURY.

Art. VIII, § 16, of the constitution of 1802, did not render invalid a statute which provides for the forfeiture of estates for nonpayment of taxes. It applies only to forfeiture which is incident to a conviction of a crime: *McMillan v. Robbins*, 5 O. 28, I Longsdorf's Notes, 244.

No man's property can be forfeited as a punishment for crime. Hence there is no power to deprive a man of the use of his property unless it be necessary in order to abate an existing nuisance: *Miller v. State*, 3 O. S. 475, II Longsdorf's Notes, 50.

III. GROUNDS OF FORFEITURE.

A. CRIME.

An heir does not forfeit the inheritance by having murdered the ancestor in order to obtain it, there being no corruption of blood or forfeiture of estate by felony: *Deem v. Millikin*, 6 O. C. C. 357, 3 O. C. D. 491 [affirming *Deem v. Risinger*, 11 Dec. Rep. 492, 27 Bull. 156; and affirmed, without opinion, *Deem v. Millikin*, 53 O. S. 668]. See also DESCENT AND DISTRIBUTION.

The clause in the constitution that no conviction shall work corruption of blood or forfeiture of estate would not prevent the legislature allowing administration upon the estate of persons serving a life sentence in the penitentiary, for forfeiture there means taking property from the heirs, and this is giving it to them: *Fraser v. Fulcher*, 17 O. 260, I Longsdorf's Notes, 809. See also CONSTITUTIONAL LAW.

The murder of the insured by the beneficiary of a life insurance policy operates as a forfeiture of the interest of such beneficiary: *Filmore v. Insurance Co.*, 82 O. S. 208.

B. WASTE.

G. C., § 8593, which provides for the forfeiture of life estates for waste only applies to estates subsequently created, else it would be invalid as creating a new disability after the estate has vested: *Kent v. Bentley*, 10 O. C. C. 132, 6 O. C. D. 457. See also CONSTITUTIONAL LAW.

Prior to the amendment in 1887 of G. C., § 8593, life estates, other than in dower or curtesy, were not forfeitable for waste, and this affected only subsequently created estates: *Kent v. Bentley*, 10 O. C. C. 132, 6 O. C. D. 457. See also WASTE.

The common-law rule whereby cutting timber amounts to waste is not followed in Ohio to its full extent; and if timber land is set off to a widow for her dower and she cuts timber therefrom sufficient in quantity to pay the taxes and the costs of managing such property, such conduct is not waste: *Crockett v. Crockett*, 2 O. S. 180, I Longsdorf's Notes, 1038.

An earlier form of G. C., § 8593, applied to wastes committed by a widow; and subsequently by amendment such statute was made to apply to all cases of tenancy for

life: *Brenneman v. Brenneman*, 1 O. N. P. 332, 3 O. D. (N.P.) 392.

In an action to enjoin waste, and for an account for waste committed, and also to recover possession, on the ground that the life estate of the tenant has been forfeited by the waste, in which action a final decree is taken to enjoin the waste and for such account, had no judgments taken for the recovery of the land, the parties have the right of appeal, and not of a second trial: *Jenks v. Langdon*, 21 O. S. 362, III Longsdorf's Notes, 34.

G. C., § 8593, does not apply to cases where a life estate is interposed between the estate of the tenant who commits the waste and the estate in reversion or remainder: *Hatch v. Hatch*, 1 O. D. (N.P.) 271, 31 Bull. 57.

C. FAILURE OF LIFE-TENANT TO PAY TAXES.

The forfeiture of the life estate provided for in G. C., § 5688, is valid and constitutional: *McMillan v. Robbins*, 5 O. 28, I Longsdorf's Notes, 244.

The tax laws which exact forfeitures are regarded as penal laws in Ohio, and must be construed strictly: *Mathers v. Dull*, 6 O. N. P. 45, 9 O. D. (N.P.) 408.

No forfeiture of the estate of a life tenant accrues, under G. C., § 5688, from the failure of the tenant to pay the taxes on the land, in consequence of which the land is sold at delinquent tax sale, where, by reason of errors or irregularities in levying the tax or in making the sale, no valid deed can be made by the auditor to the purchaser at the tax sale: *Estabrook v. Royon*, 52 O. S. 318, IV Longsdorf's Notes, 574 [reversing *Estabrook v. Royon*, 5 O. C. C. 315, 3 O. C. D. 156].

If forfeiture of a lease has been incurred by reason of a breach of a covenant to pay taxes, and such breach is not willful and is not the result of gross negligence and no demand has been made by the lessor prior to such forfeiture, equity will relieve against such forfeiture: *Eichenlaub v. Neil*, 10 O. C. C. 427, 6 O. C. D. 567 [affirmed, without opinion, *Neil v. Eichenlaub*, 56 O. S. 782].

Where a person seized of lands as tenant in dower, neglects to pay the taxes thereon so long that they are sold for the payment of taxes, if one of several tenants in common of the remainder in fee of such lands purchase the lands at the tax sale, the purchase will be held to inure to the benefit of all the cotenants in remainder: *Clark v. Lindsey*, 47 O. S. 437, IV Longsdorf's Notes, 387.

In *Clason v. Ward*, 1 O. N. P. 218, 1 O. D. (N.P.) 192, it was said that a dower right was not forfeited under G. C., § 5688, until the land was sold and one year thereafter

had expired, but that it was immaterial whether the sale was valid or not.

The purchaser of an estate in remainder at a sale on foreclosure of a mortgage upon the estate, made subject to the life estate on which the remainder is limited, can not claim a forfeiture of the life estate from the sale of the lands at delinquent tax sale, and a failure to redeem within the time prescribed by G. C., § 5688, where the omission occurred prior to the foreclosure, and there is nothing to show but that the forfeiture was waived by the mortgagor: *Chaffee v. Foster*, 52 O. S. 358, IV Longsdorf's Notes, 576.

In *Anderson v. Messenger*, 158 Fed. 250, 85 C. C. A. 468, 16 O. F. D. 134, it was said that the interest of a life tenant can not be forfeited for failure to pay assessments for local improvements.

D. FAILURE OF LIFE-TENANT TO PAY LIEN.

A forfeiture of husband's life estate will not be decreed for failure to pay off mortgages where it appears that the testatrix executed them only to save her husband from the burden of paying building association dues, and the right of forfeiture is based on a provision in the will relating to default on his part in meeting charges for maintenance, for taxes, etc.: *Bonham v. Lucas*, 7 O. L. R. 301.

E. FAILURE OF OWNER OF FEE TO PAY TAXES.

Lands can not be claimed as forfeited to the state, for the nonpayment of taxes, without a strict compliance with the statute authorizing the forfeiture: *Woodward v. Sloan*, 27 O. S. 592, III Longsdorf's Notes, 378.

The forfeiture of land to the state for nonpayment of taxes, does not divest the former proprietor of title, so as to prevent him from maintaining an action of ejectment against one in possession not claiming title under the state: *Thevenin v. Slocum*, 16 O. 519, I Longsdorf's Notes, 779.

The forfeiture herein provided for vests the title in the state for the purpose of security for the amount of taxes due and owing, and not for any other purpose: *Thevenin v. Slocum*, 16 O. 519, I Longsdorf's Notes, 779.

Where, under G. C., § 5744, lands have been duly forfeited to the state for the nonpayment of taxes and penalty, a valid sale and conveyance of such lands by the county auditor, extinguishes all previous titles thereto, either legal or equitable, and invests the purchaser with a new and perfect title to said lands, discharged from all previous liens

and incumbrances: *Kahle v. Nisely*, 74 O. S. 328, IV Longsdorf's Notes, 1010.

G. C., § 5744 and the following sections, have no application to lands which are sold at delinquent tax sales; but only to the forfeiture of lands which have been offered for sale at delinquent tax sales and have not been sold for want of bidders: *State, ex rel., v. Godfrey*, 62 O. S. 18, IV Longsdorf's Notes, 822.

Forfeiture of real estate to the state for nonpayment of taxes vests the title in the state for the purpose only of security for taxes due and owing: *Big Four Co. v. Cincinnati*, 12 O. D. (N.P.) 218.

If the owner of land dies after the land is forfeited and before it is sold, leaving heirs who are under age, such heirs may redeem: *Reynolds v. Lieper*, 7 O. (pt. 1) 17, I Longsdorf's Notes, 360.

If the heirs of a former owner redeem after his death, the land having been forfeited during his lifetime, such forfeiture bars the dower of the widow, and such subsequent redemption does not restore her right of dower to her: *Tullis v. Pierano*, 9 O. C. C. 647, 9 O. C. D. 103 [affirmed, without opinion, *Tullis v. Pierano*, 57 O. S. 661].

F. VIOLATION OF FISH AND GAME LAWS.

Confiscation of property by authority of a statute not furnishing legal proceedings wherein the parties may have a hearing is unconstitutional. Hence R. S., § 6968 (repealed 97 v. 477; for analogous section, see G. C., § 1398), authorizing the game warden to seize and confiscate fish nets in parts of Lake Erie is void, and he is liable for their value: *Edson v. Crangle*, 62 O. S. 49, IV Longsdorf's Notes, 824.

R. S., § 6968 (repealed 99 v. 382; for analogous section, see G. C., § 1398), empowering any person to destroy, without liability to action for damages, any unlicensed fishing nets as nuisances, and requiring officers to do so, involves destruction without due process of law, and is void: *Yensen v. State*, 7 O. N. P. 18, 9 O. D. (N.P.) 168.

The fish and game law of 1896, R. S., § 6968-2 (repealed 99 v. 382; for analogous section, see G. C., § 1398, 92 v. 384), is unconstitutional, as authorizing forfeiture of nets and devises without due process of law: *Crangle v. Buntain*, 37 Bull. 294 [for opinion, see *In re Fish Seizure*, 5 O. D. (N.P.) 553].

The part of R. S., § 6968 (repealed 99 v. 382; for analogous section, see G. C., § 1398), providing for confiscation of fish nets, without giving the owner a day in court, is unconstitutional. But the rest of the section is not dependent on it and is therefore valid: *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163. See also FISH AND GAME.

That property forfeited for the violation of the fish and game laws may be of insignificant value is no reason for sustaining the statute: *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181.

In its present form, with provision for hearing and with a declaration that such nets are a public nuisance and are to be destroyed as such, G. C., § 1398, is constitutional: *State v. French*, 71 O. S. 186, IV Longsdorf's Notes, 981.

G. SALE OF INTOXICATING LIQUOR CONTRARY TO LAW.

If the lease is made in order to use the premises leased for the unlawful sale of intoxicating liquors, and this purpose is carried out by the lessee, the lease is void as to both parties; while if the lease is not made for such purpose, and the premises are subsequently used for such purpose, the lease is voidable at the option of the lessor: *Zink v. Grant*, 25 O. S. 352, III Longsdorf's Notes, 238.

A sale on Sunday operates as a forfeiture of the lease: *Moser v. Stebel*, 9 O. C. C. (N. S.) 217, 19 O. C. D. 487.

A lease is said to be void after a sale to a drunkard; and the lessor is to be regarded as being in possession: *Goodall v. Brewing Co.*, 1 O. N. P. 284, 3 O. D. (N.P.) 58; see also, *Goodall v. Brewing Co.*, 56 O. S. 257, IV Longsdorf's Notes, 689.

The fact that both the lessor and the lessee are parties to the illegal transaction, and both intend the illegal use of the premises, is not a defense to the lessee in an action for the lessor to recover possession: *Zink v. Grant*, 25 O. S. 352, III Longsdorf's Notes, 238; *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

In an action brought by the lessor to recover possession, it is no defense for the lessee to show that he has paid his rent in advance for the entire term: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

In an action to recover possession, it is no defense to show that the premises were leased for saloon: *Weitzel v. Slavin*, 13 O. C. 221, 7 O. C. D. 155.

A justice of the peace has jurisdiction to hear an action in forcible entry and detainer and restore possession of the premises: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

If a tenant has used or leased premises for the unlawful sale of intoxicating liquor, and he refuses to surrender the possession thereof to the lessor, the lessor may recover possession in an action of forcible entry and de-

tainer: *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

Under this section a justice of the peace has jurisdiction to entertain an action of forcible entry and detainer, and restore possession of the premises, when the tenant has sold liquor in violation of the act, and it is not necessary that such forfeiture should have been first declared by a court of superior jurisdiction: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381 [following *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311].

A complaint in forcible entry and detainer for a violation of this section is sufficient if it substantially comports with the language of the statute: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

H. GAMING.

The action by a member of the public against a winner at gaming, under G. C., § 5969, though the plaintiff be the loser himself, is for a penalty or forfeiture and barred in one year (G. C., § 11225), and not on a statutory liability barred in six years (G. C., § 11222): *Cooper v. Rowley*, 29 O. S. 547, III Longsdorf's Notes, 496. See also LIMITATION.

Under a territorial statute which provided that a deed upon a gaming consideration should inure to the benefit of the heirs of the grantor, such conveyance did not work a technical forfeiture, but the heirs took as by descent, subject to the just debts of the grantor: *Bond v. Swearingen*, 1 O. 395, I Longsdorf's Notes, 91.

The fact that G. C., § 5972, gives to the absolute owner the power to abrogate a lease if the lessee permits gambling, does not show that the legislature, in G. C., § 5971, intended the word "owner" to mean only an absolute owner of the fee: *Iroquois Co. v. Meyer*, 80 O. S. 676, IV Longsdorf's Notes, 1053.

The owner of a building in which gambling is conducted with his knowledge may be joined as a defendant principal, together with the persons who conducted such gambling: *Pentz v. Burrows*, 8 O. C. C. (N.S.) 349, 18 O. C. D. 490.

The word "permit" in G. C., § 5972, does not here mean "expressly consent." The owner's knowledge and inaction is enough: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 465 [reversing *Ackerman v. Thompson*, 7 O. N. P. 598, 10 O. D. (N.P.) 361].

Under G. C., § 5972, the grantee of the original lessor may maintain an action in forcible entry and detainer, if the lessee conducts gambling upon such premises, on the theory that such conduct is a breach of a statutory condition subsequent: *Thompson*

v. *Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456 [reversing *Ackerman v. Thompson*, 7 O. N. P. 598, 10 O. D. (N.P.) 361].

I. FAILURE TO PROBATE WILL.

Although a devise lapses by neglect to cause a known will to be offered for or admitted to probate, it will not lapse for neglect in causing a copy of a will, probated elsewhere, to be recorded in the county where the devised property may be situated: *Carpenter v. Denoon*, 29 O. S. 379, III Longsdorf's Notes, 479.

G. C., § 10542, is punitive and must be strictly construed. Mere delay or lapse of time does not start this provision for forfeiture into operation, but to do so requires that an action be brought and a decree entered declaring the forfeiture: *Mitchell v. Long* 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

One retaining an attorney to secure for her the administration of her deceased husband's estate is not entitled to information acquired by her counsel in a prior professional relation concerning the will of her husband's brother, notwithstanding the fact that such knowledge might have enabled her to prevent the beneficiary from taking under such will, under G. C., § 10542: *Long v. Bowersox*, 8 O. N. P. (N.S.) 249, 19 O. D. (N.P.) 494.

Where deceased left two wills, the later of which was probated, and this probate was contested and set aside after three years, after which the beneficiary in whose custody it was procured the probate of the earlier will, he was not debarred from taking as a devisee under this will by the fact that more than three years had elapsed before he offered it for probate: *Avery v. Howard*, 7 O. N. P. (N.S.) 97, 19 O. D. (N.P.) 71.

G. C., § 10542, does not apply to a case where a devisee seeks, after three years, to have probated a copy of a lost will: *In re Blymeyer*, 7 O. N. P. 591, 5 O. D. (N.P.) 399.

The provisions for forfeiture contained in G. C., § 10542, do not declare a rule of property, and mere delay or lapse of time does not start this provision into operation, but to do so requires that an action shall be brought and a decree entered declaring the forfeiture: *Mitchell v. Long*, 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

J. FAILURE TO PAY LICENSE.

Dogs are property and hence can not be taken without due process of law. Hence, R. S. § 2672-55 (repealed 96 v. 96) authorizing the humane society to seize and kill dogs for nonpayment of license is unconsti-

tutional. It is also void as a local law on a general subject: *Fagin v. Humane Society*, 6 O. N. P. 357, 9 O. D. (N.P.) 341. See also CONSTITUTIONAL LAW.

K. DEFAULT IN PAYMENT FOR SCHOOL LANDS.

Under G. C., § 3228, the only remedy of the state in case of the failure of the purchaser of school lands to pay therefor is by forfeiture and resale: *State v. Glidden*, 31 O. S. 309, III Longsdorf's Notes, 586.

L. MISCONDUCT IN OFFICE.

Trustees of the gas-works of a city are officers of a municipal corporation within R. S., § 1545-79 (repealed 96 v. 96, § 231) and G. C., § 12912, which provide that personal interest of such officer in a contract forfeits his office. But *quo warranto* does not lie, the statutory remedy of G. C., § 4674 being exclusive: *State v. Funk*, 16 O. C. C. 155, 8 O. C. D. 782.

On conviction of a county commissioner for misconduct in office the court can only, under G. C., § 12920, forfeit the office held at the time of misconduct, and if that has expired, and the defendant is holding a new term, the latter can not be forfeited, for the crime did not make him ineligible: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed on other grounds, *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640]. See also OFFICE.

R. S., § 1348 (unconstitutional, *State v. Lewis*, 69 O. S. 202, IV Longsdorf's Notes, 956), forfeiting the clerk's salary on conviction of misconduct in office, will not deprive his sureties of a credit thereof where he has not been convicted, although an indictment is pending, and he is undoubtedly guilty: *State v. Hobson*, 5 O. N. P. 321, 5 O. D. (N.P.) 442. See also CLERK OF COURT.

The failure to give bond is not a forfeiture of the office of policeman: *Brown v. Milford*, 8 O. N. P. 317, 11 O. D. (N.P.) 406.

M. VIOLATION OF CHARTER.

An *ultra vires* provision in a trackage contract which can be eliminated from the rest of the contract is not ground for forfeiture of the company's charter: *Railway v. Railway*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705.

Mere intent on the part of a railroad company to violate public duties is not ground for the forfeiture of its charter: *Railway v. Railway*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705. See also RAILROADS.

For proceedings to oust a corporation from the exercise of corporate franchises, see QUO WARRANTO.

N. FORFEITURE FOR CHANGE OF USE.

When land is granted to a city upon a valuable consideration to be used for streets and other purposes the title will not, in the absence of an express stipulation to that end, revert in the grantor because the land is subsequently used for street and railroad purposes: *Railroad v. State, ex rel.*, 85 O. S. 251.

Under a deed stating a use but without a clause of re-entry, there is no reverter to the grantor because the land is used for a double purpose: *Railway v. State, ex rel.*, 85 O. S. 251.

A lot was conveyed to a church with a clause of forfeiture and re-entry if the property should ever be used for other than church purposes. The city appropriated a part of the lot to widen a street, the compensation being claimed by both the grantor and the church. It was held that performance of the condition subsequent was prevented by act of law, so that the condition and not the estate was destroyed and the church is entitled to the money: *Cincinnati v. Babb*, 4 O. D. (N.P.) 464, 29 Bull. 284 [affirmed, without opinion, *Babb v. Cincinnati*, 55 O. S. 637].

A deed of conveyance for one-half acre of land having been made and delivered by a grantor to two grantees upon consideration of twenty dollars, as follows: "To have and to hold the above granted and bargained premises with the appurtenances thereof unto them, the said grantees or their successors in office, forever, to their own proper use and behoof, but it is expressly to be understood that the said grantees nor their successors in office, shall not at any time use or occupy the aforesaid premises for any other purpose or purposes than whereon to erect or build religious meeting houses or parsonages, and for cemetery or burying ground, and that the said cemetery or burying ground shall be free and common to and for all religious denominations who may desire to occupy the same for the purpose of interring the dead, under the immediate direction and regulations of said grantees or their successors in office, but this reservation shall not extend to inhibit or prevent the fencing, planting trees or shrubs, making tombs, monuments or other ornamental improvements," and a street having been located by the village upon a strip of said land thirty feet wide, for which the successors of said grantees received five hundred dollars, and an action having been brought by the heirs of the grantor against the village for the recovery of the value of said strip of land, it was held, that said heirs had no title to said strip of land, and no right to the value

thereof and that as said deed had no words of forfeiture or re-entry, the diverting of said lands to uses and purposes, other than those expressed in the deed, did not in legal effect revert title to said lands in the grantor, or his heirs: *Ashland v. Greiner*, 58 O. S. 67, IV Longsdorf's Notes, 732.

O. NON-USE OF FRANCHISE.

The nonuser of the franchise of the corporation to which the property is granted and its practical abandonment does not create a reversion to the donor if the use is capable of enforcement: *Webb v. Moler*, 8 O. 548, I Longsdorf's Notes, 455. See also CORPORATIONS.

P. FORFEITURE OF EASEMENT ACQUIRED BY EMINENT DOMAIN.

The trustees winding up a canal company which had been ousted from the right to be a corporation, sold the canal to a railroad which proceeded to condemn the land and pay the appropriation money into court. It was held that the heirs of the original owners of the land and not the railroad were entitled to the money, for on ouster the land reverted, freed from the easement: *Railroad Co. v. Parmelee*, 1 O. C. C. 239, 1 O. C. D. 130 [affirmed, without opinion, by supreme court, *Railroad v. Parmelee*, 23 Bull. 108].

Ouster of a canal company and its dissolution by order of court puts an end to rights which it had to use the bed of a river for the canal, and the trustees, winding it up, can not convey such rights, but they revert to the proper owners: *Day v. Railroad Co.*, 44 O. S. 406, IV Longsdorf's Notes, 219.

Where a canal company, owning a dam across a river had acquired the right to overflow land of an upper proprietor and assigns to mill owners their land and dam and the right to the surplus water not needed for the canal, this does not give them the right of such overflowing after dissolution of the corporation. Such right reverts if assigned: *McCombs v. Stewart*, 40 O. S. 647, IV Longsdorf's Notes, 47. See also EASEMENT.

Q. BREACH OF EXPRESS CONDITION.

An assignee of the lessee is bound by the condition of forfeiture for nonpayment, though the word assigns is omitted, for it attends on the term: *Countee v. Armstrong*, 9 Dec. Rep. 62, 10 Bull. 339.

A devise to a county of land on condition it pays an annuity to the widow does not involve the question of the constitutionality of a later act authorizing a tax to pay the annuity, for the devise is not forfeited

by the county's inability to pay, but by actual nonpayment: *Carder v. Commissioners*, 16 O. S. 353, II Longsdorf's Notes, 782. See also WILLS, LEGACIES AND DEVISES.

A forfeiture of husband's life estate will not be decreed for failure to pay off mortgages where it appears that the testatrix executed them only to save her husband from the burden of paying building association dues, and the right of forfeiture is based on a provision in the will relating to default on his part in meeting charges for maintenance, for taxes, etc.: *Bonham v. Lucas*, 7 O. L. R. 301.

A lessee operating under an oil and gas lease, who has entered upon the premises and expended money under such lease, has a right to know if the lessor is going to insist upon greater developments of the property that have already been going on and shall have notice of the fact and be given an opportunity to more fully and more speedily develop the property before the lessor is entitled to claim a forfeiture of the lease on the ground that there is not a reasonable operation under the lease: *Oil Co. v. Hulbert*, 14 O. C. C. 144, 7 O. C. D. 321.

Competent parties may make time of the "essence of the contract," and enforce a forfeiture, as stipulated in a case of a default: *Hulett v. Fairbanks*, 40 O. S. 233, IV Longsdorf's Notes, 21.

Where a lessee under a lease for three and one-half years renewable forever, holds over for twenty days before notice is served upon him to quit the premises, he thereby elects to renew the lease, and the provision not having been complied with, that a forfeiture could only be declared after demand for unpaid rent duly made according to law; the lessee upon offering to pay his arrearages is entitled to a decree quieting his title to a permanent leasehold: *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513 [affirming *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666].

Where a policy of insurance contains a clause of forfeiture by reason of the nonpayment of premiums at a certain time, it is a valid part of the contract and the policy may be forfeited unless prohibited by statute: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

Where a street railway grant provided that the roads should be built and in operation within six months from the time the city had completed certain grading, which grading was not done for ten years although the larger part of the road was built and put in operation, and where the city after ten years caused the stipulated grading to be done, which during the winter months settled from six inches to a foot, and was leveled up,

and the construction of the road begun, the rule requiring that forfeiture be strictly construed against those for whose benefit they are provided, together with the entire failure of the city to show any damages suffered by reason of the delay, and the further fact that if any part of the franchise is to be forfeited, it must be forfeited as a whole including the portion of the road which was built ten years before the city did the stipulated grading, forbids the granting of a forfeiture of such franchise: *Toledo v. Railway Co.*, 2 O. C. C. (N.S.) 97, 15 O. C. D. 441.

When an ordinance granting a street railway franchise provides that a failure to comply with the terms and conditions of the ordinance after twenty days notice from the city council shall operate as a forfeiture of all rights and franchises granted, the failure of the owner of the franchise to lay a track in a portion of the territory covered by the franchise will not work a forfeiture of its rights to lay such track in the absence of notice given as provided in the ordinance: *Akron v. Traction Co.*, 6 O. C. C. 445, 17 O. C. D. 536 [affirmed, without opinion, *Akron v. Traction Co.*, 75 O. S. 565].

See also LANDLORD AND TENANT; INSURANCE; DEEDS.

R. BREACH OF IMPLIED CONDITION.

A deed in fee by a tenant for life passes the life estate, but does not forfeit it to the remainderman or reversioner: *Carpenter v. Denoon*, 29 O. S. 379, III Longsdorf's Notes, 479; *Koltenbrock v. Cracraft*, 36 O. S. 584, III Longsdorf's Notes, 876. See also LIFE ESTATES.

A forfeiture clause in a lease of land, for the purpose of drilling for oil, making the lease void for failure to comply with the conditions mentioned, does not apply to breach of implied covenants, such as reasonably to develop the land and protect the lines. The only remedy is an action for damages: *Harris v. Oil Co.*, 57 O. S. 118, IV Longsdorf's Notes, 708.

S. BREACH OF TRUST.

Acts or omissions of the trustees can not create a forfeiture and reversion of the property to the donor's heirs. The court would only remove the trustees and appoint others, or compel due performance: *Cincinnati v. McMicken*, 6 O. C. C. 188, 3 O. C. D. 409.

Changes of faith by the constitutional majority not involving a substantial departure from the established doctrines of a religious society are not a perversion of the trusts on which its property is held: *Rike*

v. *Floyd*, 6 O. C. C. 80, 3 O. C. D. 359. See also CHARITIES.

T. BREACH OF COVENANT.

Where a waterworks company operating in a city by contract with the city, is enjoined from enforcing unreasonable rules and violates the injunction, the city can not have the franchise forfeited, but only punishment as for contempt: *Newark v. Waterworks Co.*, 4 O. N. P. 341, 6 O. D. (N.P.) 518. See also INJUNCTION.

The remedy for a breach of an implied covenant, is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by such breach: *Harris v. Oil Co.*, 57 O. S. 118, IV Longsdorf's Notes, 708.

In the absence of a forfeiture clause in a deed excepting and reserving the timber on lands, with the privilege of removing the same within a stipulated time, grantor's right to the timber severed from the realty is not lost nor their title forfeited because of their failure to remove the same within the time stipulated in the deed: *Walcutt v. Treisch*, 82 O. S. 263, IV Longsdorf's Notes, 1060.

In the absence of a forfeiture clause in a deed excepting and reserving the timber on lands, with the privilege of removing the same within a stipulated time, the landowner can not recover from the grantors the value of timber severed from the realty but not removed until after the expiration of the stipulated period, but the extent of his remedy is the damage he may have sustained by reason of the grantor's trespass and occupation of his land: *Walcutt v. Treisch*, 82 O. S. 263, IV Longsdorf's Notes, 1060.

U. PENALTIES IN CONTRACTS.

See DAMAGES.

IV. CONSTRUCTION.

A. STATUTORY PROVISIONS.

A statute to impose a forfeiture must be clear, and the intent manifest: *Bond v. Svecaringen*, 1 O. 395, I Longsdorf's Notes, 91.

Statutes imposing forfeitures are construed strictly in the case of a right of action against a surety where the creditor disregards the notice to sue: *Moormann v. Voss*, 77 O. S. 270, IV Longsdorf's Notes, 1032.

Statutes are construed to avoid a penalty or forfeiture if possible: *State v. Elson*, 77 O. S. 489, IV Longsdorf's Notes, 1034.

G. C., § 12191, relative to notice by surety to creditor to sue is in derogation of the common law and should not be extended be-

yond its plain terms: *Moormann v. Voss*, 77 O. S. 270, IV Longsdorf's Notes, 1032.

Statutes imposing forfeitures or damages beyond just compensation to the party injured are construed strictly: *Railway v. Wells*, 65 O. S. 313, IV Longsdorf's Notes, 887.

Where a statute forbidding the use of foreign bank bills of less than \$10, merely makes paper given wholly or in part for them void, and does not enact it to be unlawful, a renewal note given in part for such paper is not wholly void, but only to the extent of the former void paper. Forfeitures are not wrought out by construction: *Doty v. Bank*, 16 O. S. 133, II Longsdorf's Notes, 764.

G. C., § 10542, as to forfeiture is punitive in effect and must be strictly construed: *Mitchell v. Long*, 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

G. C., § 10542, as to forfeiture is not a rule of property: *Mitchell v. Long*, 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

The statute of descents provides in clear terms that where one dies intestate and seized in fee of lands, they shall descend and pass to the children of such intestate and the courts can not, upon consideration of policy, so interpret the statute so as to exclude from the inheritance one who murders such intestate: *Deem v. Millikin*, 6 O. C. C. 357, 3 O. C. D. 491 [affirming *Deem v. Risinger*, 11 Dec. Rep. 492, 27 Bull. 156, and affirmed, without opinion, *Deem v. Millikin*, 53 O. S. 668].

B. PROVISIONS INSERTED BY ACT OF PARTIES.

Forfeitures are not favored by the courts especially where it appears that the provision of forfeiture is put into a contract, agreement or franchise only to secure the performance of the work: *Toledo v. Railway Co.*, 2 O. C. C. (N.S.) 97, 15 O. C. D. 441.

Clauses for forfeiture in insurance policy are construed strictly: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

The equity rule construing a forfeiture clause strictly applies at law: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613.

Provisions for forfeiture are to receive, where the intent is doubtful a strict construction against those for whose benefit they are introduced: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613.

A stipulation for the payment of \$5,000 to the lessor as a "forfeiture," upon violation of a clause as to releasing by the lessee, is treated as an agreement for liquidated damages if the parties had agreed before as

to the amount of damages that would arise: *Robinson v. Fish*, 8 O. L. R. 520 [affirmed, *Fish v. Robinson*, 14 O. C. C. (N.S.) 414, 23 O. C. D. 393]. See also DAMAGES.

A clause in an insurance policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation, the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured." It was held that a stipulation such as the latter can only be used to work a forfeiture *strictissime juris*. That clause being inserted by the insurer for the protection of the insuree is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy: *Ensel v. Insurance Co.*, 88 O. S. 269.

V. WHO CAN ENFORCE FORFEITURE.

Mere rights of entry are not alienable, for no one but the grantor or his heirs, that is, he or his privies in blood, can insist on the performance of an express condition subsequent or take a benefit of its breach. The power to forfeit for the breach can not be assigned, conveyed or even devised, and on an attempt to do so the condition is gone: *Branch v. Directors*, 11 Dec. Rep. 809, 29 Bull. 398; *State v. Railway*, 1 O. N. P. 292, 2 O. D. (N.P.) 300; *Ackerman v. Thompson*, 7 O. N. P. 598, 10 O. D. (N.P.) 361 [reversed on other grounds, *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456].

The provision of G. C., § 5972, that if leased premises are used for gaming the lessor may declare the lease at an end, is a condition subsequent, the right to enforce which can not be transferred and rests only in the lessor or his privies in blood. The possibility of reverter is a mere expectancy dependent on an uncertain event, and can not be alienated, and this doctrine applies to lesser estates as well as to a fee: *Ackerman v. Thompson*, 7 O. N. P. 598, 10 O. D. (N.P.) 361 [reversed on other grounds, *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456]. See also GAMBLING.

If two co-obligors, on a note given for the purchase price of certain land, said note containing a forfeiture clause for failure to make prompt payment, having the means to promptly pay their share of such a note (without notice to their copartners of an intent to not pay said share) in order to force the forfeiture, place said sum (and more) in the hands of a third party to

enable him to take advantage of the forfeiture and purchase the rights so forfeited, they commit a fraud upon their co-obligors. If a third party, with knowledge of the contract of purchase, of the relations of said co-obligors and of the facts as to said money, receives the same and uses it to carry the plan into effect, he is so far a party to the fraud that he can not hold the rights so purchased against the co-obligors so defrauded: *Hulett v. Fairbanks*, 40 O. S. 233, IV Longsdorf's Notes, 21.

VI. AGAINST WHOM FORFEITURE OPERATES.

An assignee of the lessee is bound by the condition of forfeiture for nonpayment though the word "assignee" is omitted, for it attends on the term: *Countee v. Armstrong*, 9 Dec. Rep. 62, 10 Bull. 339.

VII. EXCUSES.

Where a city ordinance granted a right to lay pipes in streets, provided a bond were first given to the approval of a board and the city solicitor, and that work shall begin in a year from the taking effect of the ordinance or it shall be void, and the city solicitor enjoins, and the case is not dismissed until a year has elapsed, and then the bond tendered is refused on the ground of time, it was held that the conditions would be regarded as subsequent unless clearly appearing to be precedent; that the pendency of the action may excuse the delay, and postpones the ordinance taking effect, and that mandamus to compel action on the bond will lie: *State, ex rel., v. Boyce*, 43 O. S. 46, IV Longsdorf's Notes, 145 [reversing *State, ex rel., v. Boyce*, 9 Dec. Rep. 165, 11 Bull. 131]. See also GRANTS.

Time may be made of the essence and a forfeiture of a joint purchase be enforced on default, but if nonperformance is occasioned by erroneous information by the agent of the party not in default, the forfeiture will be relieved against: *Hulett v. Fairbanks*, 40 O. S. 233, IV Longsdorf's Notes, 21. See also SALES.

VIII. WAIVER.

The omission to take any steps for so long a period for the forfeiture of the title on the ground of failure of a condition subsequent, constitutes a waiver of the rights to insist upon forfeiture, and bars the plaintiffs from recovering the property: *Field v. Railway*, 3 O. C. C. (N.S.) 130, 13 O. C. D. 1.

Injunction will lie to restrain the lessors of premises from declaring the forfeiture of a lease containing a covenant against under-

letting, where past violations of this covenant had been made with the knowledge of the lessors and without objection from them; but such an injunction will not operate to prevent lessors from insisting upon an observance of the covenant against under-letting in the future, after notice of their intention to thereafter stand on the covenant: *Beckenbach v. Harlow*, 12 O. C. C. (N.S.) 570, 21 O. C. D. 496 [affirmed, without opinion, *Harlow v. Beckenbach*, 85 O. S. 492].

IX. ESTOPPEL.

One who had full knowledge of the existence of a will which had never been probated, is estopped to set up against another the forfeiture of a devise because of the lapse of a three-year period for probate: *Mitchell v. Long*, 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

X. RELIEF IN EQUITY.

Statutory penalties or forfeitures are not relieved by equity: *Justice v. Lowe*, 26 O. S. 372, III Longsdorf's Notes, 311.

Forfeitures by nonperformance of conditions precedent are not relieved against, nor when the parties can not be put in *statu quo*: *Robert v. Insurance Co.*, 13 Dec. Rep. 66, 2 D. 106.

Forfeitures are odious, and must not be procured by management, stratagem, or trickery, to entrap a party: *Insurance Co. v. Pottker*, 33 O. S. 459, III Longsdorf's Notes, 683.

If a penalty seems to be intended only as a security for performance of the consideration, equity may relieve, for no injury is thereby done. Not so where the relief would destroy the substance of the contract, as if the stipulated thing be a collateral act, for no precise value can be affixed to such an act: *Hutcheson v. McNutt*, 1 O. 14, I Longsdorf's Notes, 64.

While equity never decrees an ouster or forfeiture, a court of chancery may by mandatory injunction require performance of the condition under which a corporation exercises its franchises: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

XI. REMEDIES.

Where a village grant of the right to build a street railroad required certain conditions as to construction and repair being observed, and that in case of neglect the city could remove the track, and six years after construction of the road the conditions were all violated, the village can revoke the franchise and remove the track without a judicial declaration of forfeiture: *Stewart v. Ashtabula*,

36 Bull. 46 [without opinion in the supreme court]. See also NUISANCE.

A suit to forfeit for nonpayment of rent will not be entertained. The remedy is ejectment with a right to a jury: *Adams v. Parnell*, 11 O. C. C. 567, 5 O. C. D. 190. See also LANDLORD AND TENANT.

XII. NOTICE AND DECLARATION OF FORFEITURE.

Notice is essential to a forfeiture: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200.

Contribution of associated owners to a fund to secure compliance with rules can not be forfeited as to any owner without notice of the charges and time of hearing. The trial board can not be filled otherwise than the articles require. If the association has dissolved, the court will try the issue: *Stein v. Sherlock*, 8 Dec. Rep. 186, 6 Bull. 203.

City council must declare forfeiture before suit: *Toledo v. Railroad Co.*, 2 O. C. C. (N. S.) 97, 15 O. C. D. 441.

When an ordinance granting a street railway franchise provides that a failure to comply with the terms and conditions of the ordinance after twenty days' notice from the city council shall operate as a forfeiture of all rights and franchises granted, the failure of the owner of the franchise to lay a track in a portion of the territory covered by the franchise will not work a forfeiture of its rights to lay such track in the absence of notice given as provided in the ordinance: *Akron v. Traction Co.*, 6 O. C. C. (N.S.) 445, 17 O. C. D. 536 [affirmed, without opinion, *Akron v. Traction Co.*, 75 O. S. 565].

XIII. PARTIES.

For who can enforce forfeiture, see V, herein.

For the general discussion of the subject of parties, see PARTIES.

XIV. PLEADING.

A complaint in forcible entry and detainer for a violation of G. C., § 6207 is sufficient if it substantially comports with the language of the statute: *McGarvey v. Puckett*, 27 O. S. 669, III Longsdorf's Notes, 381.

For the general discussion of the subject of pleading, see PLEADINGS.

XV. EVIDENCE.

The burden of proof upon the assertion of the defense of forfeiture of a devise for failure to probate the will is upon contending heir: *Mitchell v. Long*, 9 O. N. P. (N.S.) 113, 20 O. D. (N.P.) 41.

For the general discussion of the subject of evidence, see EVIDENCE.

FORFEITURE OF CHARTER.

See CORPORATIONS; QUO WARRANTO.

FORFEITURE OF RECOGNIZANCE.

See BAIL AND RECOGNIZANCE.

FORGED AFFIDAVIT.

See AFFIDAVIT; FORGERY.

FORGED CHECK.

See NEGOTIABLE INSTRUMENTS; BANKS AND BANKING; FRAUD AND DECEIT; FORGERY.

FORGED MONEY.

See COUNTERFEITING.

FORGERY.

Scope Note.—Includes falsely and fraudulently making or altering instruments, other than circulating notes issued as money or other government obligations or securities, and uttering and publishing such forged instruments; nature and elements of the crimes of forgery, uttering and publishing forged instruments; and prosecution and punishment of such acts as public offenses. Excludes effect of alterations of instruments in general; rights and liabilities of banks paying, discounting, etc., forged or altered papers, and of parties to and holders of forged or altered promissory notes, bills of exchange, checks, etc., bonds and other particular classes of instruments; and offenses of making, passing, etc., counterfeit coin or other money or government securities.

Cross References.

For general questions, see AIDERS, ABETTERS, AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; JURISDICTION; SENTENCE; VENUE; VERDICT.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For counterfeiting, see COUNTERFEITING.

For rights and liabilities in connection with forged notes, see NEGOTIABLE INSTRUMENTS.

For the liability of a bank for paying forged paper, see BANKS AND BANKING.

That ratification of a forgery is not possible, see AGENCY.

That one may be estopped to deny a forgery, see AGENCY.

That there is an implied warranty in the sale of spurious bank bills, see SALES.

For sending fraudulent instruments, see SENDING FRAUDULENT INSTRUMENT.

As to the effect of a judgment against one indorser because of a forgery upon prior indorsers, see JUDGMENT.

For election as to counts in an indictment for forgery, see INDICTMENT.

For the competency of evidence of other forgeries in case of wills, see WILLS, LEGACIES AND DEVISES.

For the effect of altering an instrument, see ALTERATION OF INSTRUMENTS.

ANALYTICAL OUTLINE.

I. Definition, 7949.

II. Elements of Forgery, 7949.

A. Intent to defraud, 7949.

B. Falsely makes, alters, etc., 7950.

C. Prejudice of another's rights, 7951.

D. Subjects of forgery, 7951.

1. Record, or matter of public nature, 7951.

2. Bond, note, check, etc., 7951.

3. Order for money, 7952.

4. Order for goods or chattels, 7953.

5. Receipt, 7953.

III. Uttering and Publishing Forgery, 7953.**IV. Aiders and Abettors, 7954.****V. Defenses, 7955.****VI. Procedure, 7955.****A. Venue, 7955.****B. Indictment, 7955.****1. Averments, 7955.****a. Purport and value, 7955.****b. Describing instrument, 7956.****c. Intent to defraud, 7957.****d. Miscellaneous, 7957.****2. Repugnancy, 7958.****3. Joinder, 7958.****C. Evidence, 7959.****1. Burden of proof, 7959.****2. Who may testify, 7959.****3. Prior similar crimes, 7959.****4. Variance, 7960.****5. Miscellaneous, 7961.****D. Sentence, 7961.****E. Review, 7962.****I. DEFINITION.**

Forgery is the false and fraudulent making or altering of an instrument, which would, if genuine, apparently impose a legal liability upon another or change his legal liability to his prejudice: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

II. ELEMENTS OF FORGERY.**A. INTENT TO DEFRAUD.**

An intent to prejudice, damage, or defraud is an essential ingredient in the crime of forgery and must be specifically and positively averred in the indictment: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

The intent to defraud some one must be averred and proved as laid: *Barnum v. State*, 15 O. 717, I Longsdorf's Notes, 740; *Clarke v. State*, 8 O. S. 630, II Longsdorf's Notes, 370.

A forgery is complete, though no one was actually injured, if the tendency and intent are manifest: *Hess v. State*, 5 O. 5, I Longsdorf's Notes, 241.

If in a prosecution for forgery an intent to defraud is shown, it is immaterial who was defrauded or intended to be defrauded thereby: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800, and exceptions

overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

Proof of the single act of forgery charged in an indictment will not of itself warrant the inference of guilty knowledge and intent: *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800 [affirming *State v. Lingafelter*, 52 Bull. 88, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

B. FALSELY MAKES, ALTERS, ETC.

Where a note is signed in blank, with marginal figures indicating the amount for which it is to be filled up, and the party to whom it is intrusted for filling up and negotiation alters the figures, and fills up and negotiates the note for a larger amount, it is no forgery of the note: *Schryver v. Hawkes*, 22 O. S. 308, III Longsdorf's Notes, 76.

Where A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note, by falsely representing that C was authorized by B so to do, it was held that A was guilty of forgery: *Gregory v. State*, 26 O. S. 510, III Longsdorf's Notes, 323.

Cutting out the words "one dollar" from the body of a bank note, artfully adjusting blank paper in the space so made, and substituting the figure five for the figure one, where it appears in the margin of the bill, with intent to defraud, is altering a bank note: *Haynes v. State*, 15 O. S. 455, II Longsdorf's Notes, 740.

An unauthorized order by a village clerk other than on the treasurer, the clerk signing his own name, and not personating another, even though it is published by him as an authorized instrument, does not constitute a forgery: *Snyder v. State*, 8 O. C. C. 463, 4 O. C. D. 279.

C. PREJUDICE OF ANOTHER'S RIGHTS.

To constitute forgery the instrument must be such when forged, that it does or may tend to prejudice the rights of another: *Barnum v. State*, 15 O. 717, I Longsdorf's Notes, 740; *Clarke v. State*, 8 O. S. 630, II Longsdorf's Notes, 370.

Where a bill of exchange to the order of A, which has not been endorsed by A, is taken by B, and C's name is endorsed thereon by B without authority, it is not a forgery since the endorsement, if genuine, could not operate as a transfer of the bill: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

An indictment charging that C, with intent to defraud L, had falsely altered a receipt made to L by a county treasurer for the payment of taxes, so that the receipt in its altered form represented the payment of a sum larger than that originally expressed therein, is bad, because upon its face the receipt could not prejudice the rights of L: *Clarke v. State*, 8 O. S. 630, II Longsdorf's Notes, 370.

A member of a firm or partnership can not be prosecuted for the forgery of a contract for advertising turned in to the company with intent to defraud it; one member of a partnership can not commit a fraud upon the other member or members for which he would be criminally liable: *State v. Pope*, 4 O. L. R. 532.

D. SUBJECTS OF FORGERY.

1. Record, or Matter of Public Nature.

A county treasurer's tax duplicate is not a "record" within the meaning of G. C., § 13083: *Smith v. State*, 18 O. S. 420, II Longsdorf's Notes, 906.

A certificate of conduct made to a church session is not "an authentic matter of a public nature," so as to make it the subject of forgery: *Peairs v. Harrah*, T. 268.

Formerly a peddler's license was not "an authentic matter of public nature": *State v. Bronson*, 1 Dec. Rep. 31, 1 W. L. J. 222.

2. Bond, Note, Check, Etc.,

A bond purporting to be issued under a statute, in anticipation of a tax authorized to be levied, to pay for a public improve-

ment, is the subject of forgery, although the statute, under certain conditions which may or may not exist, would have an operation in conflict with the constitution: *Bowles v. State*, 37 O. S. 35, III Longsdorf's Notes, 890.

A foreign bank bill may be the subject of forgery: *Thompson v. State*, 9 O. S. 354, II Longsdorf's Notes, 381.

An endorsement of a promissory note is a subject of forgery: *Poage v. State*, 3 O. S. 229, II Longsdorf's Notes, 22.

An endorsement of a check is a subject of forgery: *Cosner v. State*, 1 O. C. C. (N. S.) 197, 14 O. C. D. 734 [affirmed, without opinion, *State v. Cosner*, 68 O. S. 722].

Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexistent person or order, the drawer or maker being in ignorance of the fact and intending no fraud, the bank on which the check is drawn is not authorized to pay it and charge the amount of the instrument so drawn to the account of its customer on the endorsement of the party presenting it, although the instrument appears to have been previously endorsed by the party named as payee. Such endorsement is in effect a forgery, and the payment thereon by the bank confers no right on it as against the maker or drawer of the instrument, the check: *Jones' Sons v. Bank*, 14 O. N. P. (N.S.) 129, 23 O. D. (N.P.) 353.

3. Order for Money.

A forged instrument as follows: "Wen. 19th, Mr. Davis, pleas let the boy have \$6.00 dolers for me, B. W. Earl," is *prima facie* an order for the payment of money within the meaning of G. C., § 13083: *Evans v. State*, 8 O. S. 196, II Longsdorf's Notes, 332.

An instrument of the following tenor: "M. C. & Co., Pay Binam \$5.75. J. L. C.," does not unaided by *innuendo* import an order for the payment of money: *Bynam v. State*, 17 O. S. 142, II Longsdorf's Notes, 823.

A valid warrant for money is a claim against the drawer whether the drawer has money on deposit or not. Hence in an indictment for forgery of an instrument for money, it is not necessary to allege that the person whose name is forged had money on deposit with the drawee: *State v. Mulford*, 12 O. D. (N.P.) 720.

Certificates of indebtedness of the state of Kentucky, payable in its bonds, is a subject of forgery as a "contract for the payment of property." Court divided as to whether this is a bill of credit within the United States constitutional prohibition. (Art. I, § 10.): *State v. Neale*, 1 Dec. Rep. 153, 2 W. L. J. 570.

4. Order for Goods or Chattels.

A forged instrument in the following terms: "Akron, May 2, 1874. Mr. Schroeder: Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for. J. Butler," is an "order for the delivery of goods and chattels": *Chidester v. State*, 25 O. S. 433, III Longsdorf's Notes, 250.

An instrument of the following tenor: "Jan. the 7, 1870. Sir Mr. aid please let the barer Hav a pare of boots and I will settel the sam, A Renick," is an order for the delivery of goods: *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

An instrument of the following tenor: "Dayton, Sept. 14 '60. Messrs. Langdon & Bro., Gents: Let the bearer have one of your smallest, with load, and charge to me. R. Chambers," is not *per se* an order for the delivery of goods: *Carberry v. State*, 11 O. S. 410, II Longsdorf's Notes, 516.

An instrument of the following tenor: "J. B. Vail, 322 West Market Street, Office 125 West Market Street, Please give bearer coat and oblige, J. B. Vail," is not *prima facie* an order for the delivery of goods: *Moore v. State*, 13 O. C. C. 10, 7 O. C. D. 70.

5. Receipt.

An indorsement on a note of partial payment, in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt, the alteration of which by the payee is forgery: *Kegg v. State*, 10 O. 75, I Longsdorf's Notes, 490.

A receipt for the money due on a mortgage is a subject of forgery: *Ramsey v. Riley*, 13 O. 157, I Longsdorf's Notes, 631.

The fraudulent alteration of a settlement of a book account, with intent to defraud A, by including within the terms of settlement a claim of A against B, which accrued after the settlement was in fact made, is forgery: *Barnum v. State*, 15 O. 717, I Longsdorf's Notes, 740.

III. UTTERING AND PUBLISHING FORGERY.

One who signs a forged will as a witness, knowing it to be forged, and later assists in the probate thereof, is guilty of "uttering and publishing" the forged will within the meaning of G. C., § 13083: *Corbett v. State*, 5 O. C. C. 155, 3 O. C. D. 79 [motion to file petition in error overruled, *Corbett v. State*, 23 Bull. 236].

A charge for aiding to pass forged paper as also for uttering and publishing the same, must set forth that the accused knew it to

be forged: *Anderson v. State*, 7 O. (pt. 2) 250, I Longsdorf's Notes, 406.

The offense of "uttering and publishing as true and genuine" any bank notes, is a separate and distinct offense from that described in G. C., § 13100 punishing the "selling, bartering," etc., of any bank note; and proof of uttering and publishing counterfeit bank notes will not sustain an indictment for selling and bartering such notes: *Vanvalkenburg v. State*, 11 O. 404, I Longsdorf's Notes, 572; *Bevington v. State*, 2 O. S. 160, I Longsdorf's Notes, 1036.

Uttering and forgery of the same note is one crime: *Devere v. State*, 5 O. C. C. 509, 3 O. C. D. 249.

IV. AIDERS AND ABETTERS.

Under G. C., § 12380, when it provided that the aider and abettor could be "punished" as a principal, it was held that one charged with forgery as principal could not be convicted if he was not present at the commission of the offense, even though it was done by his procurement: *Chidester v. State*, 25 O. S. 433, III Longsdorf's Notes, 250.

G. C., § 12380 now reads that an aider and abettor may be "prosecuted and punished as if he were the principal," and a forger who procures another to utter the forged note, and is indicted for uttering it, may be convicted on evidence showing that he is only the procurer or abettor of the one who uttered the forged instrument: *Devere v. State*, 5 O. C. C. 509, 3 O. C. D. 249 [motion to file petition in error overruled, *Devere v. State*, 25 Bull. 435]; *Hanoff v. State*, 37 O. S. 178, III Longsdorf's Notes, 903.

Aiders and abettors in Ohio do not include common law accessories after the fact; and where one is indicted for forgery but the evidence shows that the offense was committed by another and that the accused merely performed acts to cover up the forger and to prevent the detection of the forger, such acts do not constitute aiding and abetting as defined in G. C., § 12380: *State v. Lingafelter*, 77 O. S. 523, IV Longsdorf's Notes, 1035.

One who signs another's name to a note solely in reliance on representations of a third person that it was specifically authorized, is not guilty of forgery because acting in good faith. But if the representations are false such third person is guilty of forgery the same as if he had used his own hand: *Shinew v. Bank*, 84 O. S. 297.

For the general subject of aiders and abettors, see AIDERS, ABETTERS AND ACCOMPLICES.

V. DEFENSES.

Intoxication is not a defense to uttering a counterfeit bill, but evidence of it may be submitted to the jury as bearing on the question of whether the accused knew the bill to be counterfeit: *Pigman v. State*, 14 O. 555, I Longsdorf's Notes, 688.

Where a defense to a charge of forgery is an alibi, the burden is on the defendant to prove the same by a preponderance of the evidence, and the defendant should be given the benefit of any doubt arising from such a defense: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N. S.) 537, 18 O. C. D. 800, and exceptions overruled, without opinion, *State v. Lingafelter*, 73 O. S. 336].

VI. PROCEDURE.

A. VENUE.

On a charge of uttering and publishing a forged instrument, the place where the instrument was uttered, and not the place where the forgery was committed, determines the jurisdiction of the court over the accused; and where the instrument is forged in Missouri and is uttered through an innocent agent in Ohio, the forger may be prosecuted in this state for "uttering and publishing" even though he was never in the state: *Lindsey v. State*, 38 O. S. 507, III Longsdorf's Notes, 989.

Where A sent to B a paper with only the name "Richard Brown" written on it, and B by A's procurement filled in a promissory note above the name, A may be prosecuted for forgery in the county in which the note is written: *Devere v. State*, 5 O. C. C. 510, 3 O. C. D. 249.

For venue in general, see VENUE.

B. INDICTMENT.

1. Averments.

(a) Purport and Value.

Formerly it was necessary to set out in the indictment an exact copy of the forged instrument and the averment must profess to describe it with precision; and an averment that the forged note was of the "purport and effect following, to-wit," was held insufficient: *Dana v. State*, 2 O. S. 91, I Longsdorf's Notes, 1024.

The word "value" in G. C., § 13584 is used in that section in the sense of "effect," "import," and not in the sense of "worth of money": *Chidester v. State*, 25 O. S. 433, III Longsdorf's Notes, 250.

In setting out a forged note according to "its purport and value," it is not necessary

to set out a power of attorney to confess judgment attached to the note: *Burdge v. State*, 53 O. S. 512, IV Longsdorf's Notes, 611.

An indictment under G. C., § 13350 for altering a tally sheet or poll book, need not set out a copy of either, and G. C., § 13584 is therefore not applicable: *State v. Granville*, 45 O. S. 264, IV Longsdorf's Notes, 274.

An indictment which charges that the accused "did falsely forge and alter a certain receipt for money, which said false and forged receipt for money is of the purport, effect and value follow: 'Deposited with the Huron County Banking Co. by Childs & Hoyt, Norwalk, Ohio, 4-16, 1904, by H. F. Bailey, currency, 145. W. C. Pratt,' by changing the date thereof as follows, 4-16, 1905, with intent then and there to defraud" is insufficient without averring extrinsic facts which show that such writing was a receipt for money, since it does not on its face purport to be a receipt, and without showing how fraud could be committed by such alteration: *State v. Bailey*, 19 O. D. (N.P.) 439.

(b) Describing Instrument.

The indictment must show on its face, by proper averments, that the instrument alleged to be forged comes within the classes described in G. C., § 13083: *Bynam v. State*, 17 O. S. 142, II Longsdorf's Notes, 823; *Oarberry v. State*, 11 O. S. 410, II Longsdorf's Notes, 516.

Where the instrument does not show on its face that it comes within the classes enumerated in the statute, extrinsic facts bringing it within one of those classes must be averred: *Henry v. State*, 35 O. S. 128, III Longsdorf's Notes, 765.

Where an instrument set out is not *prima facie* a receipt, an averment that it is a receipt, and that by the rules of the bank in which it is used it is a receipt, are not sufficient to change its *prima facie* character: *Henry v. State*, 35 O. S. 128, III Longsdorf's Notes, 765.

The following instrument, "J. B. Vail, 322 West Market Street, Office 125 West Market Street: Please give bearer coat and oblige, J. B. Vail," is not *prima facie* an order for the delivery of goods within the meaning of G. C., § 13083, and in the absence of averments of extrinsic facts showing wherein the order was fraudulent, the indictment is insufficient: *Moore v. State*, 13 O. C. C. 10, 7 O. C. D. 70.

The instrument of the following tenor, "M. C. & Co., Pay Binam \$5.75, J. L. C.," does not, unaided by *innuendo* purport to be drawn by or on any person, natural or arti-

ficial, but the indictment is insufficient: *Bynam v. State*, 17 O. S. 142, II Longsdorf's Notes, 823.

An instrument of the following tenor, "Dayton, Sept. 14, '60. Messrs. Langdon & Bro.—Gents.: Let the bearer have one of your smallest, with load, and charge to me. R. Chambers," is not *per se* an order for a delivery of a pistol, or other goods, and extrinsic proof can not be received to give it a character and meaning not apparent on its face, the indictment containing no *innuendo*: *Carberry v. State*, 11 O. S. 410, II Longsdorf's Notes, 516.

The indictment need not follow the exact language of the statute, if the forged instrument is set forth in such a manner that the court may see, by an inspection of the indictment, that the instrument is the subject of forgery: *Poage v. State*, 3 O. S. 229, II Longsdorf's Notes, 22.

In describing a bank bill in an indictment for uttering and publishing it is not improper to set out the names and residence of the engravers as the same appear upon the margin of the bill: *Thompson v. State*, 9 O. S. 354, II Longsdorf's Notes, 381.

An indictment charging that C, with intent to defraud L, had falsely altered a receipt made to L by a county treasurer for the payment of taxes, so that the receipt represented the payment of a sum larger than that originally expressed therein, where no intrinsic circumstances giving the receipt operation beyond that imported by these terms are averred, is insufficient, since upon its face the receipt could not injure the rights of L: *Clarke v. State*, 8 O. S. 630, II Longsdorf's Notes, 370.

(c) *Intent to Defraud.*

An intent to defraud is an essential ingredient of the crime of forgery and must be specifically averred. A mere statement of such intent, in the conclusion of the indictment, by way of legal deduction or inference from the facts previously found, is insufficient: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

In an indictment charging G, as township treasurer, with having uttered and published to the township board of education, as true and genuine, a forged order, knowing it to be forged, the act is properly charged as having been done with intent to defraud the board of education: *Gregory v. State*, 11 O. S. 329, II Longsdorf's Notes, 505.

(d) *Miscellaneous.*

To convict a party of forging an indorsement on a check otherwise genuine, the indictment must charge the particular act

complained of, namely, forging an indorsement of the instrument: *Cosner v. State*, 1 O. C. C. (N.S.) 197, 14 O. C. D. 734 [affirmed, without opinion, *State v. Cosner*, 68 O. S. 722].

In an indictment for forging and uttering an instrument purporting to be the last will and testament, it is not necessary to allege that the person whose name is subscribed as testator was of full age at the date of the forged instrument: *Corbett v. State*, 5 O. C. C. 155, 3 O. C. D. 79 [motion to file petition in error overruled, *Corbett v. State*, 23 Bull. 236].

The highest degree of certainty is not required in indictments; certainty to a common intent is sufficient. Defects not tending to the substantial prejudice of the defendant will not, under G. C., § 13581, defeat an indictment. Hence, in an indictment for forging an instrument for \$2,027.74, the omission of the dollar mark from the figures representing such amount will not render the indictment invalid. The amount of the instrument forged, is, in such indictment, made sufficiently evident: *State v. Mulford*, 12 O. D. (N.P.) 720.

2. *Repugnancy.*

An indictment which charges a bank bill to have been "false, forged, altered and counterfeit," is repugnant, since the word "altered" implies an instrument originally genuine, while the other terms used imply a false instrument: *Kirby v. State*, 1 O. S. 185, I Longsdorf's Notes, 963.

An indictment for uttering a "false, forged and counterfeit bank note," is not bad for repugnancy: *Stoughton v. State*, 2 O. S. 563, I Longsdorf's Notes, 1082 [*Kirby v. State*, 1 O. S. 185, I Longsdorf's Notes, 963, distinguished but doubted]; *Mackey v. State*, 3 O. S. 362, II Longsdorf's Notes, 35; *Bailey v. State*, 4 O. S. 440, II Longsdorf's Notes, 113.

An indictment described a bill payable to Blake Brothers, and not indorsed, and that defendant falsely indorsed thereon the name Drake & Brothers, and by representing himself as one of the payees drew the money, is bad, for the indorsement could not transfer the title: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

3. *Joinder.*

Where several counts are for different offenses of the same nature and with the same punishment, as, for example, counts for forging and for uttering forged bank notes, there is no misjoinder and a general verdict of guilty is good: *Stoughton v. State*, 2 O. S. 563, I Longsdorf's Notes, 1082.

C. EVIDENCE.

1. Burden of Proof.

In a prosecution for the forgery of a promissory note, when the defendant admits the making of the signature, the burden is not on him to prove that he had authority. In such case the burden remains on the state to prove that it was without authority, before a conviction can be had: *Romans v. State*, 51 O. S. 528, IV Longsdorf's Notes, 554.

2. Who May Testify.

In a prosecution for forgery, the person whose name is charged to be forged is a competent witness to prove that fact. It is not necessary for the prosecution to call the alleged subscribing witness: *Simmons v. State*, 7 O. (pt. 1) 116, I Longsdorf's Notes, 364.

For a full discussion of the circumstances under which a handwriting expert may testify, see *Koons v. State*, 36 O. S. 195, III Longsdorf's Notes, 840.

3. Prior Similar Crimes.

On the trial of a person charged with passing counterfeit bank notes, it is competent to prove he has passed other counterfeit paper, without producing it if it be out of the jurisdiction of the court: *Reed v. State*, 15 O. 217, I Longsdorf's Notes, 705.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate with intent to defraud, other forged deeds for the conveyance of real estate, including deeds of trust, made to a trustee to secure the payment of promissory notes or bonds, found in his possession, or proved to have been uttered and published by him, are competent testimony to show the guilty knowledge of the accused: *Lindsey v. State*, 38 O. S. 507, III Longsdorf's Notes, 989.

Evidence of the possession by the accused of other forged notes about the time of making and uttering of the note in question, is admissible as bearing on the question of guilty knowledge or intent, whether such possession be before or after the alleged forgery. Such evidence is admissible although several months intervene where the evidence clearly tends to show that the possession of the several notes were related parts of the execution of a connected scheme of fraud and forgery: *Devere v. State*, 5 O. C. C. 510, 3 O. C. D. 249 [motion to file petition in error overruled, *DeVere v. State*, 25 Bull. 435].

Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered or forged, and its use in connection with other instruments forged by the defendant: *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800 [motion to file petition in error overruled, *Lingafelter v. State*, 51 Bull. 377, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

4. Variance.

It is no variance between the note offered to the jury and the one set out in the indictment, that in the latter, the letter "s" is added to the word "promise," the sound and sense being the same: *May v. State*, 14 O. 461, I Longsdorf's Notes, 681.

An indictment charging forgery of a note, described in the indictment as a note without a seal, is not supported by evidence showing forgery of a note under seal, and it is error to admit such evidence in proof of the charge: *Hart v. State*, 20 O. 49, I Longsdorf's Notes, 895.

In indictment for forgery of a promissory note, the omission, in setting out the note according to its "purport and value" (G. C., § 13584), of a power of attorney to confess judgment, attached to the note, is not a material variance as defined in G. C., § 13582, and is not a ground of acquittal: *Burdge v. State*, 53 O. S. 512, IV Longsdorf's Notes, 611.

When, on a trial for forgery a variance is alleged between the name to the forged instrument and the name appearing in the indictment, if the variance is plain, such instrument ought not to be allowed to go in evidence; but if the forged name is uncertain, and susceptible of being read as agreeing with the name stated in the indictment, it is not error for the court to submit the question to the jury: *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

An indictment charging the uttering and publishing of a forged check is not supported by proof of the forgery of the indorsement of the payee's name thereon: *Cosner v. State*, 1 O. C. C. (N.S.) 197, 14 O. C. D. 734 [affirmed, without opinion, *State v. Cosner*, 68 O. S. 722].

Under an indictment for forgery, proof that the offense was committed on or about the time stated in the indictment is sufficient: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800, motion for leave

to file petition in error overruled, *Lingafelter v. State*, 51 Bull. 377, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

For a general discussion of the subject of variance, see EVIDENCE; VARIANCE.

5. Miscellaneous.

The letter of a cashier of a bank in New York, to whom paper said to be forged had been sent for collection, making suggestions as to the residence of the parties to the paper, is not competent evidence against one charged with the forgery. Nor is the protest of a notary, certifying that the parties to the paper are not to be found in New York: *Farrington v. State*, 10 O. 354, 1 Longsdorf's Notes, 518.

Where two persons are associated to pass counterfeit bank notes, the act of one may be given in evidence against the other, although the one whose acts are testified to is not indicted: *May v. State*, 14 O. 461, 1 Longsdorf's Notes, 681.

Evidence which tends to prove that the forged instrument could not under any state of circumstances, prejudice the rights of anyone, is competent to go to the jury: *Barnum v. State*, 15 O. 717, 1 Longsdorf's Notes, 740.

In a criminal prosecution for forging a will, the truth or falsity of matters recited in the alleged will may be shown as bearing upon the question of the genuineness of the instrument. Where these recitals are of the feelings of the alleged testatrix, her acts and declarations occurring shortly before or after the date of the alleged forgery may be introduced to show that her feelings were not those recited in the instrument; and where the recital in the will is, that A is the testatrix's "only true friend on earth," declarations of the testatrix that she considered A "a scheming and dangerous woman" is admissible: *Breck v. State*, 4 O. C. C. 160, 2 O. C. D. 477 [affirmed, without opinion, *Breck v. State*, 21 Bull. 204]; *Corbett v. State*, 5 O. C. C. 155, 3 O. C. D. 79.

D. SENTENCE.

Where an indictment charges A in one count with the forgery of a note, and in the second count with uttering the forged note, and a verdict of guilty is rendered on each count separate sentence on each count is erroneous. A should be sentenced as for the simple crime of forgery: *Devere v. State*, 5 O. C. C. 509, 3 O. C. D. 249 [motion to file petition in error overruled, *DeVere v. State*, 25 Bull. 435]. See also SENTENCE.

E. REVIEW.

To review a conviction on the weight of evidence, the original forged paper and genuine signatures in evidence, and not copies of them, must be in the bill of exceptions, for the jury had the right to compare them, and the court must have all the evidence the jury had: *Breck v. State*, 4 O. C. C. 160, 2 O. C. D. 477 [affirmed, without opinion, *Breck v. State*, 21 Bull. 204]. See also ERROR.

FORMAL PARTIES.

See PARTIES.

FORMATION OF CONTRACT.

See CONTRACTS.

FORMATION OF JURY.

See JURY.

FORMER ACQUITTAL.

For AUTREFOIS ACQUIT AND CONVICT.

FORMER ACTION PENDING.

See PLEADINGS; JUDGMENT.

FORMER ADJUDICATION.

See JUDGMENT.

FORMER CONVICTION.

See AUTREFOIS ACQUIT AND CONVICT.

FORMER DECISION.

For adherence to former decisions, see COURTS.

FORMER EVIDENCE.

See EVIDENCE.

FORMER JEOPARDY.

For former jeopardy, see AUTREFOIS ACQUIT AND CONVICT.

FORMER RECOVERY.

See JUDGMENT.

FORMER TESTIMONY.

See EVIDENCE.

FORMER TRIAL.

For admissibility of evidence given at a former trial, see EVIDENCE.

FORM OF ACTIONS.

See ACTIONS and cross references thereunder.

FORMS.

For forms, see also under various subjects.

For the form of an answer of a pendency of another action, by way of abatement, see *Weil v. Guerin*, 42 O. S. 299, IV Longsdorf's Notes, 113.

For the form of an accounting and open account stated, see *Bank v. Jahn*, 85 O. S. 406.

For the form of a petition under the Adair Liquor Law, see *Schneider v. Hosier*, 21 O. S. 98, III Longsdorf's Notes, 11.

For the form of an affidavit charging contributing to the delinquency of a female minor, see *Fisher v. State*, 84 O. S. 360.

For the form of affidavits under G. C., §§ 13050 and 13056, see *Kubach v. State*, 1 O. N. P. (N.S.) 406, 14 O. D. (N.P.) 726; *Kappes v. State*, 4 O. C. C. (N.S.) 14, 15 O. C. D. 723.

For the form of a petition under the anti-trust law, see *Salt Co. v. Salt Co.*, 12 O. D. (N.P.) 386.

For the form of an arbitration bond between a city and an individual, see *Springfield v. Walker*, 42 O. S. 543, IV Longsdorf's Notes, 129.

For the form of a petition to collect assessments, see *Toledo v. Board of Education*, 48 O. S. 83, IV Longsdorf's Notes, 404.

For the form of a petition to recover back a payment of an illegal assessment, see *Pelton v. Bemis*, 44 O. S. 51, IV Longsdorf's Notes, 193.

For the form of a journal entry allowing a bill of exceptions, see *Feloh v. Hodgman*, 62 O. S. 312, IV Longsdorf's Notes, 834.

For the form of a petition on a forthcoming bond of attachment, see *Johnston v. Oliver*, 51 O. S. 6, IV Longsdorf's Notes, 527.

For the form of a petition on a guardian's bond, see *King v. Bell*, 36 O. S. 460, III Longsdorf's Notes, 870.

For a guardian's petition on a guardian's bond held bad for not averring liquidation of amount, or why probate court could not compel an accounting, see *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149.

For the form of a petition on the bond of an officer for using unnecessary force in making an arrest, see *Drolesbaugh v. Hill*, 64 O. S. 257, IV Longsdorf's Notes, 870.

For the form of a petition on an official bond of a secretary of a building society, see *Building Association v. Cummings*, 45 O. S. 664, IV Longsdorf's Notes, 302.

For the form of a petition for the breach of a sheriff's bond and also the answer, see *Hubbard v. Elden*, 43 O. S. 380, IV Longsdorf's Notes, 172.

For the form of a petition on an indemnifying bond to a sheriff, see *Martin v. Bolenbaugh*, 42 O. S. 508, IV Longsdorf's Notes, 126.

For the form of a contract to build bridges for a railway company, see *Bridge Co. v. Bowman*, 41 O. S. 37, IV Longsdorf's Notes, 49.

For the form of a petition for breach of contract to deliver stone, see *Smith v. Lime Co.*, 57 O. S. 518, IV Longsdorf's Notes, 727.

For the form of a petition for conversion, see *Cow Run Co. v. Lehmer*, 41 O. S. 384, IV Longsdorf's Notes, 67.

For the form of a petition for the death of an employe of one railroad by negligence of another railroad, see *Railway v. Kernochan*, 55 O. S. 306, IV Longsdorf's Notes, 662.

For the form of a petition for wrongfully causing the death of railroad employes crossing railroad tracks, see *Pennsylvania Co. v. Mahoney*, 22 O. C. C. 470, 12 O. C. D. 367.

For the form of a petition for deceit in the sale of bags, see *Duncan v. Wills*, 51 O. S. 433, IV Longsdorf's Notes, 550.

For the form of a divorce decree ordering the release of dower, see *Julier v. Julier*, 62 O. S. 90, IV Longsdorf's Notes, 825.

For the form of a petition in error by a minor after attaining majority to reverse a judgment and assignment of error therein, see *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802.

For the form of a petition of an executor on a note, see *Rosebrough v. Ansley*, 35 O. S. 107, III Longsdorf's Notes, 763.

For the form of a petition for false imprisonment against a mayor of a village, see *Truman v. Walton*, 59 O. S. 517, IV Longsdorf's Notes, 770.

For the form of a petition by a third person to recover money lost at gambling, see *Robertson v. Deming*, 33 Bull. 190 [without opinion in supreme court].

For the form of a petition to enforce a judgment as a lien on property under the gaming act, see *Binder v. Finkbone*, 25 O. S. 103, III Longsdorf's Notes, 213.

For the form of a petition on a guaranty against directors guaranteeing a purchase by their corporations, see *Iron Co. v. Keymes*, 56 O. S. 501, IV Longsdorf's Notes, 696.

For the form of a petition to enforce a guaranty of the performance of a corporation's voidable contract, see *Zerkle v. Price*, 5 O. N. P. 480, 7 O. D. (N.P.) 465.

For the form of a petition on a guardian's promise to pay a final balance receipted for by the ward as if paid, see *Lindsay v. Lindsay*, 28 O. S. 158, III Longsdorf's Notes, 396.

For the form of a designation and entry of an heir under G. C., § 8598, see *Bird v. Young*, 56 O. S. 210, IV Longsdorf's Notes, 688.

For the form of an indictment against an aider and abettor and the principal jointly, see *Hartshorn v. State*, 29 O. S. 635, III Longsdorf's Notes, 506.

For the form of an indictment against an aider and abettor for aiding an escape of a prisoner, see *Newberry v. State*, 15 O. C. C. 208, 7 O. C. D. 622.

For the form of an indictment and sentence under the habitual criminal act, see *Blackburn v. State*, 50 O. S. 428, IV Longsdorf's Notes, 505.

For the form of an indictment against several for murder in the first degree, see *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252.

For the form of an indictment for murder while attempting to rob, see *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242.

For the form of an indictment for misconduct of an officer in not paying collections into the county treasury, see *State v. Van Gunten*, 84 O. S. 172.

For the form of an indictment for false claim by an officer, see *State v. Van Gunten*, 84 O. S. 177.

For the form of an indictment for sodomy, see *State v. Price*, 12 O. N. P. (N.S.) 349, 22 O. D. (N.P.) 435.

For the form of a petition for an injunction against assessing compensation for extending a street across a railroad (the petition involved in this case states a cause of action for the relief therein prayed for), see *Railway Co. v. Greenville*, 69 O. S. 487, IV Longsdorf's Notes, 963.

For the form of a petition for an injunction against interfering with an easement, a way, and answer, see *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346.

For the form of a cross petition on a judgment lien, see *Ambrose v. Byrne*, 61 O. S. 146, IV Longsdorf's Notes, 803.

For the form of a lease of a railroad, see *Railroad v. Railway*, 44 O. S. 287, IV Longsdorf's Notes, 212.

For the form of a wife's petition for loss of consortium, against a seller of morphine to her husband which reduced him to insanity, see *Flandermeyer v. Cooper*, 85 O. S. 327.

For the form of a petition by a wife *per quod* for loss of service, see *Westlake v. Westlake*, 34 O. S. 621, III Longsdorf's Notes, 744.

For the form of a writ of mandamus to compel payment of official fees, see *Holtz v. Commissioners*, 41 O. S. 423, IV Longsdorf's Notes, 70.

For the form of a petition and answer to compel a judge to sign a bill of exceptions, see *State v. Howes*, 43 O. S. 16, IV Longsdorf's Notes, 142.

For the form of a petition for money had and received, see *McNutt v. Kaufman*, 26 O. S. 127, III Longsdorf's Notes, 291.

For the form of a petition against a municipal corporation held demurrable for want of a cause of action, see *Robinson v. Greenville*, 42 O. S. 625, IV Longsdorf's Notes, 135.

For the form of a petition for damages for injury by defect in a street held good on demurrer except as to one point, see *Cardington v. Fredericks*, 46 O. S. 442, IV Longsdorf's Notes, 337.

For the form of a petition in an action for damages for injury to a workman in a cemetery by negligence of the superintendent, see *Toledo v. Cone*, 41 O. S. 149, IV Longsdorf's Notes, 56.

For the form of a petition against a city for articles sold to gas trustees, criticised, see *Kerr v. Bellefontaine*, 59 O. S. 446, IV Longsdorf's Notes, 769.

For the form of a petition by a divorced wife against her former husband for necessities for the support of a child, see *Pretzinger v. Pretzinger*, 45 O. S. 452, IV Longsdorf's Notes, 287.

For the form of a petition for damages for negligence for injuries received by a spectator at an exhibition by a fall of seats, see *Dunn v. Agricultural Society*, 46 O. S. 93, IV Longsdorf's Notes, 314.

For the form of a prayer against a non-resident if living and his heirs if dead, see *Rhodes v. Gunn*, 35 O. S. 387, III Longsdorf's Notes, 791.

For the form of an indictment for constructing a nuisance by obstructing a highway, see *Matthews v. State*, 25 O. S. 536, III Longsdorf's Notes, 261.

For the form of a petition against an officer to recover money paid to him as compensation without authority, see *Jones v. Commissioners*, 57 O. S. 189, IV Longsdorf's Notes, 711; and see *State v. Brown*, 20 O. C. C. 57, 11 O. C. D. 163.

For the form of a complaint of misconduct in office against a prosecuting attorney, see *Graham v. Stein*, 18 O. C. C. 770, 4 O. C. D. 140.

For the form of an indictment for perjury, see *State v. Smith*, T. 225.

For the form of information in *quo warranto*, see *State, ex rel., v. Kennon*, 7 O. S. 546, II Longsdorf's Notes, 321.

For the form of a petition in *quo warranto*, see *State v. Buckley*, 60 O. S. 273, IV Longsdorf's Notes, 785.

For the form of a petition in *quo warranto* to oust an officer elect and induct the relator, founded on a failure to obtain a majority of votes, see *State, ex rel., v. Wright*, 56 O. S. 540, IV Longsdorf's Notes, 697.

For the form of a petition for injury by noise, smoke and danger of fire from a railroad in a street, see *Railroad v. Lersch*, 58 O. S. 639, IV Longsdorf's Notes, 752.

For the form of a petition and answer in replevin for impounding strays wrongfully, see *Albright v. Payne*, 43 O. S. 8, IV Longsdorf's Notes, 142.

For the form of a petition in replevin by a mortgagee of an elephant, see *Robinson v. Fitch*, 26 O. S. 659, III Longsdorf's Notes, 338.

For the form of a plea of *res judicata*, see *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346.

For the form of a petition against a seller for nondelivery, see *Simmons v. Green*, 35 O. S. 104, III Longsdorf's Notes, 762.

For the form of a petition to recover the purchase price paid for goods, see *Crooks v. Eldridge & H. Co.*, 64 O. S. 195, IV Longsdorf's Notes, 869.

For the form of a sentence in case of conviction on several counts, see *Kubach v. State*, 1 O. N. P. (N.S.) 405, 14 O. D. (N.P.) 726 [affirmed, *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488].

For the form of a petition for services of an attorney against a surviving partner, see *Weil v. Guerin*, 42 O. S. 299, IV Longsdorf's Notes, 113.

For the form of a treasurer's petition to collect, see *Shotwell v. Moore*, 45 O. S. 632, IV Longsdorf's Notes, 300.

For the form of a county treasurer's petition to recover back taxes unpaid by reason of too low a valuation, see *McCurdy v.*

Prugh, 59 O. S. 465, IV Longsdorf's Notes, 769.

For the form of a wife's action *per quod*, see *Westlake v. Westlake*, 34 O. S. 621, III Longsdorf's Notes, 744.

For the form of a petition to contest a will, see *Wagner v. Ziegler*, 44 O. S. 59, IV Longsdorf's Notes, 193.

For the form of a decree construing and authorizing a sale in furtherance of a will, see *Bierce v. Bierce*, 41 O. S. 241, IV Longsdorf's Notes, 59.

FORNICATION.

For fornication, see ADULTERY; SEXUAL INTERCOURSE.

For fornication in cases of incest, see INCEST.

FORSWEARING.

See PERJURY.

FORTHCOMING BONDS.

See ATTACHMENT; REPLEVIN.

FORTUITOUS EVENT.

See ACCIDENT; NEGLIGENCE.

FOR VALUE RECEIVED.

See NEGOTIABLE INSTRUMENTS.

FORWARDING CARRIERS.

See CARRIERS; RAILROADS.

FOUL ODORS.

See NUISANCE.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW.

FRACTION OF DAY.

See TIME.

FRANCHISES.

Scope Note.—Includes definitions and nature of franchise; legislative and municipal control of same; and the rights and powers acquired by franchise. Excludes franchises necessary to certain kinds of business; and monopolies.

Cross References.

- For constitutional restrictions, see CONSTITUTIONAL LAW.
For grants of franchises by municipal corporations, see MUNICIPAL CORPORATIONS.
For the primary franchise of a corporation, see CORPORATIONS.
For franchises of railroads, see RAILROADS.
For franchises of street railroads, see STREET RAILWAYS AND INTERURBAN RAILWAYS.
For telegraph and telephone franchises, see TELEGRAMS AND TELEGRAPH COMPANIES; TELEPHONES AND TELEPHONE COMPANIES.
For waterworks franchise, see WATER COMPANIES.
For grant of franchise for a ferry, see also FERRIES.
For the franchise of a turnpike company, see TURNPIKE AND PLAND ROAD COMPANIES.
For franchises of electric light companies, see ELECTRIC LIGHTS AND ELECTRIC LIGHTING.
For franchises of gas companies, see GAS COMPANIES.
For franchises of heat and power companies, see HEAT AND POWER.
For franchises to place pneumatic tubes in streets, see PNEUMATIC TUBES.
For grant of power of eminent domain, see EMINENT DOMAIN.
For the remedy of mandamus, see also MANDAMUS.
For the remedy of quo warranto, see also QUO WARRANTO.
For taxation of corporate franchise, see TAXATION.
For the abutting owner's rights as to the use of streets, see ABUTTING OWNERS; also under respective companies.
For abutting owner's rights as to consent to street railway grant, see STREET RAILWAYS AND INTERURBAN RAILWAYS.
For control and regulation of right to use streets in case of street railroads, see STREET RAILWAYS AND INTERURBAN RAILWAYS.
For the question of monopolies, see MONOPOLIES AND UNLAWFUL COMBINATIONS.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 7971.
- II. Legislative Control, 7972.
- III. Powers of Municipality, 7974.
- IV. Ordinances, 7976.
 - A. Compliance with statutes, 7976.
 - B. Conditions in, 7977.
 - C. Ultra vires grant, 7978.
 - D. Other cases, 7979.
- V. Construction, 7980.
- VI. Exclusive Franchise, 7983.
- VII. Consideration, 7984.
- VIII. Enforcement of Provisions, 7986.
- IX. Termination, Renewal, etc., 7989.
- X. Misuse and Forfeiture, 7990.
- XI. Tax, 7992.
- XII. Liability Under, 7993.
- XIII. Injunction, 7993.
- XIV. Pleading, 7994.
- XV. Review, 7995.

I. DEFINITION AND NATURE.

A franchise is a particular privilege conferred by the grant of the government and vested in individuals; or, as defined by Blackstone, a branch of the king's prerogative subsisting in the hands of a subject: *State v. Railway Co.*, 50 O. S. 239, IV Longsdorf's Notes, 497.

A franchise is a right belonging to the government, as a sovereign, yet committed, in trust, to some officer, corporation or individual: *Knoup v. Bank*, 1 O. S. 603, I Longsdorf's Notes, 1010.

"Franchise," in a general sense, is a liberty or privilege; a particular privilege conferred upon individuals by grant from the government. They are usually held by corporations created for the purpose of enjoying them: *Illuminating Co. v. Mt. Gilead*, 8 O. N. P. 669, 10 O. D. (N.P.) 235.

The franchise of a street railway company is that which is commonly known as the ordinance under which it appears that the franchise emanates from the state. The legislature confers the authority upon the municipality and the municipality through its proper board passes an ordinance which, when accepted by the company, constitutes an agreement between the parties, which can not be altered by either party: *Dayton v. Railway Co.*, 12 O. D. (N.P.) 258.

The right to construct and operate a street railway in streets of a city, prior to the act of May 14, 1878 (75 v. 359), was a franchise or privilege granted by the state upon condition that the city consent to its exercise: *State v. Railway Co.*, 1 O. C. C. (N.S.) 145, 14 O. C. D. 609.

There is a difference between an office and a franchise; and the term "franchise" as used in the statute is ordinarily applied to a corporation, or something in connection therewith, and is clearly distinguishable from an office: *State v. McGonagle*, 5 O. C. C. (N.S.) 292, 16 O. C. D. 685.

The right to carry on the business of insurance is a franchise and not a matter of natural right in this state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536; *Robbins v. Hennessey*, 86 O. S. 181.

Where incorporation under the general law is for purposes of a public nature to meet a public necessity, or of such a character that having been once undertaken it can not be discontinued without prejudice to the public interest, the franchise takes upon itself the character of a contract between the state from whom the franchise issued and the body corporate existing and operating under it: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218 [reversing *Gas Co. v.*

Akron, 81 O. S. 33, IV Longsdorf's Notes, 1055].

When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055.

A renewal ordinance granting to a street railway company the right to operate upon certain streets constitutes a contract between the municipality and the company, the obligations of which can not be affected by subsequent legislation: *Railroad Co. v. Cleveland*, 7 O. N. P. (N.S.) 161, 17 O. D. (N.P.) 763. See also STREET RAILWAYS AND INTER-URBAN RAILWAYS.

Public service corporations, such as gas or water companies, are virtually subject to two contracts, one with the state to render the public service, which the purposes of its organization have defined as set forth in its articles of incorporation, and the other with the municipality to perform its agreement as set forth in the ordinance by which the consent of the municipal authorities was obtained: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218 [reversed, on other grounds, *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055]. See also GAS COMPANIES.

A franchise, granting to a gas company the right to lay its pipes in the streets and alleys of a municipality, is a contract between the gas company and the municipality, which can not be abrogated as to one of the streets included therein by vacation of said street by the municipality and the reversion of title therein to the abutting owners, but the right to maintain said pipe continues so long as the right remains in the company to supply gas to the municipality and its inhabitants: *Gas Co. v. Railway*, 14 O. N. P. (N.S.) 171.

II. LEGISLATIVE CONTROL.

Telegraph and telephone companies do not depend for their franchise in the streets, alleys, etc., of cities and villages upon a grant from the municipal authorities; the legislature has directly invested them with the right to use the streets, etc., for this purpose: *State v. Telephone Co.*, 72 O. S. 60, IV Longsdorf's Notes, 988.

Telephone companies organized in this state obtain power to construct their lines

along the streets and public ways of municipal corporations from the state by virtue of G. C., § 9170, and not from the municipal authorities: *Farmer v. Telephone Co.*, 72 O. S. 526, IV Longsdorf's Notes, 992.

A telephone company obtains its right to the use of the streets from the legislature, and the function of the probate court includes neither the length nor extent of such use, but is limited strictly to the mode: *Telephone Co. v. South Newburgh*, 4 O. N. P. (N.S.) 624, 52 Bull. 173.

Telephone companies organized under the laws of this state, have the right, under G. C., §§ 9170, 9178, 9180 and 9191, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court, directing in what mode the lines shall be constructed, when the municipal authorities and the company fail to agree, or the former unreasonably delay to enter into an agreement with the company: *Zanesville v. Telegraph Co.*, 64 O. S. 68, IV Longsdorf's Notes, 865.

A telephone company has the right by direct legislative grant to use any and all streets within a municipality; it is the mode only of such use that is subject to agreement with the municipal authorities or of judicial determination: *Telephone Co. v. Cincinnati*, 2 O. N. P. (N.S.) 51; *Telephone Co. v. Cincinnati*, 49 Bull. 177.

The right of a telephone or a telegraph company to occupy and use the streets and alleys of a municipality with the fixtures and appliances necessary in the carrying on of its business is derived directly from the sovereign state by legislative grant, contained in G. C., §§ 9170, *et seq.* This right is absolute, and subject only to the right of the public to use the same public ways for public purposes, and to the manner of use agreed upon between the municipal authorities and the company, or prescribed by the probate court. The power of the municipality in that behalf is exhausted when it agrees upon such mode of use: *Macklin v. Telephone Co.*, 1 O. C. C. (N.S.) 373, 14 O. C. D. 446.

A legislative confirmation of a grant theretofore made by any city of a franchise to lay pipes in a street is not invalid as a retroactive law nor as a special act conferring corporate power. The legislature may provide by statute for whatever it could authorize a city to do by ordinance: *Kumler v. Silsbee*, 38 O. S. 445, III Longsdorf's Notes, 983 [affirming *Kumler v. Cincinnati*, 6 Dec. Rep. 1018, 9 Am. L. Rec. 547, 6 Bull. 82]. See also CONSTITUTIONAL LAW.

The grant of legislative power to the general assembly in Art. II, § 1 of the constitu-

tion is absolute, and is not limited in that section: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

A corporation can not dispose of its franchise nor acquire the franchises of another corporation, except under authority of legislation authorizing it: *State v. Railway Co.*, 3 O. C. C. (N.S.) 285, 13 O. C. D. 603. See also CORPORATIONS.

The curative provisions of an earlier form of G. C., § 3644, validating ordinances theretofore enacted granting franchises to lay pipes for a heating system, are general in form, and will, in the absence of proof that they apply to one city only, be presumed to have uniform operation throughout the state: *Columbus v. Heating Co.*, 16 O. D. (N.P.) 311. See also HEAT AND POWER.

The curative provisions of an earlier form of G. C., § 3644, are not invalid on the ground of their unequal operation as to all corporations of the same class, merely because this section establishes twenty-five years as the maximum period for which certain franchises may thereafter be granted, and the curative provisions might operate to validate previous ordinances granting like franchises for a longer period: *Columbus v. Heating Co.*, 16 O. D. (N.P.) 311.

The limitation in said act of 75 v. 359, of the consent to the term of twenty-five years was prospective in its operation, and not the exercise by the general assembly of any of the powers reserved to it by said sections of the constitution: *State v. Railway Co.*, 1 O. C. C. (N.S.) 145, 14 O. C. D. 609. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

III. POWERS OF MUNICIPALITY.

A municipality is without power to grant an exclusive right to use the streets unless the power is expressly granted or necessary to the execution of the powers expressly granted: *State v. Railway Co.*, 1 O. C. C. (N.S.) 145, 14 O. C. D. 609.

A municipality is without authority to prescribe by ordinance that a commodity acquired by its inhabitants shall not be used for any purpose that is not dangerous or injurious: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

An action by the city solicitor under G. C., §§ 4311, *et seq.*, will lie notwithstanding the corporation is acting under color of an ordinance, if the provision of the ordinance complained of is in excess of the power of council to grant: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [af-

firmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

A municipality has the right to impose terms and conditions under which a natural gas company may come within the limits of the city and use its streets, alleys, etc., in laying pipes for distribution of gas to consumers: *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179.

The power of a municipality to fix a maximum rate for electricity includes the power to fix a maximum rate for varying quantities used, and this power is not improperly exercised when it is so exercised as to permit of a reasonable profit to the lighting company: *Van Wert v. Service Co.*, 11 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 526.

In this state the care, supervision and control of public highways, streets and grounds in cities is delegated to the council; but, notwithstanding this delegation of general powers over them, the state, now and since 1852, has in express terms delegated to cities the power to grant to railroad companies the right to occupy and incumber and use them, or in express terms has made the right subject to agreement with the municipal authorities as to the manner in which they are to be occupied, so that the general power of care, supervision and control that has been delegated to cities, does not carry with it the power to grant such right: *Railroad v. Cincinnati*, 76 O. S. 481, IV Longsdorf's Notes, 1026 [affirming *Railroad v. Cincinnati*, 4 O. N. P. (N.S.) 497, 17 O. D. (N.P.) 689]. See also RAILROADS.

G. C., § 9320, empowering municipalities to grant to gas companies the use of streets under such regulations as they may prescribe, can not be so construed as to authorize a sale to such companies of such right for the purpose of raising revenue for municipalities; the power conferred thereunder is to impose such regulations and conditions as to the use of streets as will tend to protect the public from dangers incident to the construction and maintenance of gas lines in the streets. No authority is conferred on them thereby to exact payments as a condition of the grant: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416 [reversed, *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025].

G. C., § 3675 (96 v. 23, § 7, par. 9), which gives municipalities power to license and regulate the use of vehicles on their streets, does not confer upon a city power to impose a license fee upon all street and interurban cars operated within its limits: *Columbus v. Jeffrey*, 1 O. N. P. (N.S.) 265, 13 O. D. (N.P.) 639.

The licensing of vehicles by municipal corporations is largely justified on the

ground that their use casts a considerable expense upon the municipality for keeping the public ways in repair and where, by grants from a municipality to street cars and interurban companies the burden of repairing, cleaning and sprinkling the portion of the streets lying between their outer rails and one foot beyond is imposed on them, another burden for the same thing can not be imposed under the guise of a vehicle license: *Columbus v. Jeffrey*, 1 O. N. P. (N.S.) 265, 13 O. D. (N.P.) 639. See also MUNICIPAL CORPORATIONS.

Before any gas company can occupy public highways and places for the transaction of its business, the consent of the municipal authorities must be obtained. The municipal authorities are not limited simply to the regulation of the mode and use of the streets and the price to be charged for the gas: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645].

Where the legal title of the property which it is desired to appropriate is in a municipality in trust for the inhabitants thereof for the purposes for which it has been dedicated, as in the case of the public landing in Cincinnati, the municipality is without authority to grant to a railroad company the right to occupy the same with an elevated structure. When the municipality is incompetent to contract and convey, inability to agree is clearly shown within the meaning of G. C., § 11046: *Railway Co. v. Cincinnati*, 10 O. N. P. (N.S.) 649, 56 Bull. 317 [reversed, on other grounds, *Railway Co. v. Cincinnati*, 15 O. C. C. (N.S.) 62, 23 O. C. D. 464]. See also EMINENT DOMAIN.

A city having, for valuable consideration, granted or licensed the use of the foot of certain streets for wharf and boat landings, revocable by either party on five years' notice, can not eject the licensee's grantees without having given such notice for failure to exercise the rights given, if they were not compelled to exercise them, and have not abandoned the possession: *Cincinnati v. Bridge Co.*, 20 O. C. C. 396, 10 O. C. D. 792. See also WHARF.

IV. ORDINANCES.

A. COMPLIANCE WITH STATUTES.

The approval of the municipal board of public works was necessary under R. S., § 1545-195 (repealed 96 v. 96), to give validity to an ordinance granting franchises in streets to a gas and fuel company, although the municipality at the time was under a *de facto* form of government: *Columbus v.*

Gas Co., 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

An ordinance passed by the council of a municipal corporation which grants a franchise to use the streets and alleys of the municipality for the purpose of supplying electric light and power to citizens, and also contains a contract for the lighting of the streets and alleys at a stipulated price, is in conflict with G. C., § 4224, in that it contains more than one subject and is for that reason void: *Illuminating Co. v. Mt. Gilead*, 8 O. N. P. 669, 10 O. D. (N.P.) 235.

B. CONDITIONS IN.

A provision in an establishing ordinance, for a street railroad that differences between the company receiving the grant and its employees shall be settled by arbitration, is invalid, in that it is a restraint upon bidding and likely to increase the rate of fare: *Raynolds v. Cleveland*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215.

All conditions and limitations of a railroad company's rights under a municipal ordinance accepted by the company are conclusively presumed to be in the ordinance; conversation between the parties prior to its passage can not be considered: *Railway Co. v. East Liverpool*, 51 Bull. 599. See also RAILROADS.

A city ordinance can not impose as a condition of its grant of the right to build a street railroad in the streets that it shall not exercise one of its corporate powers, and hence a regulation that it shall not carry freight is void: *State v. Traction Co.*, 18 O. C. C. 490, 10 O. C. D. 212. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

A condition in a grant of the right to lay gas pipes in streets, that the grantee shall furnish gas to heat the city buildings free as long as they have the exclusive right in the streets for their pipes is broken by a grant of the right to another: *Gas Co. v. Newark*, 7 O. N. P. 76, 8 O. D. (N.P.) 418.

If a second grant is conditioned upon the second grantee's having a gas well in operation within a year, and he fails to do this, the condition in the first grant is not broken, and the gas company can not recover against the city for gas furnished to heat its buildings: *Gas Co. v. Newark*, 7 O. N. P. (N.S.) 76, 8 O. D. (N.P.) 418.

Where a city ordinance granted a right to lay pipes in streets, provided a bond were first given to the approval of a board and the city solicitor, and that work shall begin in a year from the taking effect of the ordinance or it shall be void, and the city solicitor enjoins, and the case is not dismissed until a year has elapsed, and then

the bond tendered is refused on the ground of time, it was held that (1) the conditions would be regarded as subsequent unless clearly appearing to be precedent; (2) the pendency of the action might excuse the delay, and postpones the ordinance taking effect; (3) mandamus to compel action on the bond would lie: *State, ex rel., v. Boyce*, 43 O. S. 46, IV Longsdorf's Notes, 145 [reversing *State, ex rel., v. Boyce*, 9 Dec. Rep. 165, 11 Bull. 131]. See also GRANTS.

Conditions in a municipal ordinance granting franchises to a gas and fuel company, whereby the municipality is to receive a certain per cent. of any increase in the price of gas over a designated amount, and reserves unto itself the right to purchase all the pipes and mains of the company within the city, and also to appropriate the property for its own use, and whereby the company is forbidden to sell, lease or otherwise dispose of its franchises to any person, firm or corporation interested in supplying natural gas to consumers within the municipality, although such provisions may be *ultra vires* the municipality they do not go to the life of the franchises granted, it not appearing from the ordinance, or otherwise, that the franchise would not have been granted without such conditions: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

In view of G. C., § 4241, providing that a city council "shall not enter into any contract which is not to go into full operation during the term for which all members of such council are elected," a condition contained in an accepted bid for the purchase of a natural gas plant, providing that the bidder shall have the right to operate the plant and to fix a satisfactory price for gas, can not be waived by the bidder, so as to validate a sale, after the expiration of the terms of office of some of the members of council which accepted the bid: *Kerlin Bros. Co. v. Toledo*, 20 O. C. C. 605, 11 O. C. D. 57. [For decision of common pleas court, see *Kerlin Bros. Co. v. Toledo*, 8 O. N. P. 62, 10 O. D. (N.P.) 509].

C. ULTRA VIRES GRANT.

An ordinance is void as beyond the power of a city which in its terms grants to a company the use of the streets, etc., to lay pneumatic tubes for an undetermined period of time without reserving in the city the privilege of regulating charges thereunder from time to time, and in failing to fix a maximum limit of charges, and which fails to prescribe the number, size, dimensions or material of the conduits or pipes to be laid, and the manner or the depth under the sur-

face of the streets in which they shall be laid: *Amp't v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805 [affirming *Amp't v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394].

A franchise for such a length of time as "the public shall be served by the delivery of power, etc.," and as long as the company shall pay to the city a certain percentage of its gross receipts, is perpetual and the act of the city, in thus surrendering control over its streets, is *ultra vires*: *Amp't v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805 [affirming *Amp't v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394]. See also PNEUMATIC TUBES.

An *ultra vires* grant by a city to a corporation (as here of a right to extend a street railroad) can be validated by a retroactive statute, giving each power if the defect of power is one that could have been removed by prior enactment: *Railway Co. v. Carthage*, 18 O. C. C. 216, 8 O. C. D. 833. See also CONSTITUTIONAL LAW.

A void grant of a street railway franchise made by a board not having authority to make the grant is not validated by a subsequent ordinance of council approved by the mayor which simply grants permission to the grantee (the owner of many valid grants in the same city) to lease its road, property and franchises to another company; nor by an ordinance of council approved by the mayor which substitutes in all its grants the payment of a certain per cent. of the gross receipts of the company in lieu of car licenses as provided in its former grants; and no estoppel arises against the municipality by reason of such action and the fact that expenditures with respect to the new route were made prior to the action of the council and the mayor: *Horstman v. Railway Co.*, 14 O. D. (N.P.) 545. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

A municipal corporation, having passed an *ultra vires* ordinance, granting certain franchises, will not be released therefrom by an attempted repudiation of the same before the passage of a curative act validating such action, where it appears that no legal proceedings were commenced, prior to such legislative enactment to have the ordinance declared invalid: *Columbus v. Heating Co.*, 16 O. D. (N.P.) 311.

D. OTHER CASES.

A city ordinance passed May 3, 1875, granted to the defendant's predecessor the right to use the streets for its gas pipes, and provided that the grant should vest in the grantees power and license to make all necessary excavations and that the right in the pipes laid should be and remain in the

grantees without limitation. The ordinance contained a contract with the grantees for a period of twenty years. A second ordinance was passed in 1891 granting a predecessor of the defendant the right to purchase and maintain the pipes laid under the original ordinance and to use the streets to lay and maintain others. It was held that under these ordinances no special permit of the municipal authorities for the laying down of gas pipes and conduits could be required: *Defiance v. Gas Co.*, 12 O. D. (N.P.) 424. See also GAS COMPANIES.

An ordinance invalid for improper passage and execution may be treated as a resolution or memorandum of the municipal council, and, when the character and terms thereof are certain and definite, it may be referred to and made a part of a subsequent valid ordinance as effectually as a reference to any other record, contract or document of certain and definite terms. Hence, a subsequent ordinance granting franchises in streets, which refers to a prior defective ordinance attempting to grant certain franchises to the same grantee, carries all the rights, privileges and franchises definitely contained in the defective ordinance: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261. See also MUNICIPAL CORPORATIONS.

A city ordinance designating a street railroad right of way is not notice to the property owners: *Detwiler v. Railroad Co.*, 6 O. N. P. 485, 8 O. D. (N.P.) 166.

V. CONSTRUCTION.

Of two constructions both reasonably proper, one of which will give rise to absurd consequences and great inconvenience, and the other of which will avoid them, the latter construction is to be preferred: *Moore v. Given*, 39 O. S. 661, III Longsdorf's Notes, 1059; *Cincinnati v. Railway*, 12 O. N. P. (N.S.) 305, 22 O. D. (N.P.) 723.

If certain language in a franchise has been construed by the courts, a subsequent franchise in which the same language is implied should be construed in the same way: *Cincinnati v. Railway*, 12 O. N. P. (N.S.) 305, 22 O. D. (N.P.) 723.

An ordinance which provides that "for the purpose of dispensing with as many poles in the streets as possible, all existing poles therein are authorized to be used for electric street railway purposes upon reasonable compensation being made for the use thereof to the persons or company owning the same, provided that only one set of wires and poles shall be erected upon any one street," does not give to the company which first succeeded in erecting its poles and stringing its wires the exclusive right to

operate with electricity lines or street railways upon the streets thus occupied; and it does not prevent another company from erecting a second set of poles and wires, if the city subsequently gives authority so to do; and a taxpayer suing on behalf of the city can not prevent such second company, acting under such franchise, from erecting its poles and stringing its wires: *Mulhenney v. Railway*, 20 O. C. D. 686.

Under the franchise granted to the Cincinnati Street Railway Company, August 18, 1896, which provides that "the said company shall pay * * * five per cent. of its gross earnings to the city from every source of its said routes or lines of roads, or any extension thereof now owned or hereafter acquired by said company and also all future extensions of any of said lines, and all future connections of said lines, within or without the corporation limits of the city of Cincinnati or within the county of Hamilton," the percentage is to be figured, not on the actual receipts of the company, but on its gross earnings, and "gross earnings" comprise all revenue which flows from the franchise itself, including gross earnings within the city limits of interurban companies which enter the city over the lines of the Cincinnati Street Railway Company under agreements entered into between the said company and interurban companies, although the Cincinnati Street Railway Company receives from said interurban companies only a proportion of the earnings of the said interurban companies within the city limits: *Cincinnati v. Railway*, 12 O. N. P. (N.S.) 305, 22 O. D. (N.P.) 723.

Traffic agreements between a street railway and an interurban railway can not affect the right of the city which has granted a franchise to each railway, if the city was not a party to said contract and has not approved of the same: *Cincinnati v. Railway*, 12 O. N. P. (N.S.) 305, 22 O. D. (N.P.) 723.

Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055.

A franchise granting to an interurban railway company the right to run upon tracks laid in certain streets and to "transport passengers, baggage, mail, express, freight and other articles pertaining to the business of said railway company," does not give the company the right to use a portion of one of the streets so designated as a station for

loading and unloading freight: *Newark v. Railway*, 13 O. N. P. (N.S.) 487.

The franchise of a toll road company, which has been granted a permit by the county commissioners, under G. C., § 9233, to construct a plank road in a certain highway, and to collect toll thereon for a specified term of years, dates from the issuance of the permit by the commissioners, and not from the subsequent action of that board granting the right to collect toll, which action is based, under G. C., § 9236, upon the report of a committee that they have examined the road and found it finished: *Commissioners v. Plank Road Co.*, 1 O. N. P. (N.S.) 143. See also TURNPIKE AND PLANK ROAD COMPANIES.

Where a corporation is formed "for the purpose of producing, purchasing and acquiring natural gas" and "of piping and transporting natural gas from the place or places where it is produced, purchased or acquired" to certain named towns and cities situated in the counties along the lines of said company and between the termini thereof, "and to other cities, villages and places in the counties aforesaid," it is not one of the charter obligations of such corporation to furnish natural gas to consumers in all of such cities, towns and villages: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055. See also GAS COMPANIES.

The fact that by the terms of its franchise an interurban railway is required to be completed within a given time, does not deprive the company of the right to thereafter lay additional switches, etc., but if thereby an additional burden will be laid upon property the right so to do must first be acquired: *Chambers v. Traction Co.*, 5 O. C. C. (N.S.) 298, 17 O. C. D. 193 [affirmed, without opinion, *Traction Co. v. Chambers*, 73 O. S. 348]. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

Since G. C., § 9320, fixes no limit on the use of the streets with the consent of the authorities, such consent once given is irrevocable, and the grant becomes a vested right and includes the right to repair and extend as may be necessary: *Defiance v. Gas Co.*, 12 O. D. (N.P.) 424.

A street railway company receives its franchise to operate a street railroad subject to certain well-defined duties to the public. It can not relieve itself from these obligations by a lease or traffic arrangement by which it permits another company to make joint use of its tracks except by legislative enactment authorizing such lease or arrangement with an express provision exempting it from liability for the acts of its licensee: *Quigley v. Railway & Light Co.*, 89 O. S. —.

VI. EXCLUSIVE FRANCHISE.

Monopolies are odious; and it is contrary to public policy and the best interests of municipalities to grant exclusive privileges which will in effect create them: *Gas & Fuel Co. v. Columbus*, 16 O. D. (N.P.) 359.

An ordinance granting a franchise to an electric light company, containing a provision, which was part of the bid for the contract, that the contract shall not be binding upon the grantees unless they are granted the exclusive use of the streets for lighting purposes, is within the rule against exclusive rights in streets and that ordinance is invalid: *Illuminating Co. v. Mt. Gilead*, 8 O. N. P. 669, 10 O. D. (N.P.) 235. See also ELECTRIC LIGHTS AND ELECTRIC LIGHTING.

Councils of cities and villages in this state are not vested with authority to grant an exclusive franchise to furnish gas or light therein: *Light Co. v. Gas Co.*, 1 O. C. C. (N.S.) 526, 14 O. C. D. 684.

An ordinance granting to a gas company the exclusive privilege of laying pipes in its streets and public places is void; and a provision in an ordinance intended to convey such a right for a period of twenty years, being absolutely void, is not available to the municipality as a termination at the end of twenty years of such right. The proper construction of such an ordinance is that the gas company has the right without limit as to time, to use the streets: *Hamilton v. Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513. See also GAS COMPANIES.

A city can not grant an exclusive right to use streets for gas pipes, unless it is granted such power by the legislature. Such right is a franchise, and must emanate directly or indirectly from the legislature, and the city of Cincinnati has no such power: *State, ex rel., v. Light Co.*, 18 O. S. 262, II Longsdorf's Notes, 886.

A clause in a street railway grant that not more than one line shall be granted on the same street without the consent of the existing company is illegal as giving an exclusive privilege in the streets: *Railroad Co. v. Smith*, 29 O. S. 291, III Longsdorf's Notes, 467.

A city can not grant an exclusive right in the streets to any street railway. The general public may fit ordinary vehicles to the track and the city may allow another street railway to use the tracks to a limited extent jointly with the first company on paying compensation: *Railway Co. v. Railway Co.*, 6 O. C. C. 362, 3 O. C. D. 493 [affirmed, *Railway Co. v. Railway Co.*, 50 O. S. 603, IV Longsdorf's Notes, 517].

The streets of a city may be used for purposes authorized by statute in furtherance of the convenience and welfare of inhabitants

and not substantially interfering with the public easement of right of travel, but when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the street shall thereafter be permitted or made for similar purposes, which is not an exercise of, but an attempt to prohibit appropriation, and when the effect is to create a monopoly, the power of a municipal corporation thus to divest itself of authority conferred as a public agent must be clearly shown: *Illuminating Co. v. Mt. Gilead*, 8 O. N. P. 669, 10 O. D. (N.P.) 235.

VII. CONSIDERATION.

Where an ordinance granting a telephone franchise provides for the construction of telephone lines on both the surface and sub-surface of the streets, alleys and public places of a municipality, the provisions of G. C., § 9179, do not prevent the municipality from exacting from the company a percentage of the gross rentals received from telephones, in addition to requiring that the company shall itself restore the streets to their former state of usefulness at its own expense: *Columbus v. Telephone Co.*, 10 O. N. P. (N.S.) 433, 21 O. D. (N.P.) 273.

When the surface of the street only is used (for telephone lines), it is not an additional burden on the streets. The grant is made by the state to be regulated by the municipality. Placing the wires underground is an additional servitude: *Columbus v. Telephone Co.*, 10 O. N. P. (N.S.) 433, 21 O. D. (N.P.) 273.

The question whether the percentage exacted from a gas company by a municipality, as a condition on which the latter may use streets, is unreasonable, and the requirement void on that account, can not be considered on demurrer to the petition in an action by the municipality for an accounting: *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179.

G. C., § 9179, applies to the exaction of compensation (by a municipality) for the construction (of telephone lines) on the surface, but not to underground lines: *Columbus v. Telephone Co.*, 10 O. N. P. (N.S.) 433, 21 O. D. (N.P.) 273.

A municipal corporation, although holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when subjected to authorized additional public burden by the construction of a telephone line therein: *Zanesville v. Telegraph Co.*, 64 O. S. 68, IV Longsdorf's Notes, 865.

A municipality is without power, as a revenue measure, to require a public service corporation, such as a gas company, to pay

into the city treasury a portion of its earnings: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416.

If such an exaction is made, it must be based on the police power with which it would be competent for the legislature to invest municipalities for the purpose of providing for such inspection and supervision on the part of the city authorities, as will guard the public against the dangers which arise from the manufacture and distribution of such an agency as gas: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416.

After complying with such requirement for a number of years, it does not lie in the mouth of a gas company, while continuing to enjoy the franchise thus obtained, to deny the right of the city to collect the stipulated amount, provided the sum named in the franchise is reasonable in view of the supervision required: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416.

Upon submission on demurrer, the court will presume that public officials have performed their duty in the premises, and that \$4,000 a year is a reasonable sum to be paid for such supervisory service in the city of Columbus: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416.

A city may contract with a natural gas company to grant the right to lay pipes in the streets for a price. The city is acting in its proprietary character, and therefore is not limited to the amount of mere license regulations: *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250. See also MUNICIPAL CORPORATIONS.

Subsequent grants to other gas companies to lay pipes in the streets constitutes no defense to an action to recover payments due under a former ordinance to another company, because (a) an exclusive right to the streets is not purported to be granted to said company, (b) and the ordinance itself specifically negatives such exclusive rights or privileges: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645].

A municipal corporation being charged with the duty of keeping the streets under its control in repair, may be allowed compensation sufficient to make the repairs rendered necessary by the additional burden upon the streets by the construction of a telephone line therein. It is not essential that provision be made for the assessment of such compensation by a jury: *Zanesville v. Telegraph Co.*, 64 O. S. 68, IV Longsdorf's Notes, 865.

Where a municipal corporation, by an ordinance, grants to a gas company the right

to lay its pipes and other appliances in the streets, council may require the company to pay annually to such municipal corporation a reasonable sum to compensate for necessary supervision of the work after as well as during its installation; and when the gas company accepts the terms of said ordinance and takes possession and occupies the streets under said grant, such accepted ordinance becomes a valid contract for the annual payment of said sum. The clause in the ordinance here involved that said payments are "for the benefit of the gas and light fund of said city" does not render the ordinance invalid as a means to raise general revenue, said clause being subordinate to the principal obligation: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645]. See also GAS COMPANIES.

Municipal authorities have the power, under G. C., § 9178, to agree with telephone companies as to the mode of use of streets and upon compensation for such use, but not beyond what may be necessary to restore the streets to former state of usefulness. They have not the power to exact or receive compensation by way of free telephone service for themselves or for citizens or to fix rates for telephone charges: *Farmer v. Telephone Co.*, 72 O. S. 526, IV Longsdorf's Notes, 992.

Money paid by a street railway company to a municipality as rental for the use of the streets under a void franchise will be presumed not to be in excess of the value of such use: *Horstman v. Railway Co.*, 14 O. D. (N.P.) 545. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

VIII. ENFORCEMENT OF PROVISIONS.

The remedy for nonuser or misuser of a corporate franchise lies with the state, and a municipality can not invoke that remedy: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055.

The acceptance from a municipality of an electric franchise carries with it an obligation to furnish electric light and power agreeably to the provisions of the ordinance and the law, and specific performance of the obligation thus incurred may be enforced by the municipality through the medium of a mandatory injunction, or at least an injunction may be obtained against violation of the obligations thus assumed: *Gastlight Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356; *Van Wert v. Public Service Co.*, 11 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 526.

A city solicitor is clearly authorized under G. C., §§ 4311, *et seq.*, to bring suit in the

name of the municipality to enjoin a public utility company from violating its obligations to the city and its inhabitants: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

Although a court should be slow to enforce, by mandatory injunction or specific performance, the performance of the conditions under which a corporation exercises a franchise because of the continuing supervision which the enforcement of such an order or decree would entail upon the court, nevertheless this is not a conclusive obstacle, and when public rights are involved, a court of chancery will not shrink from the maintenance, through its duly appointed officer, of such continuing supervision as is necessary to preserve the rights of the public: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

While equity never decrees an ouster or forfeiture, a court of chancery may by mandatory injunction require performance of the conditions under which a corporation exercises its franchise: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

So long as a gas company continues to exercise any of its franchises within a contracting municipality, it may be compelled to exercise its franchise therein fairly and without discrimination: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [approving and distinguishing *Light Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356]. See also GAS COMPANIES.

The obligation of a street railroad to operate an extension of its road arises from its grant from the city or county, which is a contract, and not a trust, and hence can not be enforced by mandamus. The remedy under G. C., § 4311, is adequate: *State, ex rel., v. Railway Co.*, 15 O. C. C. 200, 8 O. C. D. 474. See also MANDAMUS.

The fact that the operation of an interurban railway is found to be unprofitable is no ground for failure on the part of the company to adequately serve the public interest, and so long as the franchise and other rights with which the company is invested are not abandoned, the company is bound both to maintain the physical condition of the road and to maintain the service thereon which will adequately serve the public interest: *Ferguson v. Transit Co.*, 4 O. L. R. 750, 52 Bull. 197. See also RAILROADS.

Where power to obtain free telephone service and fix rates is attempted to be exercised by a municipality, the company will not be required to adhere to them by mandatory injunction, even though it be shown that such rates were fixed at the solicitation of the company, and that the company ob-

tained a benefit which it would not otherwise have obtained in a mode of use of the streets more beneficial to it and more inconvenient to the public: *Farmer v. Telephone Co.*, 72 O. S. 526, IV Longsdorf's Notes, 992.

A city, by imposing conditions to the exercise of a franchise granted to a corporation to construct and operate a street railway in its streets, acts as the agent of the state and for the whole public, and the state may interfere by *quo warranto* when the conditions in which the public are interested are not complied with: *State v. Railway Co.*, 3 O. C. C. (N.S.) 285, 13 O. C. D. 603.

A municipal ordinance imposing a duty upon a street railway company to "run cars as often as public convenience and business of the road will justify," can not be enforced by specific performance, as the operation of cars would have to be adjusted from time to time as the public demand increased or diminished; the frequency of such changes would be left to conjecture and is, therefore, necessarily uncertain: *Matthews v. Traction Co.*, 15 O. C. D. 652 [affirmed, without opinion, *Matthews v. Traction Co.*, 70 O. S. 436].

Specific performance is not the remedy by which to compel an electric railway company, which is operating an interurban railroad under a municipal grant, to operate a street railroad within the municipality, to announce the names of streets and railroad crossings, keep tickets for sale on its cars, and operate its cars at a certain rate of speed, notwithstanding these obligations are imposed upon the company by the franchise under which it claims to occupy and use the municipal streets. Such a decree, in order to be effective, would require a personal supervision and control by the court of the personal acts of faith, diligence, and conduct of the company's employees upon whom the discharge of these duties are devolved, which a court of equity will not undertake: *Matthews v. Traction Co.*, 15 O. C. D. 652 [affirmed, without opinion, *Matthews v. Traction Co.*, 70 O. S. 436].

Under G. C., § 3768, and R. S., § 2502 (repealed, 96 v. 96), providing for the granting by municipalities of permission to street railway companies to construct and operate their lines upon such terms and conditions as may be prescribed by the council thereof, an ordinance prescribing the terms and conditions upon which the franchise is to be enjoyed, has the force and effect of an act of the legislature, for the violation of which an action may be brought *ex contractu* by the city or in *quo warranto* upon the relation of the state: *State v. Railway Co.*, 3 O. C. C. (N.S.) 285, 13 O. C. D. 603.

A provision in the ordinance embodying a grant to a natural gas company, that gas shall not be furnished for illuminating purposes, but only for heating and power, is void, and the company may be compelled to either furnish gas for illuminating purposes or to abandon its rights in the streets: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

IX. TERMINATION, RENEWAL, ETC.

It is competent for a municipal council and a street railway company to terminate in part or in its entirety, the rights of the company under a previous grant, and to renew the grant for a period of twenty-five years, provided the company is not released from any obligation or liability under the old grant, and the renewal will, in the opinion of the council, prove beneficial to the public: *Lima v. Cramer*, 5 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 245.

An ordinance which recites that it is intended by it to renew and extend all the franchises, rights and privileges now owned by a street railway company, and which provides in plain terms that the rights, privileges and franchises granted under a former ordinance "be and the same are hereby renewed and extended," continues and renews the right of the company to lay tracks on a portion of the territory covered by the original ordinance, but not constructed at the passage of the renewing ordinance, notwithstanding the fact that such territory is not specifically named in the renewing ordinance: *Akron v. Traction Co.*, 6 O. C. C. (N.S.) 445, 17 O. C. D. 536 [affirmed, without opinion, *Akron v. Traction Co.*, 75 O. S. 565].

The statutory requirement as to the securing of consents and the giving of notice of application for a franchise and its award to the individual or corporation agreeing to carry passengers for the lowest rates of fare, do not apply to the renewal of an existing franchise: *Lima v. Cramer*, 5 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 245.

The general right of a gas company granted under a municipal ordinance authorizing the use of the streets, lanes, alleys and public grounds of a city for the purpose of laying down pipes, etc., is not terminated at the end of twenty years by a section of such ordinance providing that the gas company shall have the exclusive right for laying gas pipes for a period of twenty years from the passage of the ordinance: *Hamilton v. Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513.

An ordinance granting to a gas company the exclusive privilege of laying pipes in its

streets and public places is void and a provision in an ordinance intended to convey such a right for a period of twenty years, being absolutely void, is not available to the municipality as a termination at the end of twenty years of such right. The proper construction of such an ordinance is that the gas company has the right, without limit as to time, to use the streets: *Hamilton v. Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513. See also GAS COMPANIES.

A provision in a renewal franchise to a street railway subjecting it to future legislation of the municipality does not affect the contractual rights of the company in any way save as may be necessary by police regulations: *Railroad Co. v. Cleveland*, 7 O. N. P. (N.S.) 161, 17 O. D. (N.P.) 763.

A franchise or privilege to construct and operate a street railway granted and consented to prior to the act of 75 v. 359, without limitation of time is perpetual, but subject to be determined by the general assembly under Art. I, § 2, or Art. XIII, §§ 1 and 2 of the constitution: *State v. Railway Co.*, 1 O. C. C. (N.S.) 145, 14 O. C. D. 609.

Consent given prior to the act of 75 v. 359, without limitation of time or to a corporation with succession during the term of its charter is revocable only by legislative authority: *State v. Railway Co.*, 1 O. C. C. (N.S.) 145, 14 O. C. D. 609.

X. MISUSE AND FORFEITURE.

A railway corporation assumes the performance of duties for the benefit of the public generally. The use of such road for private interests only is a misuse of corporate powers, franchises and privileges: *State v. Railway Co.*, 40 O. S. 504, IV Longsdorf's Notes, 38.

Under an indeterminate franchise, an incorporated company may voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; and in such case the municipality has no right to prevent the company from removing its property nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055.

Equity can not be resorted to, to work an ouster or to forfeit a franchise: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

Where an allegation is made in a petition to declare a forfeiture of franchises, that the defendant was about to sell its property and franchises to some person unknown, in violation of the conditions thereof, and coun-

sel desire to bring an action to test the validity and effect of such condition, a temporary injunction against such sale will be granted: *Columbus v. Gas & Fuel Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

The franchise for the use of a street in a municipality for the furnishing of gas being silent as to the duration of the franchise and the ten-year agreement as to price having expired, the municipality may, under its power of regulation, impose new conditions as to price, and the gas company may accept or reject them. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city, but not of its property: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 918.

A suit for the forfeiture of a franchise of a street railway will not lie, unless based upon a determination by the city council that a forfeiture should be declared: *Toledo v. Railway Co.*, 2 O. C. C. (N.S.) 97, 15 O. C. D. 441.

The city solicitor, under G. C., § 4312, empowering him to restrain "the abuse of its corporate power, or the execution or performance of any contract" in contravention of law or ordinance, has power to maintain an action in behalf of the municipality to declare a forfeiture of franchises granted to a gas and fuel company in the streets and territory under municipal control: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

A municipal corporation is estopped from declaring a forfeiture of franchises granted in its streets to a gas and fuel company for the purpose of laying pipes to transport gas to its consumers, where the city has stood silently by and permitted the company to complete and mature all its plans, expend over a half million of dollars thereunder and is in the very act of supplying about thirteen hundred houses with gas, and has also given bond and taken every step necessary to perfect its rights under the statutes: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261. See also GAS COMPANIES.

Where an ordinance granting a street railway franchise provides that a failure to comply with the terms and conditions of the ordinance after twenty days' notice from the city council shall operate as a forfeiture of all rights and franchises granted, the failure of the owner of the franchise to lay a track in a portion of the territory covered by the franchise will not work a forfeiture of its rights to lay such track in the absence of notice given as provided in the ordinance: *Akron v. Traction Co.*, 6 O. C. C. (N.S.) 445, 17 O. C. D. 536 [affirmed, with-

out opinion, *Akron v. Traction Co.*, 75 O. S. 565]. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

A mere intention on the part of a railroad company to violate its public duties does not change the legal status of the company, or afford ground for the forfeiture of its charter: *Railroad Co. v. Railway Co.*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705 [affirming *Railroad Co. v. Railway Co.*, 1 O. N. P. (N.S.) 577, 15 O. D. (N.P.) 795; affirmed, without opinion, *Railway Co. v. Railroad Co.*, 67 O. S. 523]. See also RAILROADS.

A trackage contract between railroad companies, whose tracks are parallel for a distance of fifteen miles and thereafter separate widely, is within the enumerated powers of railroads, and does not destroy but rather creates competition between them, and where in a contract of this character an *ultra vires* feature is found which can be eliminated, the remaining portion of the contract is not rendered invalid thereby, nor is ground afforded for forfeiture of the company's charter: *Railroad Co. v. Railway Co.*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705 [affirming *Railroad Co. v. Railway Co.*, 1 O. N. P. (N.S.) 577, 15 O. D. (N.P.) 795; affirmed, without opinion, *Railway Co. v. Railroad Co.*, 67 O. S. 523].

XI. TAX.

The franchise of a domestic corporation is its life and existence which, with their accompanying powers, is given by the state, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

Where there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution that private property shall ever be held inviolate but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

By reason of the implied limitations of the constitution, a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts: *Gum Co. v. Laylin*, 66

O. S. 578, IV Longsdorf's Notes, 918. See also CONSTITUTIONAL LAW.

The tax of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock of corporations as provided for in the act of 95 v. 124 (G. C., §§ 5522, *et seq.*; repealed, 95 v. 440) known as the Willis act, requiring corporations to file annual reports with the secretary of state and to pay annual fees therefor, is a franchise tax and not a tax on property. Said act is a valid constitutional law: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

A franchise tax may be imposed by the general assembly upon corporations both domestic and foreign, doing business in this state: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

An excise tax or franchise tax for general revenue may be constitutionally collected from corporations: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918.

To constitute double taxation, both taxes must be property taxes and both on the same property. The limitation of the constitution which prohibits double taxation of the property of corporations, applies only to taxation on property, and not to taxation of privileges or franchises: *Gum Co. v. Laylin*, 66 O. S. 578, IV Longsdorf's Notes, 918 [distinguishing *Trust Co. v. Lander*, 62 O. S. 266, IV Longsdorf's Notes, 833; *Railway Co. v. State*, 49 O. S. 189, IV Longsdorf's Notes, 448]. See also TAXATION.

XII. LIABILITY UNDER.

Where there are contractual relations between parties authorized by legislative grant and there has been a proper exercise of such grant by the use of due care, no cause of action will lie against the parties so properly exercising such franchise or right under contract or statute: *Dayton v. Railway Co.*, 12 O. D. (N.P.) 258.

When W conveyed to G an undivided half of his ferry franchise, they became tenants in common thereof, but in the running of the business they are partners. The conveyance did not convey W's landing, and he is not obliged to furnish the landings. Hence, G is chargeable for a share of their use and also of the expense of improving them, but these are to be determined in one suit, and two law actions are to be consolidated and amended to ask an account: *Wiggins v. Good*, 3 Dec. Rep. 318, 1 Gaz. 217. See also FERRIES.

XIII. INJUNCTION.

If a ferry-keeper on one side of a river lands persons on the land of a ferry-keeper on the other side, it is not an invasion of a

ferry franchise, but a mere trespass, and not enjoined: *Ross v. Page*, 6 O. 166, I Longsdorf's Notes, 330. See also FERRIES.

An invalid grant by a municipality of a street railway franchise is both an abuse of corporate power and a contract made in behalf of the municipality in contravention of law within the meaning of G. C., §§ 4311 to 4314, and its operation may be enjoined: *Horstman v. Railway Co.*, 14 O. D. (N.P.) 545.

A corporation formed with power to manufacture, operate, sell or rent electric appliances, and for other purposes, has no power to carry on the business of illuminating. Hence, a decree or permit to light streets will not give it the power to do so, and a competing company may enjoin its using their poles: *Light Co. v. Electric Co.*, 10 Dec. Rep. 767, 23 Bull. 329. See also ELECTRIC LIGHTS AND ELECTRIC LIGHTING.

When a city council has, by ordinance, legally granted to one street railway company the right to construct its railway and lay its track on and over a particular part of a designated street within said city, and such company has duly accepted said grant and entered upon and taken possession of the right of way so specifically granted, a subsequent grant by said city council, or its successor in office, the board of control, of the same right of way, or a substantial part thereof, to another street railway company for like purpose will not of itself confer upon the second grantee the right to enter upon and take possession of the route or right of way so granted, where such entry and possession by it will materially and injuriously interfere with, interrupt and abridge the first grantee's use and enjoyment of the said right of way. And where such said second grantee threatens, and is about to take possession of said route and right of way under and by virtue of its said grant, without the consent and against the will of said first grantee, and without having appropriated the right so to do, it will be restrained from so doing by injunction: *Traction Co. v. Traction Co.*, 69 O. S. 402, IV Longsdorf's Notes, 961.

Upon the refusal of corporation counsel to bring suit for an injunction against the city to prevent it from allowing, and to prevent a private corporation from using its public streets for certain purposes, a taxpayer, under G. C., §§ 4311 to 4314, has authority to bring such suit: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805. See also INJUNCTION.

XIV. PLEADING.

Where a corporation is made a defendant, and its charter, powers or franchise become

the foundation of the action, the same must be specially pleaded in the petition; and in the case of a foreign corporation, the name of the state by which, and the substantial terms in which, the charter, powers or franchises were granted, should appear in the petition: *Brady v. Supply Co.*, 64 O. S. 267, IV Longsdorf's Notes, 871 [approving and following *Devoss v. Gray*, 22 O. S. 159, III Longsdorf's Notes, 65]. See also CORPORATIONS.

Furnishing electricity and payment therefor are parts of the same transaction, and complaint will not lie against an ordinance on the ground that both subjects are covered by its title: *Van Wert v. Service Co.*, 11 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 526.

XV. REVIEW.

The action of the council of a municipality in granting to a street railway company a franchise in a street which crosses a steam railroad at grade, is not the subject of judicial review, where it does not appear that council exceeded its power, or that its action was induced by fraud. Nor would a review be authorized by showing that a safer crossing could be made on another street: *Railway v. Railway*, 5 O. C. C. (N.S.) 583, 16 O. C. D. 180 [affirmed, without opinion, *Railway Co. v. Railway Co.*, 73 O. S. 364].

FRANCHISE TAXES.

See TAXATION.

FRANKLIN COUNTY.

G. C., § 3001 (87 v. 57), and at least that part of G. C., § 3001 (83 v. 71), which is intended to be applicable to Franklin county, are unconstitutional and void, but money paid thereunder to a county commissioner can not be recovered unless the amount paid to him was more than was therein provided:

State, ex rel., v. Carlisle, 2 O. N. P. (N.S.) 637, 15 O. D. (N.P.) 287.

G. C., §§ 10224 and 10225, as amended (93 v. 146), in so far as they except Cuyahoga and Franklin counties from the general provisions of said section as to the jurisdiction of justices of the peace in attachment cases, are unconstitutional; and the justices of the peace in said counties, as well as in all counties of the state, have jurisdiction co-extensive with their counties "to issue attachments and proceed against the goods and effects of debtors in certain cases": *Oakman v. Furniture Co.*, 10 O. C. C. (N.S.) 247, 20 O. C. D. 301.

G. C., §§ 10224 and 10225, as amended (93 v. 146), by which the jurisdiction of justices of the peace in Cuyahoga and Franklin counties in attachment and forcible entry and detainer cases is limited to townships for which they are elected, are not unconstitutional, although in all other counties in the state their jurisdiction extends over the entire county: *Fisher v. Garey*, 11 O. D. (N.P.) 796. See also COURTS.

The provisions of G. C., § 11268, that action affecting real property shall be brought in the county in which the property is situated, does not deprive the courts of Franklin county of the jurisdiction conferred by G. C., § 345, in actions brought by the attorney-general on behalf of the state, and in which the state is interested: *State v. Fenn*, 10 O. N. P. (N.S.) 325, 21 O. D. (N.P.) 593.

FRATERNAL INSURANCE.

For fraternal insurance, see INSURANCE.

FRATERNAL SOCIETIES.

For fraternal societies, see INSURANCE.

FRATERNITIES.

For fraternities, see INSURANCE.

FRAUD AND DECEIT.

Scope Note.—Includes deception and damage by means of false representations of material facts with a knowledge of their falsity and an intent to deceive; parties liable, and pleading and evidence relating thereto; effect of fraud upon contract and other transactions; and fraud in transactions between persons in particular personal relations, as executors and administrators, trustees, appraisers, etc., and effect of such relationship and waiver of the fraud. Excludes effect of fraud on conveyances; fraud as ground for reformation of instruments in writing; conveyance fraudulent as to creditors, purchasers, etc.; requirement and operation of the statute of frauds; suspension of statutes of limitations on ground of fraud; conspiracies to defraud; and particular classes of offenses involving fraud.

Cross References.

- For innocent misrepresentations, see also **MISREPRESENTATION**.
For mistake, see **MISTAKE**.
For fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.
For obtaining property under false pretenses, see **FALSE PRETENSES**.
For attachment on the ground of fraud, see **ATTACHMENT**.
For arrest on the ground of fraud, see **ARREST**.
For actions against directors of corporations for fraud or negligence, see also **CORPORATIONS**.
For fraud upon accounting officers, see **OFFICE**.
For the effect of fraud upon a judgment or decree obtained thereby, see also **JUDGMENT**.
For damages for fraud, see also **DAMAGES**.
For fraud as affecting specific performance, see **SPECIFIC PERFORMANCE**.
For the time at which statute of limitations begins to run in case of fraud, see **LIMITATIONS, STATUTE OF**.
For fraud as working an estoppel, see also **ESTOPPEL**.
For fraudulent infringement of trade-marks, see **TRADE-MARKS AND TRADE NAMES**.
For fraud and misrepresentation as affecting contract of insurance, see also **INSURANCE**.
For rescission in equity as a remedy for fraud, see also **RESCISSION**.
For criminal liability for forgery, see **FORGERY**.
For liability of a partnership for the fraud of an individual partner, see **PARTNERSHIP**.
For fraud as affecting negotiable instruments, see also **NEGOTIABLE INSTRUMENTS**.
For the doctrine of constructive trusts as a remedy against fraud, see **TRUSTS**.
For the liability of an infant for frauds, see also **INFANTS**.
For rights arising under fraudulent sales, see also **SALES**.
For questions of parties, see **PARTIES**.
For questions of pleadings, see **PLEADINGS**.
For questions of evidence, see **EVIDENCE**.
For fraud as a ground for reformation in equity, see **REFORMATION**.
For the statute of frauds, see **FRAUDS, STATUTE OF**.
For conspiracies to defraud, see **CONSPIRACY**.

ANALYTICAL OUTLINE.**I. Definition and Nature, 8001.****II. Actual Fraud, 8002.****A. Elements, 8002.**

1. Falsity of statement, 8002.
2. Duty to make disclosure, 8003.
3. Material fact, 8006.
 - a. What constitutes, 8006.
 - b. Promise, 8008.
 - aa. With intent to perform, 8008.
 - bb. Without intent to perform, 8009.
 - c. Opinion, 8010.
 - d. Statement of law, 8012.
 - e. Immaterial fact, 8013.
4. Knowledge of falsity, 8013.
5. Intent to deceive, 8014.
6. Deception, 8016.
 - a. Continuing representations, 8016.
 - b. Reliance on other information, 8017.
7. Damage, 8018.

B. By whom made, 8019.

1. Party, 8019.
2. Agent, 8019.
3. Third person, 8020.

- C. *To whom made*, 8020.
 - 1. Party, 8020.
 - 2. Agent, 8021.
 - 3. Third person, 8022.
- D. *Effect*, 8022.
 - 1. Action of tort, 8022.
 - 2. Effect on contract, 8023.
 - a. Fraud as to essential element, 8023.
 - aa. In absence of negligence, 8023.
 - bb. In case of negligence, 8024.
 - aaa. Between parties, 8024.
 - bbb. As to third persons, 8024.
 - b. Fraud as to collateral fact, 8026.
 - aa. Between parties, 8026.
 - bb. Sureties, 8027.
 - cc. Third persons not bona fide purchasers, 8027.
 - dd. Bona fide purchasers, 8028.
 - 3. On judgment, 8030.
 - 4. Other questions, 8032.
- E. *Waiver and ratification*, 8034.
- F. *Rescission*, 8035.
 - 1. Informal rescission, 8035.
 - a. Right to informal rescission, 8035.
 - b. Restitution by defrauded party, 8036.
 - c. Apportionment of consideration, 8037.
 - d. Necessity of demand, 8038.
 - 2. Formal rescission, 8038.
 - a. Right to have formal rescission in equity, 8038.
 - b. Necessity of formal rescission, 8040.
- G. *Parties*, 8040.
- H. *Pleading*, 8041.
- I. *Evidence*, 8045.
- J. *Judgment or decree*, 8052.
- K. *Review*, 8052.
- L. *Survivor*, 8053.

III. **Constructive Fraud**, 8053.

- A. *Elements*, 8053.
 - 1. Parties guilty of constructive fraud, 8053.
 - a. Agent, 8053.
 - aa. Private, 8053.
 - bb. Public, 8055.
 - b. Attorney, 8055.
 - c. Executors and administrators, 8056.
 - d. Guardian, 8058.
 - e. Guardian ad litem, 8058.
 - f. Trustees, 8058.
 - g. Promoters, 8061.
 - h. Directors, 8062.
 - i. Stockholders, 8063.
 - j. Appraisers, 8063.
 - k. Parties to antenuptial contract, 8064.
 - l. Husband and wife, 8064.
 - m. Pledge, 8066.
 - n. Other relations, 8067.

2. Effect of relationship, 8067.
 - a. Opinions, 8067.
 - b. Statement of law, 8067.
 - c. Duty to make disclosure, 8067.
 - d. Ejectment, 8068.

- B. *Waiver*, 8068.
- C. *Laches*, 8068.
- D. *Jurisdiction*, 8069.
- E. *Pleading*, 8069.
- F. *Evidence*, 8069.

IV. Crime, 8070.

I. DEFINITION AND NATURE.

Deceit, or fraud, in business transactions consist in fraudulent representations or contrivances by which one person deceived another, who has a right to rely upon such representations. or has no means of detecting such fraud: *Spencer v. King*, 3 O. N. P. 270, 5 O. D. (N.P.) 113.

Fraud consists of some willful act or omission, which is unconscientious, and a violation of good faith, and by which one person obtains an undue advantage over another: *Gregg v. Rogers*, 1 O. N. P. 117, 1 O. D. (N.P.) 163.

By fraud is meant, a surprise, trick, cunning, dissembling, and other unfair way that is used to cheat anyone. Fraud, indeed in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another: *Bank v. Insurance Co.*, 12 Dec. Rep. 738, 1 D. 469; *Vance v. Park*, 7 O. N. P. 138, 7 O. D. (N.P.) 564 [affirmed, *Vance v. Park*, 15 O. C. C. 713, 8 O. C. D. 425].

In order that an act be constructively fraudulent it is essential that it would, either in the particular case or in common experience, lead to consequences equivalent to those following actual fraud: *Stevens v. Summers*, 68 O. S. 421, IV Longsdorf's Notes, 946.

Constructive frauds are such as are assumed by the court to have been committed by acts without regard to motive: *Rolling Mill Co. v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46; *Bank v. Bethel*, 1 O. D. (N.P.) 233, 32 Bull. 135.

Fraud has been defined to be "deceiving to another's disadvantage": *Miller v. Miller*, 31 Bull. 141.

There may also be fraud in law legally deduced from certain acts, even though both parties were strictly honest and had no intention of fraud: *Burbridge v. Seely*, W. 359, I Longsdorf's Notes, 29.

A mistake common to all the parties as to the construction of a public work, is not fraud, and will not vitiate a contract: *State v. Perry*, W. 662, I Longsdorf's Notes, 51.

While statutes of a penal nature are to be strictly construed, yet those enacted to prevent fraud are to be so construed as not to encourage, but prevent the evil aimed at: *State, ex rel., v. Pinney*, 13 O. D. (N.P.) 210. See also STATUTES.

II. ACTUAL FRAUD.

A. ELEMENTS.

1. *Falsity of Statement.*

In an action for deceit it must appear that the defendant made a false representation of a material fact; that he made it with knowledge of its falsity; that the plaintiff was ignorant of its falsity and believed it to be true; that it was made with the intent that it should be acted upon; and that it was acted upon by the plaintiff to his damage: *State, ex rel., v. Dolle*, 5 O. N. P. (N.S.) 248, 17 O. D. (N.P.) 307.

The statement must be materially false, and hence, a representation by a mortgagor that he is the sole owner of the property upon which he is contracting the loan, whereas, in fact, he is the legal owner with an equitable interest outstanding upon which the owner asserts no claim, is not such a false representation as to title as to relieve the mortgagee from advancing the full amount stipulated in the mortgage contract: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

A minister of the gospel is not held by law to any greater degree of honesty in a sale than a layman: *Spencer v. King*, 3 O. N. P. 270, 5 O. D. (N.P.) 113.

Where a person engaging in business, obtains funds from his father and wife, for which he executes and delivers to them respectively his promissory notes, failure to include such outstanding notes in written statements of his assets and liabilities, each of which was made by him to a mercantile

agency with knowledge that it would be used by the customers of such agency as a basis for extending him credit, renders such statements materially false, and is sufficient ground for denying a discharge in bankruptcy, if objection to his discharge be made by one of such customers who has been subjected to loss on account of credit given to such person in sole reliance of the truthfulness of such written statements: *In re Augspurger*, 7 O. L. R. 549.

2. Duty to Make Disclosure.

The general rule is *caveat emptor*, and there is no implied warranty of quality, but fraud constitutes an exception: *Hadley v. Importing Co.*, 13 O. S. 502, II Longsdorf's Notes, 622.

A person agreeing to manufacture for another steam boilers to run the latter's mill impliedly warrants that they shall be free from such defects latent or otherwise as would render them unfit for the usual use of boilers: *Rodgers v. Niles*, 11 O. S. 48, II Longsdorf's Notes, 479.

Branding pork as "mess pork" is a warranty to the buyer that it is such. An express refusal to warrant a commodity will not prevent a representation known to be false and relied on by the buyer being a warranty: *Edmands v. Hiltz*, 1 Dec. Rep. 81, 2 W. L. J. 45.

A foreign manufacturer advised a customer to buy a ton or so from another customer to whom he had shipped, "for a sample, should you wish to test the quality with a view to import," and the former customer informed the manufacturer that he had done so and found the iron satisfactory and ordered twenty tons of the brand. It was held that a warranty that the twenty tons should be equal to the sample: *Dayton v. Hooglund*, 39 O. S. 671, III Longsdorf's Notes, 1061.

In an action on a warranty in an exchange of horses an express warranty must be proved. The law implies no warranty of quality, but only of property: *Gibson v. Hamell*, T. 47.

One selling articles for a specific purpose impliedly warrants their fitness for it, and a failure of such fitness is ground for rescission: *Byers v. Chapin*, 28 O. S. 300, III Longsdorf's Notes, 406.

A buyer whose duty it is to expend labor and skill to prepare the articles for the purpose for which they were bought, and seeking rescission because they can not be made fit, impliedly warrants that the unfitness is from no fault of his: *Byers v. Chapin*, 28 O. S. 300, III Longsdorf's Notes, 406.

The exposure or offer of goods for sale by a manufacturer as being of his build or workmanship implies a warranty or repre-

sentation that they are made properly, and that the fault, if any, is a latent one, arising from causes which he could not control: *Manufacturing Co. v. Implement Co.*, 51 Bull. 578.

When the defect in an article offered for sale arises from a defect in the materials employed, the warranty is implied only where the manufacturer is shown, or may be presumed to have known the defect: *Manufacturing Co. v. Implement Co.*, 51 Bull. 578.

When a manufacturing company sells goods to another company which it knows is in the implement business and purchasing goods for the purpose of reselling, there is an implied warranty that the machinery is of good material, good workmanship and in such condition that it can be used for the purpose for which it was intended, and if the goods are not as warranted the purchaser is entitled to recover damages sustained: *Manufacturing Co. v. Implement Co.*, 51 Bull. 578.

Where an article, which is not accessible for examination by the purchaser, is sold for a specific purpose, there is an implied warranty that it is suited for the purpose for which it is to be used: *Supply Co. v. Davidson*, 8 O. C. C. (N.S.) 417, 18 O. C. D. 731 [affirmed, without opinion, *Supply Co. v. Davidson*, 75 O. S. 611].

Where one goes to a seed store to purchase a certain variety of a species of seeds, and they are given him without comment with the name printed on the package in which they are contained, the sale is without warranty either that the seeds will grow or that they are of the variety stipulated: *Calhoon v. Brinker*, 5 O. N. P. (N.S.) 122, 17 O. D. (N.P.) 705.

When, in a contract for the sale of machinery, its power and capacity are expressly described, there is no implied warranty that it will be adequate to the purpose for which it is to be used, though that purpose is known by the vendor at the time of making the contract: *Punch Works v. Carbon Co.*, 75 O. S. 153, IV Longsdorf's Notes, 1014.

No implied warranty of fitness arises from ordering a known and definite article for a particular purpose, for the presumption that the buyer relied on his own judgment overthrows this. But *contra* if it appears that the buyer relied on the seller's judgment and not on his own and had a right so to do: *Hauser v. Curran*, 5 O. N. P. 224, 8 O. D. (N.P.) 495.

If an article not in existence is ordered for a declared purpose an implied warranty of fitness arises, and this, though the article is of a specific kind, for not being *in esse*, or being indeterminate and, therefore, to be

selected by the seller, the buyer can not exercise his own judgment: *Hauser v. Curran*, 5 O. N. P. 224, 8 O. D. (N.P.) 495 [reversing *Curran v. Hauser*, 4 O. D. (N.P.) 449].

Where the means of information are not equal, but the vendor knows of a secret defect unfitting the article for its intended purpose, the failure to disclose, while not fraud in law, may be evidence of it. As where a cow is sold and bought for a breeder and the seller knew she had been artificially delivered of a dead calf, which fact would impair her fertility, it is for the jury to determine if the nondisclosure is a fraud: *Hadley v. Importing Co.*, 13 O. S. 502, II Longsdorf's Notes, 623.

Concealment must be of some fact which the seller was bound to disclose. One who sells stock in a corporation is not bound to disclose a claim which he has against the corporation which may reduce the value of the stock, if valid: *Goodale v. Hunt*, 8 Dec. Rep. 35, 5 Bull. 172; 8 Am. L. Rec. 624, 6 Dec. Rep. 897 [affirmed, without opinion, *Goodale v. Hunt*, 11 Bull. 107].

If an undisclosed partner conceals the fact that he is a member of the partnership and attempts to purchase claims against the insolvent partnership for less than their face value such transaction will be treated as a partial payment by him, and not as a sale of such claims; and such undisclosed partner or his estate will be held liable for balance due upon such claims: *Fager v. Greiss*, 1 O. C. 531, 1 O. C. D. 296.

The bringing of a suit against a corporation without notice to the defendants in an existing suit brought to enforce stockholder's liability can not of itself be characterized as a fraud, nor is collusion established by the fact that the company made no defense: *Scotfield v. Oil Co.*, 6 O. C. C. (N.S.) 176, 17 O. C. D. 318 [affirmed, without opinion, *Cobb v. Scotfield*, 74 O. S. 513]. See also CORPORATIONS.

An action by a prosecuting attorney to recover interest from a bank by way of damages for the unlawful use of county funds, obtained from county treasurers, is not an action for relief on the ground of fraud, and if it were, the statute would begin to run from the time the fraud was discovered or ought to have been discovered: *Welty v. Bank*, 7 O. N. P. (N.S.) 43, 19 O. D. (N. P.) 82. See also COUNTIES AND COUNTY COMMISSIONERS.

A charge in a suit on a promissory note, given in payment for sheep, that, "If the plaintiff, at and prior to the sale of said sheep, was the owner of them; that they had the 'foot rot'; that it was a contagious disease; and that knowing them to be so diseased, he sold them to the defendant with-

out disclosing that fact, still said note was not void, and plaintiff could maintain his action thereon, subject to the damages sustained and claimed for by the defendant," was held to be correct: *Vining v. Bricker*, 19 O. S. 331, II Longsdorf's Notes, 663.

If a lessor has knowledge of defects in the premises which are not discoverable by the tenant upon practical examination, and which will imperil his person or property, a liability arises from the fraudulent concealment of such defect; and, in the application of this rule, the terms, fraud, fraudulent concealment, constructive fraud and deceit are synonymous: *Shinkle v. Birney*, 68 O. S. 328, IV Longsdorf's Notes, 944. See also LANDLORD AND TENANT.

The relation of landlord and tenant arises out of contract, and, where there is neither express warranty nor deceit, the latter can not maintain an action against the former on account of the condition of the premises hired: *Shinkle v. Birney*, 68 O. S. 328, IV Longsdorf's Notes, 944.

A settlement of accounts will not be opened unless fraud or particular mistake is shown. If one partner in settling with the other assigns to him a claim on the government and he obtains an extra allowance, this is neither mistake nor fraud, though he did not disclose his expectations of it, all the facts being known to both: *Fowler v. Piatt*, W. 206, I Longsdorf's Notes, 18. See also ACCOUNT.

A surety is entitled to know any moral delinquency on the part of his principal which is known to the adversary party and which would naturally affect his incurring such liability: *Dinsmore v. Tidball*, 34 O. S. 411, III Longsdorf's Notes, 725; *Smith v. Josselyn*, 40 O. S. 409, IV Longsdorf's Notes, 34; *State v. Surety Co.*, 12 O. N. P. (N.S.) 185, 21 O. D. (N.P.) 571.

Concealment of prior negligent conduct avoids the bond where it is to secure against negligence. Thus, a bond to "keep correct accounts with the members" is invalid where the employer, knowing of incorrect accounting, though not dishonest, during a previous term, took new bonds for the succeeding terms without disclosing this to the sureties thereon. Silence is an affirmation that such facts do not exist: *Loan Co. v. Fromlet*, 7 O. N. P. 194, 6 O. D. (N.P.) 184. See also BONDS, SURETY.

3. Material Fact.

(a) What Constitutes.

One seeking to be relieved from a contract, on the ground of alleged false representations must show that there is, among other things, a false representation of a

material fact: *Armstrong v. Karahner*, 47 O. S. 276, IV Longsdorf's Notes, 372.

An action for fraud and deceit must be founded on a misrepresentation of an existing fact, and can not be based on a future occurrence, or on an act to be done: *Smith v. Bowler*, 12 Dec. Rep. 770, 1 D. 520.

Whether a seller's representations of value of personalty are mere opinion or false statements of fact, on which the buyer might or did rely, is a question for the jury, and if the property was of no value, they are justified in finding them to be of the latter kind: *Floyd v. Paul*, 6 Dec. Rep. 1185, 12 Am. L. Rec. 231, 10 Bull. 14.

A seller's statement to induce a sale that the lots were worth \$25 per foot, but he would sell to defendant for \$13, and had sold the other lots at \$20, is not an opinion but fact, and if false, is a defense to an action for the price: *Ketchum v. Phillips*, 4 Dec Rep. 81, 1 Clev. L. Rep. 9.

Where the foreman of a corporation's business, knowing it to be insolvent procures a person to buy its stock by representing that he would become foreman and make his fortune, such sale is fraudulent: *Zeveink v. Lappert*, 6 Dec. Rep. 1017, 9 Am. L. Rec. 546.

In a suit upon a policy of life insurance, the defense of fraud in the procuring of the insurance must be regarded as sustained, where the insured, who died within a few months after the policy was issued from the effects of enlargement of his spleen to twenty-six times its normal size, failed to disclose his condition to the examining physician, although three physicians had told him of the bad condition of his health, one of whom had refused to pass him for life insurance, and one had told him he had heart disease, and one had discovered the enlargement; and this is true, notwithstanding the examining physician failed to discover his condition and numerous acquaintances testified to his apparent good health: *Insurance Co. v. Whittaker*, 7 O. C. C. (N.S.) 1, 18 O. C. D. 688. See also INSURANCE.

It is said that a lessor who, with knowledge, conceals sources of peril which are not discoverable by the lessee, is not guilty of negligence but of fraud: *Shinkle v. Birney*, 68 O. S. 328, IV Longsdorf's Notes, 944.

One who for value issues to another his check upon a bank, thereby represents that he has funds in such bank subject to such check; and, if he is aware that there are no funds in the bank subject to his check, and conceals that fact from the drawee, he is guilty of false representations to and fraud upon such drawee: *Banking Co. v. Banking Co.*, 20 O. C. C. 591, 10 O. C. D. 754. See also NEGOTIABLE INSTRUMENTS.

A representation by a solvent debtor that he was insolvent is fraudulent if the creditor is induced thereby to surrender a note of such debtor for much less than its face value: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728.

(b) *Promise.*

(aa) *With Intent to Perform.*

Mere knowledge of insolvency without disclosing it to the buyer is not fraudulent if there is an intention and reasonable expectation of paying, though not well grounded: *Talcott v. Henderson*, 31 O. S. 162, III Longsdorf's Notes, 570.

The purchase by an insolvent buyer, who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, but a purchase under like circumstances, save that such intent is absent, is not in law fraudulent. The simple failure to disclose a condition of insolvency does not imply a purpose to defraud: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clarke & Co. v. Lithographing Co.*, 52 O. S. 668].

The giving of notes by defendants in settlement of an account without intent to defraud, although knowing themselves to be insolvent, is not fraud in law, where there was no concealment of the insolvency, but simply a failure to disclose it, unless the insolvency was so gross as to lead to the presumption of an intent not to pay: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clarke & Co. v. Lithographing Co.*, 52 O. S. 668].

The fact that plaintiffs were induced to accept notes in settlement of an account against defendants upon receipt of a letter representing that there was about to be an increase of capital stock, when there was neither intention or expectation of increasing such stock, justifies plaintiff in disregarding the notes and suing on the original account: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668].

Where an account was due for which notes were given to extend the time of payment, and the holder was induced to accept such notes by false representation, or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668].

A promise to do something in the future as to reorganize a business is not a false

representation on which a seller of goods can replevy unless the buyer had no intention at the time of fulfilling it: *Hosiery Co. v. Baker*, 18 O. C. C. 604, 10 O. C. D. 219. See also SALES.

Representations as to the future intention, purpose, or expectation of the company, whereby subscriptions are obtained, will not defeat recovery thereon if not shown to be fraudulent for the purpose of deceiving, though those as to past or present status, or as to material matters, may have that effect: *Armstrong v. Karshner*, 47 O. S. 276, IV Longsdorf's Notes, 372. See also CORPORATIONS.

(bb) Without Intent to Perform.

A promise by a purchaser to do a specific thing at some time in the future, does not amount to a false representation upon which an action in replevin, based upon a fraudulent purchase, can be maintained, unless the purchaser at the time the promise was made, had no intention of fulfilling it: *Hosiery Co. v. Baker*, 18 O. C. C. 604, 10 O. C. D. 219.

Bad intent will not render actionable an act not amounting to a legal injury. A promise made without intent to perform it is not a fraudulent act in law where no special damages resulted: *Smith v. Bowler*, 13 Dec. Rep. 95, 2 D. 153.

A buyer not intending to pay or knowing he can not is a fraudulent buyer, and the seller may rescind against him or his assignee for creditors: *Kraft v. Dulles*, 13 Dec. Rep. 802, 2 C. S. C. R. 116.

A purchase on credit without intent to pay is fraudulent and having no reasonable expectation of being able to pay, is equivalent to an intent not to pay: *Talcott v. Henderson*, 31 O. S. 162, III Longsdorf's Notes, 570; *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 454.

An action for deceit must be founded on representations of an existing fact and not of future acts, or promises, though without any intention to fulfill them, as inducing a person to accept employment on promise of future promotion: *Smith v. Bowler*, 12 Dec. Rep. 770, 1 D. 520 [affirmed, *Smith v. Bowler*, 13 Dec. Rep. 95, 2 D. 153].

Fraud may consist in buying on credit after having sold all property, thus still proceeding on the credit of former possessions. (U. S. D. C., N. D. O.): *Ely v. Hanks*, 3 O. F. D. 421, 1 W. L. M. 107. See also ATTACHMENT.

A sale of chattels is fraudulent and the vendor may rescind the contract and recover the goods from the vendee or his assignee for the benefit of creditors, where the

financial condition of the vendee was such as to give him no reasonable expectation of being able to pay at the time the purchase money becomes due: *Sigler v. Rogers Co.*, 46 Bull. 190. See also SALES.

A debt is fraudulently contracted, where a purchase of property is made, with an intent on the part of the purchaser not to pay for the same: *Coal Co. v. Ludlum*, 69 O. S. 311, IV Longsdorf's Notes, 958. See also ARREST.

Evidence showing a fraudulent purpose on the part of a defendant corporation, in that with the intention of embarrassing the plaintiff, a large amount of goods were purchased from the plaintiff, for which payment was refused, and steps then taken to turn stock of the defendant into debenture bonds, with authority in the holders to seize the company's property upon short notice, thereby creating an indebtedness which did not exist at the time the goods were bought, is sufficient to sustain an attachment upon the property of the defendant: *Rubber Co. v. Tire Co.*, 7 O. C. C. (N.S.) 224, 16 O. C. D. 269. See also ATTACHMENT.

A, the principal maker of a note, desiring a renewal applied to the sureties thereon, who claimed to have a defense, and declined to renew except as sureties for B if he would sign. A procured B's signature to the renewal by representing that the former sureties would sign as his cosureties. A then procured the former sureties to sign, who did so, stipulating as sureties for B without his knowledge and without inquiry as to the terms on which he signed. It was held that the stipulation was not effective and the sureties were cosureties: *Crouse v. Wagner*, 41 O. S. 470, IV Longsdorf's Notes, 73.

A departure from the established route of a street railway, by running over private right of way to avoid sharp curves, is not fraud *per se*, against abutting property owners, whose consents were secured with the understanding that the line would follow the route specified. The right to complain of such change is in the public and not in the abutter, unless there has been fraud in obtaining his consent: *Ireton Bros. v. Traction Co.*, 2 O. N. P. (N.S.) 317, 15 O. D. (N.P.) 129.

(c) Opinion.

When representations are only given as a matter of opinion, fraud can not be based upon them, because fraud can not be based upon an opinion, but only upon matters of fact: *Curran v. Houser*, 4 O. D. (N.P.) 449 [reversed, *Houser v. Curran*, 5 O. N. P. 224, 8 O. D. (N.P.) 495].

The opinion as to the value of land expressed by the seller to induce the purchaser

to buy is not a fraud, if it was only an opinion, and honestly given, although untrue: *Spencer v. King*, 3 O. N. P. 270, 5 O. D. (N.P.) 113.

Where an agent of an insurance company makes representations to one having a claim for loss against the company, the parties standing in antagonistic relations to each other, that the latter had no claim or rights that he could enforce by legal proceedings, such representations are only opinion—representations upon which he had no right to rely, and if he does so rely, it must be at his own risk because the truth or falsehood of such representations could be ascertained by ordinary diligence: *Insurance Co. v. Reed*, 33 O. S. 283, III Longsdorf's Notes, 673.

The false representation must be of an existing ascertainable fact, and not mere opinion. A representation that a valuable mine would earn the deferred payments for its purchase, is a mere opinion of its productiveness: *Belmont Mining Co. v. Rogers*, 10 O. C. C. 305, 6 O. C. D. 619.

A purchaser of real property who, if competent and capable of judging of its value, examines it, can not avoid the transaction by showing a statement of the seller that the property is worth more than it really is. This rule is applicable to a mortgagee of real estate, mortgagee being required to advance, at the suit of a receiver, the full amount of a loan: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

In matters of value, which are always to a great extent matters of opinion, if the purchaser examines the property himself and has full opportunity to examine it, and is competent and capable of judging of its value, so that no advantage of him is taken, a statement by the seller that the property is worth more than it really is, is not a fraudulent representation, or such a representation as would avoid a contract: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417. See also RESCISSION.

Representations as to the value of real estate offered as security for a loan, to the effect that the property is worth \$9,000, when in fact it is not worth more than \$6,000, held not to amount to fraud or to vitiate mortgage, where it appeared that the report of appraisers appointed by the loan company, showing the real value of the property, was given on the same application and it also appeared that the general manager of the loan company also examined the property. Under such circumstances the loan company can not be said to have relied on the statements of the applicant for the loan: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417. See also RESCISSION.

Whether a seller's representations of value of personalty are mere opinion or false statements of fact, on which the buyer might or did rely, is a question for the jury, and if the property was of no value, they are justified in finding them to be of the latter kind: *Floyd v. Paul*, 6 Dec. Rep. 1185, 12 Am. L. Rec. 231, 10 Bull. 14. See also FRAUD AND DECEIT.

Where an agent of a life insurance company, acting within the scope of his authority, to induce a person to apply for insurance in the company, fraudulently represents to him that, for a specified annual premium, a policy would be fully paid at a given period and further entitle the holder to certain other specified benefits, and thereby induces such person to apply for a policy on his life, and to pay the premium therefor; if the policy issued to him is materially different from what it was represented to him, it would be, he may rescind and recover back of the company the premium paid. These were held not to be merely expressions of opinion: *Insurance Co. v. Wright*, 33 O. S. 533, III Longsdorf's Notes, 687.

(d) Statement of Law.

Representations which are mere matter of opinion, the parties being mutually cognizant of the facts and not in any fiduciary relation, if relied on, can not be ground to ask the aid of the law: *Insurance Co. v. Reed*, 33 O. S. 283, III Longsdorf's Notes, 673.

If an insurance adjuster induces the insured to settle the loss at a very low sum by assuring him he had no claim and could not recover, and reading law to him in proof of the fact, the insured relies on this at his own risk. A representation as to the law of the case is but an opinion since both parties are presumed to know the law: *Insurance Co. v. Reed*, 33 O. S. 283, III Longsdorf's Notes, 673.

A telephone company securing no more than its legal rights and the city parting with nothing of value is not estopped from maintaining a charge of \$18 per year, on the ground that the passage of the ordinance fixing the mode of its occupation of the streets was secured by fraud, in that an invalid provision fixing the rate of charges at \$12 per year was incorporated: *Macklin v. Telephone Co.*, 1 O. C. C. (N.S.) 373, 14 O. C. D. 446. See also TELEPHONES AND TELEPHONE COMPANIES.

False representations or an erroneous opinion as to legal rights will not invalidate an accord and satisfaction: *Burke v. Insurance Co.*, 12 O. D. (N.P.) 37 [affirmed, *Insurance Co. v. Burke*, 13 O. C. C. 39; re-

versed, *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958].

(e) *Immaterial Fact.*

An action will not lie for recovery of money paid for bonds represented to be valid, but afterward found to be invalid, where the representation consisted of a false statement as to an immaterial fact, to the effect that the attorney-general of the state had declared that an act under which the bonds were issued was constitutional, and was not affected by recent decisions of the supreme court as to special legislation: *National Bank v. Trust Co.*, 2 O. N. P. (N.S.) 525, 14 O. D. (N.P.) 577.

4. *Knowledge of Falsity.*

To constitute a cause of action in tort there must be bad faith. If the representations, when made, were believed to be true, and the facts of the case were such as to justify the belief, there is no fraud or deceit: *Taylor v. Leith*, 26 O. S. 428, III Longsdorf's Notes, 317; *Parmlee v. Adolph*, 28 O. S. 10, III Longsdorf's Notes, 385; *King v. Hopkins*, 13 O. C. C. 305, 7 O. C. D. 362; *Foreman v. Compton*, 4 Dec. Rep. 479, 2 Clev. L. Rec. 219.

If representations are made recklessly, and without any knowledge or information on the subject calculated to induce such belief, and they are untrue, then they are fraudulent: *Parmlee v. Adolph*, 28 O. S. 10, III Longsdorf's Notes, 385.

It is error to charge that "if the party signed certificate of incorporation certifying that there had been one hundred and fifty thousand dollars paid in, not knowing whether it was true or false, when in fact it was untrue, and such signing was done without knowledge thereof as to its truth or falsity, such statement would be recklessly made, and party making it would be liable for damages resulting the same as though he knew the statement to be untrue": *Schenck v. Knott*, 13 O. C. C. (N.S.) 41, 21 O. C. D. 581.

Representations founded on information given by those professing to know, and on due inquiry, and believed by the defendant to be true, will not support an action for deceit: *Mining Co. v. Rogers*, 10 O. C. C. 305, 6 O. C. D. 619.

In an action upon a promissory note given for the purchase price of certain cattle, defendants can not recover by way of counterclaim on the ground of misrepresentations as to the soundness of such cattle, unless such representations are alleged to be made with fraudulent intent and with knowledge of

their falsity: *Thompson v. Bank*, 13 O. C. C. (N.S.) 515, 22 O. C. D. 131 [affirmed, without opinion, *Thompson v. Bank*, 82 O. S. 446]; *Forging Co. v. Lamb*, 9 Dec. Rep. 199, 11 Bull. 190.

Funds paid upon legitimate claims or claims supposed to be legitimate, and at a time when it was supposed by defendants that the concern was solvent, will not sustain an attachment on the ground that funds were paid out in fraud of creditors: *Specialty Co. v. O'Brien*, 2 O. N. P. (N.S.) 550, 15 O. D. (N.P.) 749 [affirmed, *Specialty Co. v. O'Brien*, 7 O. C. C. (N.S.) 103, 18 O. C. D. 64]. See also ATTACHMENT.

In an action against the directors of a national bank by one who purchases some of its stock, relying on the statements contained in its report to the comptroller of the currency as to its resources and liabilities, which report was attested by the directors and published as the statute directs, some of which statements are false, whereby the purchaser is damaged, it is not error for the court to charge the jury that: "It must appear by preponderance of the evidence that at the time of the attesting and publication of said report, that the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing said report to be false, or under such circumstances as will warrant the jury in finding, by a preponderance of the evidence, that such director, or directors, by the exercise of ordinary care and prudence, would have known, that the said report was false in some one or more of the particulars set forth in the petition: *Mason v. Moore*, 73 O. S. 275, IV Longsdorf's Notes, 1003.

5. *Intent to Deceive.*

Representations are not fraudulent when there is no intent to deceive, nor are they fraudulent in law, because they are recklessly made: *Curran v. Houser*, 4 O. D. (N.P.) 449 [reversed on other grounds, *Houser v. Curran*, 5 O. N. P. 224, 8 O. D. (N.P.) 495].

The purchase by an insolvent buyer, who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, but a purchase under like circumstances, save that such intent is absent, is not in law fraudulent. The simple failure to disclose a condition of insolvency does not imply a purpose to defraud: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668]. See also SALES.

While fraud or bad faith is not essential to estoppel, it is a necessary ingredient in

misrepresentation by passivity: *Insurance Co. v. Miller*, 1 O. C. C. (N.S.) 397, 14 O. C. D. 667. See also ESTOPPEL.

G. C., § 3810, relating to the requirement that the funds for an improvement be in the city treasury before the work is undertaken, is fairly open to two constructions; and where a city solicitor in good faith advises the board of public service that the funds for a proposed improvement may properly be certified as in the treasury, whereas the bonds therefor have been lawfully authorized but have not been sold, the issuance of a certificate by the city auditor that the funds for the improvement are then available is not sufficient, should this interpretation be erroneous, to sustain a charge of fraud and thereby invalidate the contract: *Emmert v. Elyria*, 6 O. C. C. (N.S.) 381, 17 O. C. D. 353 [affirmed, *Emmert v. Elyria*, 74 O. S. 185, IV Longsdorf's Notes, 1008]. See also MUNICIPAL CORPORATIONS.

Where a label or style of package is imitated, it is necessary to show by evidence an intent to deceive the public and to steal the plaintiff's market. This intent may be shown by proof of actual deception, but it may be inferred from examination of the respective labels. Positive proof of fraudulent intent is not required if the simulation is clearly shown. If the infringing device be such that persons exercising ordinary caution are liable to be misled into purchasing the article bearing the objectionable device when they intend to purchase the other one, an injunction will be allowed: *Medicine Co. v. Gleasoner*, 68 O. S. 337, IV Longsdorf's Notes, 945. See also TRADE-MARKS AND TRADE NAMES.

To sustain an attachment on the ground of fraud, actual intent to defraud must be clearly shown: *Specialty Co. v. O'Brien*, 7 O. C. C. (N.S.) 103, 18 O. C. D. 64 [affirming *Specialty Co. v. O'Brien*, 2 O. N. P. (N.S.) 550, 15 O. D. (N.P.) 749]. See also ATTACHMENT.

Constructive fraud, and even such evidence of fraud as might justify setting aside a conveyance, are not sufficient to sustain an attachment: *Specialty Co. v. O'Brien*, 7 O. C. C. (N.S.) 103, 18 O. C. D. 64 [affirming *Specialty Co. v. O'Brien*, 2 O. N. P. (N.S.) 550, 15 O. D. (N.P.) 749]. See also ATTACHMENT.

Constructive fraud, or the fact that the transfer has this effect, is not sufficient to support an action for conversion: *Chamberlain v. Strong*, 3 Dec. Rep. 118, 3 Gaz. 281; *Bank v. Bethel*, 32 Bull. 135; *Bank v. Purcell*, 6 Dec. Rep. 936, 8 Am. L. Rec. 744 [affirmed, without opinion, *Bank v. Purcell*, 11 Bull. 323]; *Rolling Mill v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46.

The fraudulent intent to injure or delay the creditor must actually exist to justify an attachment before the debt is due. Merely that such is the necessary consequence of a sale is not sufficient: *Heidenheimer v. Ogborn*, 12 Dec. Rep. 665, 1 D. 351. See also ATTACHMENT.

Whether representations as to his pecuniary circumstances made by the purchaser to the seller of goods, at one time in order to obtain credit, influenced the seller in making a like sale to the same party at a subsequent time, is a question of fact; and in such case, it is competent for the seller to testify that they did. But the fact is to be determined by the jury in view of all the circumstances; as, also, whether there was such fraud in the subsequent sale as to entitle the seller to recover the property, on the ground that the information given in the first instance was false: *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

6. Deception.

(a) Continuing Representations.

If the representations to the mercantile agency are as to a past fact, which must continue to be true or false, as here that the corporation claims that \$50,000 of its capital is paid in, the statement is a continuing representation, though three years have elapsed. But if in reference to a fact that may fluctuate with the future, they can be relied on only within a reasonable time which depends upon the circumstances in each case: *Wilmot v. Lyon*, 11 O. C. C. 238, 7 O. C. D. 394 [affirmed, on other grounds, *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 454].

A buyer's deceit as to his pecuniary condition at one purchase on credit may constitute fraud on the same seller at a later sale, which is a question for the jury. The seller may testify that he still relied on the prior statement: *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

A buyer, by false statements that he was out of debt, obtained goods on credit. He paid for them punctually, and in a few months obtained more goods on credit from the same seller, who testifies that he relied on the former statements. The buyer at once transferred the goods to his wife for a past debt of long standing. It was held that it is for the jury to say whether the seller had a right to rely on the former statement and whether there was fraud in the second sale by reason thereof and by reason of any intent not to pay for them, and a verdict for

the seller is proper: *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

The reply to a direct question as to what was the production of certain oil wells, that "I run two one-hundred barrel tanks a day," was a subterfuge and misrepresentation, where the fact was that the production alluded to was some weeks previous, while the production at the time the inquiry was made with a view of purchase, was only fifty-three barrels a day: *Jones v. Draper*, 4 O. C. C. (N.S.) 105, 16 O. C. D. 785 [affirmed, without opinion, *Draper v. Jones*, 73 O. S. 369].

(b) *Reliance on Other Information.*

If the buyer relied on his own knowledge, and not on the false representations, he was not deceived, and can not recover: *Wilkinson v. Root*, W. 686, I Longsdorf's Notes, 53.

A purchaser of real property who, if competent and capable of judging of its value, examines it, can not avoid the transaction by showing a statement of the seller that the property is worth more than it really is, this rule is applicable to a mortgagee of real estate, mortgagee being required to advance, at the suit of a receiver, the full amount of a loan: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

Representations as to the value of real estate offered as security for a loan, to the effect that the property is worth \$9,000, when in fact it is not worth more than \$6,000, held not to amount to fraud or to vitiate mortgage, where it appeared that the report of appraisers appointed by the loan company, showing the real value of the property, was given on the same application and it also appeared that the general manager of the loan company also examined the property. Under such circumstances the loan company can not be said to have relied on the statements of the applicant for the loan: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

In matters of value, which are always to a great extent matters of opinion, if the purchaser examines the property himself and has full opportunity to examine it, and is competent and capable of judging of its value, so that no advantage of him is taken, a statement by the seller that the property is worth more than it really is, is not a fraudulent representation, or such a representation as would avoid a contract: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

Where, in making a contract one party gives the other references as to his financial

standing and credit, but the other party concludes the contract without inquiring of such references, a subsequent inquiry, because unsatisfactory in results, will not avail him to rescind the contract: *Graff v. Book Concern*, 8 O. N. P. 240, 11 O. D. (N.P.) 152.

Where evidence is introduced tending to show that one member of a firm committed or consented to the commission of a fraud upon his copartners, notice on his part is not notice to them: *Jones v. Draper*, 4 O. C. C. (N.S.) 105, 16 O. C. D. 785 [affirmed, without opinion, *Draper v. Jones*, 73 O. S. 369]. See also PARTNERSHIP.

G contracted to sell certain lands to W, representing that he could convey as trustee, but a few days before signing the contract, put his title deed in W's hands, and there showed that G had but a small interest. It was held that W can not recover damages or reimbursement for expenses, for the deeds put him on notice: *Elevator Co. v. Guthrie*, 7 O. N. P. 200, 1 O. D. (N.P.) 190 [affirmed, on other points, *Elevator Co. v. Guthrie*, 12 O. C. C. 182, 5 O. C. D. 128].

A purchaser can not resist payment on the ground that the advertisement called for a depth of 143 feet and there was only 109 feet when the fact was announced to him before he made the contract: *Board of Education v. Eversman*, 7 Dec. Rep. 571, 3 Bull. 1122.

7. *Damage.*

Where a trust company as trustee under a deed of trust or mortgage certifies that "this bond is one of a series of bonds mentioned in the mortgage or deed of trust with-in referred to," well knowing that none of the property described in such mortgage belongs to the mortgagor, and redelivers to the mortgagor the bond thus certified without restriction on its use, it becomes liable to a pledgee of such bond who relied upon such certificate to his prejudice, regardless of the motive in making such certificate: *Dreifus v. Bank & Trust Co.*, 13 O. C. C. (N.S.) 441, 23 O. C. D. 46 [reversed, without opinion, *Bank v. Dreifus*, 87 O. S. 525].

In order that fraud may constitute an actionable tort, damages must result: *Bortges v. O'Neils*, 13 O. S. 72, II Longsdorf's Notes, 598.

To constitute a case of fraud it is not sufficient that an act be done maliciously or fraudulently, if it be not in itself unlawful, nor is it sufficient that the conduct of a defendant be immoral; there must be legal damage resulting: *Smith v. Bowler*, 13 Dec. Rep. 95, 2 D. 153 [affirming *Smith v. Bowler*, 12 Dec. Rep. 770, 1 D. 520].

B. BY WHOM MADE.

1. Party.

If a man makes a representation that a third party is pecuniarily responsible, and yet has no knowledge on that subject, but makes the statement recklessly, and it turns out that the said third party is not as represented, the man is responsible in the same way that he would have been if he had known that the party was without property: *Parmlee v. Adolph*, 28 O. S. 10, III Longsdorf's Notes, 385.

The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it where by so doing the rights of innocent parties may be preserved or fraud circumvented: *In re Rieger*, 8 O. L. R. 498.

2. Agent.

Where a local agent repeats representations of a general agent, the latter's letters to him containing them are admissible in evidence in an action for the deceit against a corporation: *Home and Dower Association v. Kirk*, 8 Dec. Rep. 592, 9 Bull. 48.

If an agent or attorney employed by the creditor to get security from the debtor procures an accommodation indorsement by fraudulent misrepresentations to the indorser, the creditor is responsible for his acts and the indorsement is void: *Kingsland v. Pryor*, 33 O. S. 19, III Longsdorf's Notes, 656.

But if the attorney is merely silent, knowing the debtor is hopelessly insolvent, and the indorser will have the note to pay, the creditor is not affected. The attorney is not bound to make public information that will prevent the accomplishment of his object: *Kingsland v. Pryor*, 33 O. S. 19, III Longsdorf's Notes, 656.

A debtor, who, on demand of his creditor for security, obtains an accommodation indorsement by fraudulent representations to the surety, is not the creditor's agent in so doing, and if the creditor was ignorant of them he is not affected: *Kingsland v. Pryor*, 33 O. S. 19, III Longsdorf's Notes, 656.

A mercantile agency to whom a person makes representations of his financial condition is thereby made his agent to convey them to its subscribers in the course of business, and if he knows them to be false, the seller to him in reliance on them has the same right to rescind as if made to him personally: *Wilmot v. Lyon*, 11 O. C. C. 238, 7 O. C. D. 394 [affirmed, on other grounds, *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 454].

Fraud by one partner of a firm employed as agents to sell plaintiff's iron by secretly

buying the iron for himself on finding the market rising, and reporting to plaintiff that the firm had sold to a third person, it was held that binds the firm though the co-partners were innocent. Fraudulent representations in the course of the business create a liability on the firm coextensive therewith: *Iron Co. v. Harper*, 41 O. S. 100, IV Longsdorf's Notes, 52. See also PARTNERSHIP.

A subscription with the state for the canal fund, obtained by fraudulent representations of a public agent not having power to act for the state, is avoided. The state retaining the benefit of the contract must take it as it is, and is chargeable with the fraud: *State v. Perry*, W. 662, I Longsdorf's Notes, 51.

Where it is undisputed that a life insurance company is a stock company the fact that the impression was conveyed by its agents that it was doing a mutual business, and that policy holders who elected to take participating contracts had written in their contracts that they would share in the profits "as apportioned by the company," does not transform the company into a mutual company, or make even the participating contracts mutual insurance contracts, or estop the company from treating the surplus fund as belonging to the stockholders: *State v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

Where A, on solicitation of a stranger agreed to buy a load of hay from him, and the stranger informed B thereof and accompanied B with the hay to A, and while B was unloading, the stranger procured from him the weigher's certificate and thereby arranged the amount and collected it from A and went away, it was held that A must suffer the loss, for B did not sell to the stranger nor make him agent, and intrusting him with the weigher's certificate is not contributory negligence, and A is liable for conversion if he refuses to pay or redeliver: *Brockhaus v. Klein*, 8 Dec. Rep. 487, 8 Bull. 205.

3. Third Person.

A sale by the assignee of an insolvent corporation in good faith is not invalidated by the fraud of a stockholder. The fraud consisting in misrepresenting to the buyer the value and condition of the property, is by a stranger to the seller: *Trevitt v. Converse*, 31 O. S. 60, III Longsdorf's Notes, 562.

C. TO WHOM MADE.

1. Party.

W knowing that D and R desired to buy hogs separately, misrepresented to them the

cost and health of his hogs, but refusing to sell separately, induced them to buy in one lot and divide. The hogs were infected with cholera, and of D's lot many died, and his other hogs were infected. It was held that though a joint sale in form, and the misrepresentations were not made to D alone, D could sue alone without joining R as co-plaintiff for his losses: *Duncan v. Willis*, 51 O. S. 433, IV Longsdorf's Notes, 550.

W, having knowledge that D. O. D. and R. W. D. were desirous of purchasing thirty or forty head of hogs, each for separate use, represented to them that he had one hundred head of the kind and quality they wanted; he would not sell in separate lots, but would sell in one lot and the purchasers could divide them to suit themselves. He further represented that his hogs were sound, healthy and free from disease, and that he had purchased them a few days before at \$5.00 per 100 pounds. In fact, the hogs had been exposed to hog cholera and were then infected with it and had been purchased by W as diseased hogs and for a sum much less than \$5.00 per 100 pounds, all which was well known to W, but unknown to the purchasers. Relying on the foregoing representations, the entire lot was purchased for \$5.12½ per 100 pounds, the two purchasers each to have fifty head as his separate and individual property, and to feed the same on their respective farms. The hogs were so divided immediately upon completion of the purchase. On the same day a number of them owned by D. O. D. died from cholera and the disease was communicated to his other hogs, some of which also died. It was held that D. O. D. might maintain an action for damages against W for the deceit and fraud, without joining R. W. D. or making him a party defendant: *Duncan v. Willis*, 51 O. S. 433, IV Longsdorf's Notes, 550.

2. Agent.

That the seller sold through a broker or agent does not affect his right to rely on the representations: *Wilmot v. Lyon*, 11 O. C. C. 238, 7 O. C. D. 394 [affirmed, on other grounds, *Wilmot v. Lyon*, 40 O. S. 296, IV Longsdorf's Notes, 454].

Only the person can sue whose conduct was intended to be influenced by the deceit. Accordingly, if B, by falsely representing his sheep to be healthy, sells them to A, acting as known agent of C, with the avowed purpose of mingling them with C's other sheep and the united flock is infected, and A buys the united flock from C, both being still ignorant of the deceit, A can not sue B for the original or continued injury: *Wells v. Cook*, 16 O. S. 67, II Longsdorf's Notes, 759.

3. Third Person.

If A write a letter to B, desiring him to introduce the representative of another to such merchants as he may desire and describing the principal as a man of property, persons seeing and relying on said letter can not maintain an action of deceit against A, though such representations are untrue, unless it came to them through B to whom it was directed: *McCracken v. West*, 17 O. 16, I Longsdorf's Notes, 792.

D. EFFECT.

1. Action of Tort.

For every fraud or deceit which results in consequential damage to a party, he may maintain a special action on the case: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728; *Bartholomew v. Bentley*, 15 O. 660, I Longsdorf's Notes, 737.

It was held by the trial court and affirmed by an evenly divided supreme court that, if a debtor fraudulently represented himself to be insolvent and thereby induces his creditor to surrender his note in consideration of certain property, worth about a quarter of the face of the note, a special action on the case would lie, and that the right to rescind and to sue on the note was not the sole right of such creditor: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728.

Punitive damages for fraud can only be recovered where there is a gross or malicious fraud, or something showing a very corrupt condition of affairs, but not for a bare case of fraud: *Cable v. Bowlus*, 21 O. C. C. 54, 11 O. C. D. 526. See also DAMAGES.

There may be recoupment for misrepresentations which would not sustain an independent action, as where the vendor believed them to be true, and had good reason for so believing, and is suing for the purchase money: *Mulvey v. King*, 39 O. S. 491, III Longsdorf's Notes, 1043. See also VENDOR AND PURCHASER.

An infant can not be held liable in tort in an action for deceit which consisted in false representations as to his age, where the proof shows a contract, the making and performance of which was induced by such representations: *Mulholland v. Berlinsky*, 16 O. D. (N.P.) 183, 3 O. L. R. 350. See also INFANTS.

Endorsing notes "without recourse" does not protect the seller from an action for deceit if he misrepresented their value: *Spencer v. King*, 3 O. N. P. 270, 5 O. D. (N.P.) 113.

A subcontractor who performs work in reliance on the owner's false representations, that there was money enough in his

hands to pay all bills and leave the head contractor a profit, can recover from the owner, who knew that but a small sum remained due, and the head contractor was insolvent: *Ridenour v. Chamberlain*, 11 O. N. P. (N.S.) 225, 21 O. D. (N.P.) 501.

2. Effect on Contract.

(a) Fraud as to Essential Element.

(aa) In Absence of Negligence.

Where A, induced by B's false representations that he is agent of C, agrees to sell chattels to C, and delivers them to B, who then sells them to C; C, though innocent of the fraud, gets no title and is liable to A if he converted them to his own use. If B paid A in part on delivery, this will affect the amount of recovery, but not the right of action: *Hamet v. Letcher*, 37 O. S. 356, III Longsdorf's Notes, 919.

One who signs a negotiable note when he is induced by the fraudulent representations of the payee to believe that it is a contract of agency, is not liable to a *bona fide* holder thereof if such maker was free from negligence: *De Camp v. Hamma*, 29 O. S. 467, III Longsdorf's Notes, 489.

The same principle applies to indorsement of a negotiable instrument: *Perkins v. White*, 36 O. S. 530, III Longsdorf's Notes, 874.

Where a dealer gets an order for goods by letter signed W. A., and finding that W. A. was of good standing ships the goods, and then learning that there was another W. A. in the same town of no standing, and the latter gets the goods before the dealer can intercept them and ships them elsewhere to other buyers, the dealer has not parted with his title, for he did not intend to sell to the other W. A., and can recover as for conversion from a buyer from such: *Block v. Peebles*, 10 Dec. Rep. 3, 18 Bull. 36.

If the carrier delivers the goods to a person of a name different from that of the consignee, he is liable to the consignor even if such goods were ordered by the person to whom they were delivered, and who used the name of such consignee in sending such order: *Oskamp, Nolting & Co. v. Express Co.*, 61 O. S. 341, IV Longsdorf's Notes, 811.

A signature to a written instrument obtained by fraudulent representations as to the nature of the instrument is invalid as against him: *Burke v. Insurance Co.*, 12 O. D. (N.P.) 37 [affirmed, *Insurance Co. v. Burke*, 13 O. C. D. 39; which was reversed on another point in *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958].

(bb) In Case of Negligence.

(aaa) Between Parties.

Representations by the agent as to the contents of a policy of insurance are said to be merged in such policy; and the insured is bound by the terms thereof: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

It is no defense to assessments against the holder of a mutual policy containing a clause making him liable to be assessed to pay debts, that the agent assured him that only straight policies were issued by the company, and that there was no liability of the kind allowed under its amended charter, in reliance on which he took the policy and had held it eighteen months, and is now sued by trustees winding up the company. The prior agreements were merged in the policy. The policy was only voidable and not void for the fraud, and can not be avoided as against innocent intervening rights, after sleeping so long. There has been ample time to ascertain the contents of the policy: *Mansfield v. Ice Co.*, 11 Dec. Rep. 617, 28 Bull. 113. See also INSURANCE.

Courts will not refuse to listen to one asking relief from a contract which he failed to read, but on the contrary will grant relief where fraud is charged and shown in the matter of reading the contract to him or in stating its nature of terms: *Monnett v. Railway Co.*, 4 O. C. C. (N.S.) 369, 16 O. C. D. 469.

(bbb) As to Third Persons.

One who negligently signs a negotiable note, relying upon the fraudulent representations of the payee that it is an instrument of a different character, is liable to a *bona fide* holder thereof: *Ross v. Doland*, 29 O. S. 473, III Longsdorf's Notes, 490; *Winchell v. Crider*, 29 O. S. 480, III Longsdorf's Notes, 491.

The same principle applies to the indorsement of a negotiable instrument: *Perkins v. White*, 36 O. S. 530, III Longsdorf's Notes, 874.

If one of two innocent persons must suffer loss by the fraud or misconduct of a third person he who first reposes the confidence and commits the first oversight must bear the loss: *Selser v. Brock*, 3 O. S. 302, II Longsdorf's Notes, 29; *Ogden v. Ogden*, 4 O. S. 182, II Longsdorf's Notes, 85; *Bigelow v. Comegys*, 5 O. S. 256, II Longsdorf's Notes, 180; *Resor v. Railroad Co.*, 17 O. S. 139, II Longsdorf's Notes, 822; *Ramsay v. Jones*, 41 O. S. 685, IV Longsdorf's Notes, 83; *McHenry v. Bank*, 85 O. S. 203; *Jones' Sons v. Bank*, 14 O. N. P. (N.S.) 129.

The rule that where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss, applies to a case where one gives a bank check to a person to whom he has loaned money and taken to secure the same a mortgage on land represented by such person as owned by him and believed by the drawer of the check to be so owned, though in fact not owned by him, and the bank, relying upon the same means of identification of the payee of the check as was relied upon by the drawer, and with no reason to suspect the *bona fides* of the transaction, pays the check to the identical person to whom the drawer intended to and did deliver it, although not to the person who in fact owned the land attempted to be mortgaged: *McHenry v. Bank*, 85 O. S. 203.

Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexistent person or order, the drawer or maker being in ignorance of the fact and intending no fraud, the bank on which the check is drawn is not authorized to pay it and charge the amount of the instrument so drawn to the account of its customer on the endorsement of the party representing it, although the instrument appears to have been previously endorsed by the party named as payee. Such endorsement is in effect a forgery, and the payment thereon by the bank confers no right on it as against the maker or drawer of the instrument, the check: *Jones' Sons v. Bank*, 14 O. N. P. (N.S.) 129.

In the absence of a course of dealing or understanding to the contrary between the parties, that is, as between the drawer of the check and the bank paying it, the duty of the banker is, in all cases, to pay the check to the person named or his order where the terms of the check are such; and the bank may and should withhold payment of the check until fully satisfied as to the genuineness of the endorsement: *Jones' Sons v. Bank*, 14 O. N. P. (N.S.) 129.

The rule of law that a negotiable instrument made payable to a fictitious person or order is, in effect, an instrument payable to bearer and needs no endorsement to pass it to another in the commercial world and affairs, applies only where it is so made with the knowledge of the party making it and does not apply where the maker or makers, supposing the payee to be a real person and intending payment to be made to such person or his order, is induced by the fraud of another to so draw it: *Jones' Sons v. Bank*, 14 O. N. P. (N.S.) 129.

(b) *Fraud as to Collateral Fact.*

(aa) Between Parties.

A contract which is obtained by fraudulent representations as to a collateral material fact is, as between the parties, voidable at the election of the party who is misled by such fraud: *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 570; *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Greever*, 6 O. C. C. 269, 3 O. C. D. 448].

Fraud or failure of consideration is a defense; as where a note is given for services on the payee's false assurance that the work had been performed: *Loffland v. Russell*, W. 438, I Longsdorf's Notes, 35.

If a buyer obtains goods by falsely representing himself free from debt and worth a stated amount, the seller may rescind: *Frost v. Lowry*, 15 O. 200, I Longsdorf's Notes, 705.

If goods are obtained by fraud a court of law will deem the property to be in the vendor while they remain in specie and possession can be restored, and a court of equity may enjoin a transfer: *Hulse v. Wright*, W. 61, I Longsdorf's Notes, 5.

A signature to a written instrument obtained by such fraudulent representations as to facts as overcome the will of the signer, is void as against him: *Burke v. Insurance Co.*, 12 O. D. (N.P.) 37 [affirmed, *Insurance Co. v. Burke*, 23 O. C. C. 39, 13 O. C. D. 39; reversed on other grounds, *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958]. See also INSTRUMENT IN WRITING.

Fraud in obtaining the policy or negligence in causing the fire is a defense: *Clary v. Insurance Co.*, W. 227, I Longsdorf's Notes, 20.

Specific performance will be refused if there are indications of fraud or unfairness and disparity in value, coupled with defendant's intoxication when importuned into signing the contract: *Wingart v. Fry*, W. 105, I Longsdorf's Notes, 9.

If the party asking specific performance seeks to retain an unjust advantage arising out of a technicality, he does not come with clean hands and his bill will be dismissed: *Townsend v. Alexander*, 2 O. 18, I Longsdorf's Notes, 104.

A buyer of land who has let his purchase notes go by and then bought them in at a discount from one to whom the vendor had pledged them will not be aided in equity to compel a conveyance of the title unless he pays his vendor what is due: *Taft v. Leavitt*, W. 389, I Longsdorf's Notes, 32.

Where money is deposited to the credit of a broker by a customer after hopeless insolvency on his part has intervened, an equitable trust in the deposit results, and the customer will not be required to trace

the identical money deposited, but an order will be made for payment to him of the amount of his deposit, less the amount of his indebtedness to the broker on the day the broker was compelled to close out all pending trades: *In re Bultman Co.*, 7 O. L. R. 587.

Where money is deposited to the credit of a broker by a customer after hopeless insolvency on his part has intervened, the fraud avoids the implied contract between the parties by which the relation of debtor would ordinarily arise and prevents the deposit becoming the property of the broker: *In re Bultman Co.*, 7 O. L. R. 587.

(bb) Sureties.

Misrepresentation by the debtor to the surety, without which he would not have signed, will relieve him if the creditor had knowledge and assented thereto, but not if, without the creditor's knowledge, the prior names are forged by the debtor: *Selser v. Brock*, 3 O. S. 302, II Longsdorf's Notes, 29.

A surety signing after other sureties' names affirms their genuineness and is bound to an innocent payee, not by way of warranty, but because of two innocent persons the one first trusting a third person must suffer by his fraud: *Selser v. Brock*, 3 O. S. 302, II Longsdorf's Notes, 29.

A bank holding C's note on which L and X were sureties, promised C to renew it if he would obtain B as surety in place of X, and C induced B to erase X's name and sign his own by falsely representing to him that L had agreed to the extension. It was held that, though L is plainly released by the extension, B was liable. The note is in legal effect a new note. C was in no sense the agent of the bank: *Bank v. Lucas*, 26 O. S. 385, III Longsdorf's Notes, 312.

If an extension was procured by the debtor's fraud or false representations the surety is not discharged, for the debtor himself could not enforce it, and this applies where the debtor's wife is the surety: *Mack v. Kaetzel*, 2 Dec. Rep. 313, 2 W. L. M. 412.

If an extension is procured by the debtor's forging the surety's name to the renewal, the surety is not discharged: *Tarbill v. Mill Works*, 2 O. C. C. 564, 1 O. C. D. 643.

(cc) Third Persons Not Bona Fide Purchasers.

One who is induced by fraud to sell goods may recover them from one to whom the original vendee has transferred them in payment of a pre-existing debt: *Eaton v. Davidson*, 46 O. S. 355, IV Longsdorf's Notes, 329.

Where a person by deceit obtains goods on credit and then transfers them for a pre-existing debt, this consideration will not make such buyer a bona fide holder as against the defrauded seller: *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

The implied condition that property sold for cash and delivered, shall be paid for in cash or possession may be recovered, follows the property into the hands of an assignee for the benefit of creditors, for he only takes the assignor's title: *Hodgson v. Barrett*, 33 O. S. 63, III Longsdorf's Notes, 657. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

If a buyer obtains goods by fraud, the delivery being voluntary and with intent to pass property, the title passes, but the contract is voidable, both as against the buyer and his assignee for creditors: *Kraft v. Dulles*, 13 Dec. Rep. 802, 2 C. S. C. R. 116.

A sale of chattels is fraudulent and the vendor may rescind the contract and recover the goods from the vendee or his assignee for the benefit of creditors, where the financial condition of the vendee was such as to give him no reasonable expectation of being able to pay at the time the purchase money becomes due: *Sigler v. Rogers*, 46 Bull. 190.

(dd) Bona Fide Purchasers.

In a sale for cash on delivery, when the goods are in the custody of a bailee and the vendor, without requiring payment, gives to the vendee a delivery order directing the bailee to deliver the goods to the vendee or to his order, intending to transfer both the property and possession, and the bailee pursuant to the order delivers the goods to a bona fide purchaser from the vendee, the delivery is as to the innocent purchaser absolute and not conditional and the title of such subvendee is good against the seller, although the sale between the vendor and vendee was fraudulent: *Railway v. Good*, 82 O. S. 278 [reversing *Good v. Railway*, 81 O. S. 529, which affirmed, without opinion, *Good v. Bender*, 11 O. C. C. (N.S.) 417, 20 O. C. D. 715].

Where a person by a worthless check procured a draft from a banker and remitted it to plaintiffs but the banker notified plaintiffs by telegraph before they received the draft, no title in it vests in plaintiff as bona fide holders. Acceptance may be presumed from relivity to a carrier in favor of natural justice, but not against it: *Wright v. Ellis*, 12 Dec. Rep. 282, 1 H. 546. See also NEGOTIABLE INSTRUMENTS.

If a person buys goods without intending to pay for them, mere knowledge by subse-

quent buyers of his insolvency will not make them buyers with notice: *Salmon v. Reis*, 5 O. C. C. 375, 3 O. C. D. 184. See also *BONA FIDE BUYERS*.

Where an owner of land, under a verbal agreement for the sale of it, places the purchaser in possession, and executes a deed and places it in the hands of a third person, with direction to deliver it on the purchase-money being paid or secured by mortgage; and the grantee induces the holder of the deed to deliver it to him that he may exhibit it as evidence of title, and the grantee does so to one ignorant of the facts, and who in good faith makes him a loan secured by mortgage on the property, the grantor in such case is estopped from setting up his claim to the land or a lien on it for purchase money, against such innocent mortgagee: *Schurtz v. Colvin*, 55 O. S. 274, IV Longsdorf's Notes, 861 [distinguishing *Ogden v. Ogden*, 4 O. S. 182, II Longsdorf's Notes, 85].

Where a vendor put his vendee into possession, and executed and placed in his hands a deed of conveyance for the land sold, with an understanding between them that the deed should not be considered as delivered, or become effectual, until the purchase money should be paid; and the vendee subsequently put the deed upon record, and, without paying the purchase-money, mortgaged the land to *bona fide* mortgagees for value, and without notice, it was held that such vendor is estopped, as between him and the mortgagees, from denying the delivery of the deed, or asserting any claim to the land: *Resor v. Railroad Co.*, 17 O. S. 139, II Longsdorf's Notes, 822.

The doctrine that he who first reposes confidence is the loser does not apply to cases of fraud; accordingly procuring the delivery of a deed from the holder in escrow by fraud, recording it and mortgaging the land to another, does not give the latter a lien: *Ogden v. Ogden*, 4 O. S. 182, II Longsdorf's Notes, 85. See also *BONA FIDE BUYER*.

Where A obtains by the fraud of his confederate, B, a deed from H, but sells without having it recorded, to D, a *bona fide* buyer, and C cancels the unrecorded deed without obtaining a reconveyance, and, knowing the fraud, makes a new deed to D, with but one witness and no acknowledgment, and delivers it to B for D, and D, on the faith thereof, parts with valuable consideration, C is estopped to dispute D's title. Where a loss must fall on one of two innocent persons he who occasioned it must bear it though he committed no positive fault, especially if he was negligent. The maxim, he who is first in time is stronger in right, will not prevail

if the junior equity is superior in merit: *Wilson v. Hicks*, 40 O. S. 418, IV Longsdorf's Notes, 35. See also *DEEDS*.

3. On Judgment.

The fraud or undue advantage for which a court of equity will set aside a judgment or decree, must consist of extrinsic acts outside of and collateral to the matter actually tried by the first court and not related to the matter concerning which the judgment or decree was rendered: *Michael v. Bank*, 84 O. S. 370.

A large sum of money was taken from the vaults of a bank between the time of closing the bank for business and the time of opening it up the following business day. The method by which such money was taken was at that time unknown. In an action against the bank officials to recover such fund they alleged that such money was taken away by some person or persons unknown to such officials. A reply was filed denying such allegations. At the trial the bank officials had no evidence whatever of the way in which such money was taken. A verdict was rendered against such officials, a motion for new trial was filed and overruled, proceedings in error were brought in the circuit court and subsequently in the supreme court, and the judgment was affirmed. The bank officials then paid such judgment after execution issued. Four years after the judgment was paid and seven years after the robbery, it was discovered that the time lock of the bank had been tampered with, and that the money had been stolen from the bank without any fault of the bank officials. One of the bank officials thereupon proceeded in equity to have the verdict set aside and a new trial awarded and other relief. It was held that while the case was one of great hardship, no fraud was done in the original case and that the bank official was entitled to no relief: *Michael v. Bank*, 84 O. S. 370.

A motion to vacate a decree of divorce a *vinculo* will be granted where fraud has been practiced upon the court, invoking its jurisdiction, or where the court never had any jurisdiction of the parties or subject-matter thereof, and especially where service is made by publication and there has been no new marriage of either party: *Travers v. Travers*, 47 Bull. 188 [distinguishing *Parrish v. Parrish*, 9 O. S. 534, II Longsdorf's Notes, 396].

Where it appeared that a resident of one county, having failed to get a decree for divorce upon a full hearing therein, subsequently removed to and applied for a divorce in another county, giving no notice to the defendant except by publication, and, not

carrying to learn his residence, made no effort to locate him so that he could be notified, falsely stated in her petition and testimony that she was a *bona fide* resident of the latter county, and that six weeks did not elapse from the date of the first publication until the decree was entered, and that plaintiff left such county immediately after the decree, together with evidence from which it conclusively appeared that she came solely and exclusively for the purpose and with a fraudulent intent to stealthily procure a divorce, a decree procured under such circumstances is fraudulent and may be set aside: *Travers v. Travers*, 47 Bull. 188. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

In an action between a *bona fide* purchaser or assignee of a judgment and a stranger to the judgment, such purchaser or assignee stands unaffected by frauds of which he had no knowledge, express or constructive: *Wright v. Snell*, 22 O. C. C. 86, 12 O. C. D. 308. See also JUDGMENT.

A plea of former prosecution and compromise may be defeated by proof that it was obtained by defendant's fraud, for the justice's duties being ministerial, the entry can be collaterally impeached: *Kezarlee v. Cartmell*, 31 O. S. 522, IV Longsdorf's Notes, 602. See also BASTARDY.

The award in an arbitration can not be impeached for error, nothing but fraud in the parties or in the arbitrators, or such manifest mistake as naturally works a fraud can be alleged to avoid it: *Corrigan v. Rockefeller*, 67 O. S. 354, IV Longsdorf's Notes, 932. See also ARBITRATION.

A decree from the bonds of matrimony, although obtained by fraud and false testimony, can not be set aside on an original bill filed at a subsequent term: *Parrish v. Parrish*, 9 O. S. 534, II Longsdorf's Notes, 396.

A judgment procured against a party on an account which she never owed, nor became either directly or indirectly liable for its payment, constitutes a fraud on the court rendering such judgment, which should be set aside in a proper proceeding brought for that purpose: *Ulman v. Effinger*, 11 O. C. C. (N.S.) 383, 20 O. C. D. 791 [affirmed, without opinion, *Einstein v. Effinger*, 60 O. S. 579]. See also JUDGMENT.

A petition which recites that a suit to foreclose a mortgage had been brought in the common pleas court, that summons was duly issued thereon, that the return of the sheriff showed all parties to have served according to law, and that a judgment and decree of sale was entered thereon and the premises sold under said decree, and which seeks to set aside said decree and order of

sale on the ground that the return of the sheriff was false and fraudulent, does not state a cause of action against the purchaser at said sale: *Korfer v. Katz*, 14 O. N. P. (N.S.) 345.

4. Other Questions.

A petition under the Jones law, G. C., § 6140 (98 v. 68), is in effect voting by petition rather than by ballot, differing in this one respect, that a signer may withdraw his name after the petition is filed upon proof by him of fraud or misrepresentation. The burden of making such proof is upon the signer desiring to withdraw his name: *In re Local Option*, 6 O. N. P. (N.S.) 251, 18 O. D. (N.P.) 591 [reversed, *In re Local Option*, 11 O. C. C. (N.S.) 33, 20 O. C. D. 705]. See also INTOXICATING LIQUOR.

Fraud and misrepresentation can not be predicated upon a claim that the petition under the Jones Law, G. C., § 6140 (98 v. 68), was not read to the signer, or that he did not understand its contents. The signer has no right to rely upon the statement of others as to the purpose of the petition, or the territory embraced, since both are required to be set out: *In re Local Option*, 6 O. N. P. (N.S.) 251, 18 O. D. (N.P.) 591 [reversed, *In re Local Option*, 11 O. C. C. (N.S.) 33, 20 O. C. D. 705]. See also INTOXICATING LIQUOR.

The will and judgment of voters can not be rendered ineffectual through a disregard by the judges of election of their duty as laid down in the statute, whether such disregard be due to fraud, accident, mistake, misapprehension or negligence: *State v. Markley*, 9 O. C. C. (N.S.) 561, 20 O. C. D. 113 [affirmed, without opinion, *Markley v. State*, 76 O. S. 636]. See also ELECTIONS, POLITICAL.

The right to contest an election for fraud or mistake has always been held an invaluable one as a matter of public policy, and a statute will not be construed as repealing or abridging this privilege unless such an intention is clearly expressed. It certainly can not be done by mere inference: *State v. Conser*, 14 O. C. D. 270. See also ELECTIONS, POLITICAL.

The necessity of the appropriation can not be questioned except for collusion or fraud: *Pansing v. Miamisburg*, 11 O. C. C. (N.S.) 511, 21 O. C. D. 130 [affirmed, without opinion, *Pansing v. Miamisburg*, 79 O. S. 430]. See also EMINENT DOMAIN.

The bringing of a suit against a corporation without notice to the defendants in an existing suit brought to enforce stockholder's liability can not of itself be characterized as a fraud, nor is collusion established by

the fact that the company made no defense: *Scofield v. Oil Co.*, 6 O. C. C. (N.S.) 176, 17 O. C. D. 318 [affirmed, without opinion, *Cobb v. Scofield*, 74 O. S. 513]. See also CORPORATIONS.

The management of a society or corporation will not be interfered with by a court of equity upon complaint of a member, unless it appear that there has been fraud or collusion, or action in excess of corporate power: *Coss v. Mansfield Lodge*, 4 O. C. C. (N.S.) 11, 14 O. C. D. 36. See also CORPORATIONS.

A court of equity may in the proper case ignore the doctrine of corporate entity where by so doing the rights of innocent parties may be preserved or fraud circumvented: *In re Rieger*, 8 O. L. R. 498.

The accounts of executors or administrators are impeachable for fraud, and, if necessary, the whole account must be restated: *In re Leidigh*, 15 O. D. (N.P.) 193. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

The fact that a woman represents herself as chaste and virtuous, and as never having been married but once, from which marriage she has been granted a legal separation, when in fact she had been twice married, been divorced by her first husband upon the ground of her own adultery, and divorced by her second husband upon a decree in his favor, is not sufficient fraud upon which to base a decree for divorce: *Joy v. Joy*, 12 O. D. (N.P.) 574, 1 Dayton Term Rep. (Idings) 58. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

The question of a proper material for a contemplated improvement is for determination by the board of public service as an administrative body. In the absence of a showing of fraud or collusion, the courts will not interfere with the discretion exercised by the board of public service in the choice of material to be used in a street improvement: *State v. Miller*, 18 O. D. (N.P.) 218, 5 O. L. R. 260 [affirmed, *State v. Miller*, 10 O. C. C. (N.S.) 406, 20 O. C. D. 460]. See also STREETS.

To invalidate a will for fraud or undue influence, it must appear that the fraud or influence complained of had some effect upon the testator in making his will. A mere suggestion that the testator should make certain provisions, etc., is not sufficient: *Kettemann v. Metzger*, 3 O. C. C. (N.S.) 224, 13 O. C. D. 61. See also WILLS, LEGACIES AND DEVICES.

Where money is deposited to the credit of a broker by a customer after hopeless insolvency on his part has intervened, the fraud avoids the implied contract between the parties by which the relation of debtor would

ordinarily arise and prevents the deposit becoming the property of the broker: *In re Bultman*, 7 O. L. R. 587. See also FACTORS AND BROKERS.

In an action to recover damages for fraud and deceit in the sale of personal property, the measure of damages is the difference between the value of the property as it was represented to be and its actual value at the time of the purchase: *Shoffstal v. Elder*, 1 O. C. C. A. 164 [*Linerode v. Rasmussen*, 63 O. S. 545, IV Longsdorf's Notes, 862, followed].

It is the settled law of this state that the holder of a policy of life insurance induced by fraud and misrepresentation may, by an action brought in due time, recover from the insurance company the amount of premiums paid with interest thereon and without deduction for intervening insurance which he has not had and enjoyed: *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. —].

E. WAIVER AND RATIFICATION.

In an action for damages for having obtained plaintiff's goods by deceit, levy of an attachment on the part of the same goods and other property, and sale thereof, does not necessarily affirm the contract nor waive the fraud: *Dean v. Yates*, 22 O. S. 388, III Longsdorf's Notes, 84.

A party to an executory contract procured by false representations who, after knowledge, performs or, without necessity, completes performance of the contract and accepts payment according to its terms, thereby waives the fraud: *Railroad Co. v. Jolly*, 71 O. S. 92, IV Longsdorf's Notes, 980.

One who, induced by fraud to sign his name as surety, and knowing the facts, but ignorant that the fraud was a defense in law, voluntarily requests the payee to extend the time, which was done, and on that consideration promises to pay, has waived the defense of fraud: *Rindskopf v. Doman*, 28 O. S. 516, III Longsdorf's Notes, 418.

An action for the real value against one who has obtained plaintiff's property for an inadequate price by the influence of a fiduciary relationship and misrepresentation that plaintiff's ancestor had acquired it with defendant's money, is demurrable. The plaintiff must affirm or repudiate the contract, but can not do both, nor assert a vendor's lien. The facts do not amount to a sale. The grantee is a constructive trustee. But leave to amend will be given: *Stewart v. Marsham*, 2 O. C. C. 471, 1 O. C. D. 594. See also RESCISSION.

The state is without the facilities for the discovery of fraud or irregularities in mat-

ters of public work which are open to individuals with reference to their own affairs, and a court of equity, applying the rule of laches according to its own ideas of right and justice, will recognize this fact where a claim of laches is made against the state: *State, ex rel., v. Abbot*, 2 O. C. C. (N.S.) 281, 15 O. C. D. 538. See also PUBLIC CONTRACTS.

A corporation knowing that an executor had misappropriated stock certificates held by him as trustee for the granddaughter of the testatrix, required the executor to obtain the granddaughter's power of attorney, ratifying all his transactions with the stock. She was then twenty-two years old, but feeble, and not as capable of business as the average woman, and had been living with the executor's family as a daughter. She did not read the writing, did not know its contents, nor that he had converted and squandered her funds. He told her it empowered him to draw her funds and deposit them in another bank, and she trusted him implicitly as a father. It was held that the company is chargeable with notice of the fraud, being warned by him of his dread to disclose the truth to her. At that time she had no power over the corpus of the fund. For both these reasons the company can not take benefit of the writing: *Mook v. Savings & Loan Co.*, 87 O. S. 273.

Where the defendant was sued on notes given for purchase money for a farm, and sought to recoup damages on the ground that the plaintiff had represented that "underlying said premises was a three or three and a half foot vein of good bituminous minable coal," whereas there was no coal whatever under said premises, the measure of damages is the difference between the value of the farm as it was represented to be and its actual value at the time of the purchase: *Linerode v. Rasmussen*, 63 O. S. 545, IV Longsdorf's Notes, 862.

F. RESCISSION.

1. Informal Rescission.

(a) Right to Informal Rescission.

In contracts except those under seal and deeds, it is held that the defrauded party may rescind upon discovery of fraud: *Frost v. Lowry*, 15 O. 200, I Longsdorf's Notes, 705; *Hodgson v. Barrett*, 33 O. S. 63, III Longsdorf's Notes, 657; *Eaton v. Davidson*, 46 O. S. 355, IV Longsdorf's Notes, 329; *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 570; *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

The fact that plaintiffs were induced to accept notes in settlement of an account

against defendants upon receipt of a letter representing that there was about to be an increase of capital stock, when there was neither intention or expectation of increasing such stock, justifies plaintiff in disregarding the notes and suing on the original account: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clark & Co. v. Lithographing Co.*, 52 O. S. 668].

Where an account was due for which notes were given to extend the time of payment, and the holder was induced to accept such notes by false representation, or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clark & Co. v. Lithographing Co.*, 52 O. S. 668].

A contract under seal for the purchase of real estate, where possession has not been delivered, may be rescinded by verbal agreement; but if the rescission is obtained by the fraudulent representation of the purchaser, no effect will be given to it; and it will make no difference that such fraudulent representation was a verbal proposition to purchase lands not enforceable under the statute of frauds: *Jones v. Booth*, 38 O. S. 405, III Longsdorf's Notes, 979.

It has recently been held, however, that a written contract of release can not be avoided by informal rescission, but that formal rescission in equity is necessary: *Perry v. The M. O'Neil & Co.*, 78 O. S. 200, IV Longsdorf's Notes, 1040; *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Coleman v. Railway*, 81 O. S. 522].

(b) Restitution by Defrauded Party.

Where at the time of a compromise of a claim founded on a contract of life insurance, a dispute exists between the parties as to the liability of the company in any sum whatever, it denying that anything is owing, and an amount less than the claim is paid to the claimant in settlement of the controversy, and he executes a full acquittance and release, and surrenders the policy, an action at law on the policy can not be maintained without a return or a tender of the amount received, even though the party's assent to the settlement was obtained by the fraudulent representations of the other party and the amount received as the settlement is in the petition credited as a payment on the policy: *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958.

False representations by a debtor to his creditor that the surety had consented, whereby an extension is procured in consideration of the payment of interest, renders the agreement fraudulent as to the creditor, and he may on discovery of the fraud, even after the extension has expired, repudiate the contract and sue without tendering back the interest: *Bebout v. Bodle*, 38 O. S. 500, III Longsdorf's Notes, 988.

If goods are got by false pretenses, and the buyer give an accepted draft, the seller may rescind and replevy from attaching creditors without returning the draft to the buyer, but having erased the acceptance: *Frost v. Lowry*, 15 O. 200, I Longsdorf's Notes, 705.

It is said that no recovery can be had upon a counterclaim for misrepresentations made concerning the soundness and condition of cattle, unless such cattle are tendered to the person by whom such false statements were made: *Thompson v. Bank*, 13 O. C. C. (N.S.) 515, 22 O. C. D. 131 [affirmed, without opinion, *Thompson v. Bank*, 82 O. S. 446]; *Forging Co. v. Lamb*, 9 Dec. Rep. 199, 11 Bull. 193.

Where a seller takes the bank bills offered in payment to a broker to inquire their value, and being informed there was a discount of two and one-half per cent., sold them to the broker and closed the sale with their customer, if they are spurious, the broker can recover of the seller after offer in a reasonable time to return them: *Haire v. Beattus*, 3 Dec. Rep. 5, 2 Gaz. 3.

Taking notes in settlement before knowledge of the falsity of representations will not prevent replevin where the notes were tendered back before action: *Furniture Co. v. Symmes*, 19 O. C. C. 659, 10 O. C. D. 514.

(c) *Apportionment of Consideration.*

If goods are obtained by fraud and sold to one who buys without notice, and pays therefor in part by a valuable consideration and in part by discharge of a pre-existing debt, apportionment of such consideration is proper: *Eaton v. Davidson*, 46 O. S. 355, IV Longsdorf's Notes, 329.

A buyer of a farm was deceived as to the quality of part. He paid part and gave a note for the balance. He is in possession, and does not rescind, but sets up the fraud in defense to the note. It was held that fraud not going to the whole consideration was no defense to a note. The court can not apportion the consideration and thus make a new contract: *Harlan v. Read*, 3 O. 285, I Longsdorf's Notes, 170.

(d) *Necessity of Demand.*

Demand by a defrauded seller of goods is not necessary before replevin, for the buyer does not acquire a lawful possession as against him: *Wilmot v. Lyon*, 11 O. C. C. 238, 7 O. C. D. 394 [affirmed, on other grounds, *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 454].

2. *Formal Rescission.*

(a) *Right to Have Formal Rescission in Equity.*

A contract for the sale of land induced by fraud is voidable and not void. The party can retain it and recover the loss or rescind and recover full damages: *Railroad v. Steinfeld*, 42 O. S. 449, IV Longsdorf's Notes, 123.

If a vendor aid one in fraudulently inducing his associates to buy land knowing they were partners, and they, on discovering the fraud, promptly elect to rescind and tender reconveyance, a rescission will be decreed although it also relieves one of the malfeasors with the innocent buyers: *Yeoman v. Lasley*, 40 O. S. 190, IV Longsdorf's Notes, 16. See also RESCISSION.

Under an allegation that a promissory note "was obtained without consideration and held in fraud of the rights of these defendants," equity will not decree cancellation of a promissory note after the maturity thereof on the cross petition of the makers after the plaintiff has dismissed his action on the note without prejudice to a new action; but equity will leave such makers to their legal remedy of interposing such defense in the action upon such note which such holder may bring thereafter: *Bank v. Weyand*, 30 O. S. 126, III Longsdorf's Notes, 520.

Where plaintiff dismisses his case on a promissory note, the court should proceed to hear the defendant's counterclaim asking for cancellation of the note on the ground of fraud: *Smith v. Minchell*, 6 Dec. Rep. 1107, 10 Am. L. Rec. 485, 6 Bull. 835.

Fraud, by which the owner of a note is induced, by the fraudulent pretense of the obligor therein, to destroy the note, is ground for relief in equity: *Richards v. Fridley*, W. 167, I Longsdorf's Notes, 15; *Richards v. Friedly*, W. 753, I Longsdorf's Notes, 59.

Where two persons have each used the other in a fraudulent transaction in the belief that the transaction would result in their making something out of nothing, a court will refuse assistance to either one to get an advantage over the other; and affirmative relief being asked by both, the court will cancel the note and stock certificate given as

part of such transaction; will refuse money relief to each, and will require each party to pay the costs he has made: *Bank v. McDonald*, 14 O. N. P. (N.S.) 335.

Where a corporation was organized by parties who represented that they held an option whereby a contract could be entered into for the building of a steamship under terms extremely favorable, and the discovery is made after the vessel is completed and delivered that the said parties received from the company which built the vessel a large sum of money for securing the contract, the entire transaction must be regarded as rendered fraudulent from the beginning by the double dealing of the said promoters, and an action for the rescission of the contract is not open to demurrer on grounds of jurisdiction, or of lack of equity, or because of an adequate remedy at law, notwithstanding the builders of the vessel can not be placed in the position they occupied before its construction was undertaken but will be subject to serious loss by being compelled to take back the boat and refund the purchase price: *Steamship Co. v. Shipbuilding Co.*, 10 O. L. R. 395.

Certain promoters, representing that they were in possession of options for the construction of steamships upon terms much more favorable than could at that time be obtained, organized three corporations, disposed of their securities, and procured from the companies orders for the purchase of three steamships for operation on the Great Lakes, at a cost of \$385,000 to \$410,000 each. The boats were built and delivered by the defendant company, and were operated by the plaintiff companies, with reasonable care and skill, for periods of about five years each, when the discovery was made by the plaintiff companies that the said promoters, who had been compensated by the said companies for their promotion services were secretly in the employ of the defendant company, and received from the defendant commissions aggregating \$62,500 for effecting the sales of said vessels. Thereupon the vessels were tendered back to the defendant, and the present suits were brought for rescission of the contracts of purchase. It was held that the fraud of the promoters in acting in the same transactions as the paid agents of the defendant, while serving the plaintiff companies in a fiduciary capacity, invalidated the contracts of purchase from the beginning and gave to the purchasing companies the right to maintain actions for rescission; and it is decreed that the said contracts of purchase be rescinded and canceled, and the vessels returned to the defendant company, which is entitled to no allowance for depreciation, but must repay the

plaintiffs all it has received from them on the purchase price of said vessels with interest thereon, together with interest on outstanding bonds issued by the plaintiffs in raising the purchase price of said vessels, and further that no allowance shall be made to the defendant for the amounts paid as commissions to said promoters, notwithstanding twelve per cent. of the stock of the plaintiff companies was owned by the said promoters, who would thereby profit by their own fraud: *Steamship Co. v. Shipbuilding Co.*, 10 O. L. R. 427.

(b) *Necessity of Formal Rescission.*

A sealed instrument is enforceable at law unless it is void as for illegality. If voidable merely as for fraud the defendant must seek relief in equity: *Morrison v. Eaton*, T. 173.

If a release is voidable only and not void, the plaintiff can not maintain his action while it stands uncanceled, and he can not seek its cancellation in a reply but must do so by petition in a suit in equity for that purpose only, or as a cause of action in the same suit in which he seeks to recover damages for the injury: *Perry v. The M. O'Neil & Co.*, 78 O. S. 200, IV Longsdorf's Notes, 1040; *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Coleman v. Railway*, 81 O. S. 522].

G. PARTIES.

If the design be to defraud the public generally, any one suffering injury thereby may maintain his action: *Bartholomew v. Bentley*, 15 O. 660, I Longsdorf's Notes, 737.

A holder of bonds for the benefit of others is not a proper party to an action for deceit practiced on the *cestus* in their purchase of bonds, nor to an equitable action based on fraud. These actions are not on the bonds, and if assignable are not assigned by assigning the bonds. The defrauded persons must sue: *Raymond v. Railway Co.*, 10 Dec. Rep. 416, 21 Bull. 103. See also TRUSTS.

Children can not sustain an action to set aside a conveyance of property obtained by fraud from their old and infirm parents and to enjoin the grantees from conveying to third persons. Children being merely heirs apparent, have no sufficient legal interest in the property: *Zink v. Jergens*, 1 Dayton Term Rep. (Iddings) 14. See also PARENT AND CHILD.

In an action against several defendants to recover damages in which it is alleged that the defendants conspired to commit an actionable wrong which is capable of being perpetrated by the joint act of several or by the independent act of one, judgment may be

recovered against one defendant and in favor of another, and the failure of the court so to submit the case to the jury that they may find for one defendant and against the other is error: *Schenck v. Knott*, 13 O. C. C. (N.S.) 41, 21 O. C. D. 581.

W having knowledge that D O D and R W D were desirous of purchasing thirty or forty head of hogs, each for separate use, represented to them that he had one hundred head of the kind and quality they wanted; he would not sell in separate lots, but would sell in one lot and the purchasers could divide them to suit themselves. He further represented that his hogs were sound, healthy, and free from disease and that he had purchased them a few days before at five dollars per one hundred pounds. In fact, the hogs had been exposed to hog cholera and were then infected with it, and had been purchased by W as diseased hogs and for a sum much less than five dollars per one hundred pounds, all which was well known to W, but unknown to the purchasers. Relying on the foregoing representations, the entire lot was purchased for five dollars and twelve and one-half cents per one hundred pounds, the two purchasers each to have fifty head as his separate and individual property, and to feed the same on their respective farms. The hogs were so divided immediately upon completion of the purchase. On the same day, a number of them owned by D O D died from cholera and the disease was communicated to his other hogs some of which also died. It was held that D O D might maintain an action for damages against W for the deceit and fraud without joining R W D or making him a party defendant: *Duncan v. Willis*, 51 O. S. 433, IV Longsdorf's Notes, 550.

For the general discussion of the subject of parties, see PARTIES.

H. PLEADING.

In an action brought to recover for a cheat practiced by the defendant, it is not sufficient to state facts showing the misrepresentations and deceit on the part of the defendant, but there must be the additional facts stated to show that the plaintiffs were thereby damaged: *Bartges v. O'Neil*, 13 O. S. 72, II Longsdorf's Notes, 598.

To impeach a decree for fraud, the particular and precise circumstances constituting the fraud must be set out: *Pendleton v. Galloway*, 9 O. 178, I Longsdorf's Notes, 474.

An averment that merchandise was sold to a husband, and that afterwards and before suit was brought, the name of the wife was inserted in said account without her knowledge

or consent, is a sufficient averment of fraud to constitute a cause of action: *Ulman Co. v. Effinger*, 11 O. C. C. (N.S.) 383, 20 O. C. D. 791 [affirmed, without opinion, *Einstein & Co. v. Effinger*, 60 O. S. 579].

Fraudulent intent must be charged positively and not left to be inferred from the falsity of the facts set out: *Bartholomew v. Bentley*, 15 O. 659, I Longsdorf's Notes, 737.

It is not sufficient to plead a history of the facts showing fraud without any averment of the ultimate fact. Fraud will not be inferred: *Waler v. Robinson*, 2 Dec. Rep. 16, 1 W. L. M. 90.

A plea that the sealed note sued on was obtained by fraud is good, without setting out the facts and circumstances, and will be presumed to relate to the execution and not to the consideration, which can not be inquired into on a sealed instrument. Fraud may be averred specially, though it would have been available under the general issue. Fraud can not be particularly set out: *Saunders v. Stotts*, 6 O. 380, I Longsdorf's Notes, 344.

An answer that the notes and mortgage sued on were obtained by fraud and misrepresentation is not wholly a legal conclusion, but contains a fact, and even under the code is not demurrable: *Derby v. Corlett*, 4 Dec. Rep. 283, 1 Clev. L. Rep. 210.

A petition averring that defendant as agent of a proposed borrower falsely represented the borrower's title was found by him to be unencumbered, on which plaintiff relied and made the loan, but the property was encumbered to its full value, to plaintiff's damage four thousand dollars, is not demurrable. The agency is sufficiently stated. Benefit to the defendant is not necessary. Plaintiff had a right to rely on defendant's examination of the title. The averment of loss may be uncertain, but is not demurrable: *Jenkinson v. Stoneman*, 4 Dec. Rep. 289, 1 Clev. L. Rep. 218.

Where, in an action for damages resulting from injuries alleged to have been sustained through the negligence of the defendant, the answer sets forth as a defense that the plaintiff in writing released the defendant from all claims resulting from such alleged negligence, and the reply sets forth facts which, if established, would render such release voidable, and further fact which, if established, would render such release void, and there is evidence tending to establish the facts which might render the release voidable only, but no evidence tending to establish the facts necessary to be established to render the release void, it is the duty of the court, on motion of the defendant to instruct the jury to return a verdict for the

defendant: *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Railway v. Coleman*, 81 O. S. 522].

Facts that, if established, would render a release void, may be pleaded in the reply by way of avoidance of the defense of release; but if the facts would render the release voidable only, and not void, the plaintiff can not avail himself thereof by way of reply: *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Railway v. Coleman*, 81 O. S. 522].

If a release is voidable only and not void, the plaintiff can not maintain his action while it stands uncanceled, and he can not seek its cancellation in a reply, but must do so by petition in a suit in equity for that purpose only, or as a cause of action in the same suit in which he seeks to recover damages for the injury: *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Railway v. Coleman*, 81 O. S. 522; following *Perry v. O'Neil & Co.*, 78 O. S. 200, IV Longsdorf's Notes, 1040].

That a note was procured to be given by fraud of the payee upon the maker in order to be made available as a defense in an action on the note brought by one claiming to be a holder in due course, all the material elements necessary to be proved to establish such fraud must be pleaded specifically by the maker: *Thompson v. Bank*, 13 O. C. C. (N.S.) 515, 22 O. C. D. 131 [affirmed, without opinion, *Thompson v. Bank*, 82 O. S. 446]. See also NEGOTIABLE INSTRUMENTS.

In an action upon a promissory note given for the purchase price of certain cattle, defendants can not recover by way of counterclaim on the ground of misrepresentations as to the soundness of such cattle, unless such representations are alleged to be made with fraudulent intent and knowledge of their falsity: *Thompson v. Bank*, 13 O. C. C. (N.S.) 515, 22 O. C. D. 131 [affirmed, without opinion, *Thompson v. Bank*, 82 O. S. 446]; *Forging Co. v. Lamb*, 9 Dec. Rep. 190, 11 Bull. 190.

A declaration that defendant warranted a borrower to be a respectable man of Tuscarawas county, named Adam Riggle, whereas he was not of that name or that county, whereby the loan was lost, is demurrable; for, if in assumpsit, the promise is collateral and conditional, and notice should be averred; if for deceit, an intent to deceive should be averred. Nor is the injury shown to arise from the representation: *Bank v. Beebe*, 6 O. 497, I Longsdorf's Notes, 353. See also GUARANTY.

A petition praying for the dissolution of a corporation of which plaintiff is a stock-

holder, and then, on behalf of the corporation, for relief against other defendants for pecuniary injuries arising out of frauds of directors and shareholders of such corporation, constitutes a misjoinder of causes of action, which in turn necessarily generated a misjoinder of parties defendant: *Rabenstein v. Organ Co.*, 8 O. N. P. 315, 11 O. D. (N.P.) 22. See also PLEADINGS.

Inducing a husband by fraud to pay one thousand two hundred dollars for land worth only one hundred dollars, which he had the defendant convey to his wife, is a cause of action in him alone, and not in both, and an action in favor of both is erroneous: *Bartges v. O'Neil*, 13 O. S. 72, II Longsdorf's Notes, 598. See also PARTIES.

An affidavit for an order of attachment is not defective as to form in setting forth merely that the affiant "is a director and agent of the plaintiff;" nor is it defective in substance or insufficient in allegation of facts, where the language used is sufficient to charge actual fraud and the fraudulent incurrence of the obligation under the statute, and is sufficient to and does charge the defendants with committing and intending to commit actual fraud. The provisions of G. C., § 11358, as to when an agent may make an affidavit were intended to apply only to affidavits in verification of pleadings: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198 [following *Whits v. Stanley*, 29 O. S. 423, III Longsdorf's Notes, 483; distinguishing *Rolling Mill Co. v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46]. See also ATTACHMENT.

Fraud or fraudulent intent will not be presumed; it must be pleaded and proved as a fact. In cases of fraudulent conveyances an intent may be held to exist by force of circumstances, where perhaps no conscious purpose, existed, under the rule that a man must be held to intend the natural and inevitable consequences of his acts: *Bank v. Scott*, 13 O. D. (N.P.) 600. See also FRAUDULENT CONVEYANCES.

An assessment for a street improvement can not be attacked on the ground that there is a substantial defect in the work done or in the performance of the contract, unless fraud is alleged: *McGlynn v. Toledo*, 22 O. C. C. 34, 12 O. C. D. 15 [distinguishing *Stone v. Viele*, 38 O. S. 314, IV Longsdorf's Notes, 970]. See also ASSESSMENTS.

An affidavit that defendant is about to sell his goods for the purpose of defrauding plaintiff is bad. Mere selling or intent to sell without implicating circumstances can not be fraudulent: *Mulligan v. Ruggles*, 3 Dec. Rep. 311, 1 Gaz. 157. See also ATTACHMENT.

In an action to set aside releases obtained by a life tenant from legatees under the will,

on the ground that the said releases were obtained by fraud, if plaintiff incorporates the will in petition, objection can not be made to an answer in the form of a general denial, although it involves a denial of allegations shown to be true by the will itself: *Leedle v. Christie*, 15 O. C. C. (N.S.) 385 [affirmed, without opinion, 88 O. S. —].

It is a sufficient averment of fraud, in a petition to set aside a judgment, to allege that the merchandise for which the judgment was obtained was sold to plaintiff's husband and that afterwards the name of the wife was inserted in the account therefor, without her knowledge or consent, which account with her name so fraudulently inserted was sued on and judgment procured against her: *Einstein v. Effinger*, 12 O. C. D. 746, [affirmed, without opinion, *Einstein v. Efinger*, 60 O. S. 579]. See also PLEADINGS.

Where in a suit on an insurance policy a contract of settlement is pleaded as a defense, a reply which simply alleges that the settlement was induced by fraud, but does not allege a payment or tender of the amount received, is not responsive to the answer and is insufficient in law: *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958 [distinguishing *Insurance Co. v. Hull*, 51 O. S. 270].

For the general discussion of the subject of pleading, see PLEADINGS.

I. EVIDENCE.

The legislature has power to declare as a rule of evidence that certain facts shall be conclusive of fraud, whether it exists or not: *Roller v. Truesdale*, 26 O. S. 586, III Longsdorf's Notes, 332.

Fraud is not to be inferred or guessed at, it must be proved and clearly proved: *Mollenkopf v. Baumgardner*, 21 O. C. C. 591, 11 O. C. D. 655.

Fraud is not presumed, but to be proved by the party setting it up, though seldom susceptible of direct proof: *Stitt v. Wilson*, W. 505, I Longsdorf's Notes, 40; *Landis v. Kelly*, 27 O. S. 567, III Longsdorf's Notes, 377; *Lake v. Doud*, 10 O. 415, I Longsdorf's Notes, 525.

Where fraud is charged, involving a forfeiture if proved, nothing can be presumed, but the burden is on the plaintiffs, and a charge to the jury which shifts some of this burden upon the defendants is erroneous: *Michael v. Insurance Co.*, 6 O. N. P. (N.S.) 401, 18 O. D. (N.P.) 530.

If the bill charges fraud, and the answer denies it, the bill must be sustained by proof sufficient to counterbalance the answer: *Wilson v. Delarack*, 3 O. 290, I Longsdorf's Notes, 171.

Fraud must be proved. Extrinsic circumstances of bare suspicion are not enough: *Bohart v. Atkinson*, 14 O. 228, I Longsdorf's Notes, 664.

Fraud is never presumed but must be proved. Greater latitude in the proof is given than in ordinary cases: *Lake v. Doud*, 10 O. 415, I Longsdorf's Notes, 525.

Parties are presumed to intend the natural consequences of their own acts and to the extent that an act works a fraud to that extent a fraud is presumed intended, and need not be proved: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

A charge of actual fraud in fact must be substantially proved, and not made out by presumption alone. Finding one conspirator guilty does not even raise a presumption as to the others: *Landis v. Kelly*, 27 O. S. 567, III Longsdorf's Notes, 377.

Notwithstanding fraud must be proved and not presumed, there is a presumption that every reasonable man expects and intends the ordinary and probable consequences of known causes and conditions: *Lithographing Co. v. Belford Co.*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clarke & Co. v. Lithographing Co.*, 52 O. S. 668].

The intention of the purchaser not to pay for goods may be presumed when he has knowledge of his own insolvency and inability to pay for them; and such intention may be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency, but such inference may be rebutted: *Lithographing Co. v. Belford Co.*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Clarke & Co. v. Lithographing Co.*, 52 O. S. 668].

The fact that one of the parties to a conveyance conditioned for care and support was well along in years, and the father of and living with the grantee, does not put upon the grantee the burden of showing affirmatively that there was no undue influence exerted or fraud practiced, but the ordinary rule prevails that fraud and undue influence must be proved by the one alleging them: *Kime v. Addlesperger*, 2 O. C. C. (N.S.) 270, 14 O. C. D. 397. See also DEEDS.

A written contract in the absence of mistake or fraud is conclusively presumed to embody the agreement between the parties thereto, and parol evidence is inadmissible to prove any agreement made prior to the execution of the written instrument: *Weller v. Gordon*, 14 O. D. (N.P.) 407. See also CONTRACTS.

In an action by a grantor in a deed, to reform the instrument upon the ground that the grantee fraudulently concealed and misstated the contents of the deed to the grantor,

when it appears that the grantee is a son of the grantor and an attorney at law, and that such grantee was entrusted with the drafting of the instrument upon his own suggestion, such facts raise a presumption of the existence of relations of trust and confidence between the parties and put upon the grantee the burden of showing that no undue advantage was taken of the grantor in the execution of the deed. But when it also clearly appears in such case that such deed is in apparent accord with previous declarations of the grantor as to his intentions and his subsequent declarations as to what he had done, and that he could read and had ample opportunity before, at, and after, signing the deed to read the same, the presumption of undue advantage by reason of confidential relations is rebutted and the burden rests upon the grantor to show by clear and convincing proof that the deed is fraudulent. In such case declarations of the grantor, made in the absence of the grantee, are not competent evidence to prove the alleged fraud; but statements of the grantor which tend to rebut the claim of fraud, whether made before or after the signing of the deed are admissible: *McAdams v. McAdams*, 80 O. S. 232, IV Longsdorf's Notes, 1051.

In an action for deceit in the sale of three tracts of land, defendant claimed that the wrong tract was described for one of the parcels, in that the northeast for the northwest quarter section was named, and that as to it the representations were true. It was held that he may prove this. As the alleged deceit exists independent of the deed, the deed will not prevent inquiring into the real transaction as bearing on the fraud or the damages: *Taylor v. Leith*, 26 O. S. 428, III Longsdorf's Notes, 318.

In deceit in a sale of a business to plaintiff it is proper to exclude proof of plaintiff's loss of time and labor in the business, for it was expended in his own business; also the price at which he sold out his other property, for this has no possible bearing: *Dokes v. Soards*, 8 Dec. Rep. 621, 9 Bull. 76.

On the issue of fraudulent books and destruction of diggers' bills to deceive, evidence of the size of the veins, acreage mined, and the tonnage each acre should yield, is admissible not to show the quantity mined, but to show fraud in the books, and if the disparity is such as to impeach the books, such evidence may be used as a standard of quantity mined: *Burgner v. Humphrey*, 41 O. S. 340, IV Longsdorf's Notes, 64. See also SALES.

Prior negotiations are only excluded on the issue of a contract and its terms, but

not where the issue is whether money was obtained by fraudulent representations, and the representations are provable: *Home Association v. Kirk*, 8 Dec. Rep. 592, 9 Bull. 48. See also EVIDENCE.

Where the evidence shows that certain directors, defendants in a suit in attachment, made representations as to their interest in the corporation and the value of certain property which were untrue, and which they knew were untrue, the allegation of fraud in an affidavit for attachment will be regarded as established, notwithstanding other directors with less knowledge of the value of the property being transferred to the corporation, voted with them for its purchase: *Savings Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198. See also ATTACHMENT.

Where the attitude of a defendant is such as not to deny that there was a contract entered into, but rather to maintain that the contract signed was not the true contract, he is estopped to deny its terms, unless it can be impeached for fraud or mistake, and in the absence of a plea of fraud or mistake, parol evidence which contradicts or varies the terms of the written contract is incompetent: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

The fact that one is not able to read or write does not of itself show that he was free from negligence in signing and delivering an instrument, believing it to be an instrument of a different character: *Perkins v. White*, 36 O. S. 530, III Longsdorf's Notes, 874.

The fact that the evidence, as it appears in the reviewing court, is sufficient to arouse a strong suspicion of fraud against a defendant in attachment, is not sufficient to warrant that court in distributing a judgment discharging the attachment: *Bernard v. Schwartz*, 22 O. C. C. 147, 12 O. C. D. 183. See also ERROR.

Unless it appears that grantee acted from corrupt motives, the fact that he withheld a deed from record for a long time is not material: *Hetrick v. Gregg*, 8 O. N. P. 24, 10 O. D. (N.P.) 462. See also FRAUDULENT CONVEYANCES.

The provision of G. C., § 11494, concerning privileged communications between attorney and client is declaratory only, and subject to the same construction as the rule at common law. It is founded upon public policy, to encourage confidence between attorney and client, by preventing disclosure of communications, but the protection thus guaranteed the client can not be used to defraud the attorney: *Keck v. Bode*, 13 O. C. D. 413.

Under G. C., § 11494, relating to privileged communications, it is competent for an attorney to testify as to communications between his client and himself, where it is necessary for him to do so in order to protect his own interests; but the same rule which creates this exception to the statute, limits its scope and effect, and if the communication is not essential to preserve the rights of the attorney, it continues to be privileged: *Keck v. Bode*, 13 O. C. D. 413. See also ATTORNEY AND CLIENT.

Where land in another state, or a mortgage on it, is the subject of sale, the decision of the supreme court of that state, sustaining the title, is binding here in an action for deceit in the sale: *Spencer v. King*, 3 O. N. P. 270, 5 O. D. (N.P.) 113. See also VENDOR AND PURCHASER.

In an action upon an accident policy in which the insurance company raises the defense, under G. C., § 9391, that the answers were willfully false and fraudulently made, were material to the risk and induced the company to issue the policy and that but for such answers the policy would not have been issued, and that neither the company nor its agents had knowledge of the fraud or falsity thereof, the burden is the defendant's to clearly establish such allegations. The mere omission of statements or the mere error in statements made, does not affect the validity of the policy: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594, 14 O. C. D. 232. See also INSURANCE.

Where it appears by parol evidence that a bill of sale, absolute on its face, was merely intended as security for a debt, but that the creditor, in violation of the agreement, has taken possession of the stock of goods and sold them without accounting for the proceeds to the debtor, the debtor is entitled to recover damages from such creditor, and the fact that the debtor avers to have been fraudulently induced to sign the bill of sale but fails to establish fraud, will not prevent a recovery: *Mollenkopf v. Baumgardner*, 21 O. C. C. 591, 11 O. C. D. 655. See also CHATTEL MORTGAGES.

To sustain a defense that the subscription sued on to a book was a forgery, evidence that other disconnected subscriptions taken by other persons who represented themselves to be agents of plaintiff, but without proof that they were such, were fraudulent, is not relevant: *Beers v. Gurney*, 14 O. C. C. 82, 7 O. C. D. 411.

A charge to the jury to the effect that if a settlement was procured by fraud or mistake, it is not binding upon the plaintiff, is erroneous in the absence of an averment to that effect in the pleading: *Continental Casu-*

alty Co. v. Jordan, 17 O. C. D. 696, 3 O. L. R. 133. See also CHARGE OF COURT.

In an action to set aside releases of legacies on the ground of fraud, if the evidence shows that the legatees were not under duress, but treated with the life tenant at arm's length, and remarked that they understood their rights, and that they preferred "a bird in hand" to the contingencies in which their legacies were involved, it can not be said that they sustained the burden of proof devolving upon them, and judgment must be given for the defendant: *Leedle v. Christie*, 15 O. C. C. (N.S.) 385 [affirmed without opinion, 88 O. S. —].

To show fraud in an insured who has a large amount of goods, which it is claimed were withdrawn from the store before the fire, it is competent to show that he was discharged in insolvency after the fire, after swearing that he had no property: *Harris v. Insurance Co.*, W. 548, I Longsdorf's Notes, 43.

In an action for deceit in the sale of three tracts of land, and on the warranty for failure of title in one of them, the withdrawal by the plaintiff of the latter claim does not narrow the issue as to the deceit, and defendant may therefore show that the representations as to such tract were true: *Taylor v. Leith*, 26 O. S. 428, III Longsdorf's Notes, 318.

If recovery is to be had on the ground of fraud and deceit in the sale of bank stock by a director of the bank, the plaintiff must establish by a preponderance of the evidence that the representations were made; that they were false; that the defendant made them knowing at the time that they were false, or by the exercise of ordinary care and prudence would have known that they were false in some or all of the particulars alleged, and that the representations were made by the defendant with intent to deceive the plaintiff, and that he did thereby deceive him: *Hetteshimer v. Swisher*, 7 O. L. R. 629, 56 Bull. 71.

Where, in an action for damages resulting from injuries alleged to have been sustained through the negligence of the defendant, the answer sets forth as a defense that the plaintiff in writing released the defendant from all claims resulting from such alleged negligence, and the reply sets forth facts which, if established, would render such release voidable, and further fact which, if established, would render such release void, and there is evidence tending to establish the facts which might render the release voidable only, but no evidence tending to establish the facts necessary to be established to render the release void, it is the duty of the court, on motion of the defendant, to in-

struct the jury to return a verdict for the defendant: *Railway v. Coleman*, 12 O. C. C. (N.S.) 497, 22 O. C. D. 746 [affirmed, without opinion, *Coleman v. Railway*, 81 O. S. 522].

A bought goods of one B, and procured him to charge them to C, and C was compelled by suit to pay B for them. C now sues A for the money paid. It was held that C is entitled to recover on proof that A had the goods charged to C and his payment. If there is any reason for charging C with them, it is for A to show it: *Scoles v. Wright*, W. 92, I Longsdorf's Notes, 7.

To prove fraud used to induce the signing of a contract, all that took place between the parties before and at the signing may be shown: *Home and Dover Association v. Reams*, 7 Bull. 8 [affirmed, without opinion, *Home Association v. Reams*, 12 Bull. 264].

To prove that a buyer purchased knowing that he could not pay for the goods, fraudulent representations by the buyer of his condition, made to other persons before or afterwards, so connected in time or similarity that the same motive may be ascribed, namely, to further a general scheme of fraud by getting goods and turning them over to favored creditors, are admissible on the question of the fraudulent concealment of insolvency: *Wilmot v. Lyon*, 11 O. C. C. 238, 7 O. C. D. 394 [affirmed, on other grounds, *Wilmot v. Lyon*, 49 O. S. 296, IV Longsdorf's Notes, 454]. See also EVIDENCE.

One who has sold on credit, relying on a prior statement by the buyer of his pecuniary condition, may testify that he did still rely on the prior statement: *Grever v. Taylor*, 53 O. S. 621, IV Longsdorf's Notes, 616 [reversing *Taylor v. Grever*, 6 O. C. C. 269, 3 O. C. D. 448].

By virtue of G. C., §§ 8157 and 8164, in an action on a promissory note by an endorsee who acquired title from the original holder, when it is shown that the title of the original holder was defective by reason of misrepresentation and fraud in procuring the note and failure of consideration therefor, the burden is on the holder to prove that he acquired the title as a holder in due course: *Regan v. Sherman*, 1 O. C. C. A. 201

In an action for false representations by a debtor as to his solvency, inducing plaintiff to compromise a collectible claim, similar false representations to other creditors, known by the debtor to be false, are not competent to prove the representations made to plaintiff, but if the latter are proved *aliunde*, are competent to show the intent: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728.

It would seem that similar representations by a clerk in the debtor's store will be

deemed made under instructions and in concert, and are also admissible: *Edwards v. Owen*, 15 O. 500, IV Longsdorf's Notes, 728.

In a suit based on fraudulent representations, made to procure plaintiff to contract, similar representations to others, are only competent to show scienter; hence, if no knowledge of their falsity in the other instances is shown, they should be ruled out: *Insurance Co. v. Wright*, 33 O. S. 533, III Longsdorf's Notes, 687.

A court will not set aside a deed on the ground of misrepresentation and deceit as to the character of the land conveyed, where there is a conflict of testimony and the court is left in some doubt as to the nature of the representations which were made to the grantee: *Shimmel v. Cole*, 23 O. D. (N.P.) 29, 9 O. L. R. 103.

To rebut a charge of deceit in representing another as worthy of credit, the defendant may show his own prior declarations as to what he thought such person was worth when there was no motive to falsify, for motive must be gathered from acts and declarations: *McCracken v. West*, 17 O. 16, I Longsdorf's Notes, 792.

For the general discussion of the subject of evidence, see EVIDENCE.

J. JUDGMENT OR DECREE.

Where an action was prosecuted to set aside a contract on the ground of fraud, and to cancel an unmatured note given in pursuance of the contract, which resulted in a judgment affirming the validity of the contract and note, it was held that in a subsequent action on the note the defendant is estopped by the judgment in the former action from setting up that the contract and note were executed by the parties under a mutual mistake: *Bell v. McColloch*, 31 O. S. 397, III Longsdorf's Notes, 592.

In deceit for representing valueless bonds to be of a stated value, the jury having found the whole amount without interest for the plaintiff, it is error to require them to add interest, for this is discretionary with the jury in torts: *Floyd v. Paul*, 6 Dec. Rep. 1185, 12 Am. L. Rec. 231, 9 Dec. Rep. 7, 10 Bull. 14.

K. REVIEW.

If a judgment is attacked for fraud, the statutory remedy (G. C., §§ 11580, *et seq.* and G. C., §§ 11631, *et seq.*) is not exclusive but is cumulative: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845; *Coates v. Bank*, 23 O. S. 415, III Longsdorf's Notes, 131; *Darst v. Phillips*, 41 O. S. 514, IV Longsdorf's Notes, 75; *Michael v. Bank*, 84 O. S. 370.

Failure by the court in its charge to the jury to concretely define the issues left in the case for their consideration, particularly in a case having a foundation so elusive in its nature as fraud, constitutes reversible error: *Russell v. Weiler*, 7 O. C. C. (N.S.) 596, 18 O. C. D. 176. See also CHARGE OF COURT.

A bill of review can not raise the objection that the decree was procured by fraud or by a mistaken finding of assent. The injured party must resort to an original bill to impeach it, though possibly it might be reached on bill of review for newly discovered evidence, if that were alleged: *Cooch v. Cooch*, 18 O. 146, 1 Longsdorf's Notes, 840. See also BILL OF REVIEW.

For the general discussion of the subject of error, see ERROR.

For the general discussion of the subject of appeal, see APPEALS.

L. SURVIVOR.

In Ohio a cause of action for deceit or fraud survives in an assignee, and the remedy for redressing the wrong passes to the assignee: *Steamship Co. v. Shipbuilding Co.*, 10 O. L. R. 395.

III. CONSTRUCTIVE FRAUD.

A. ELEMENTS.

1. Parties Guilty of Constructive Fraud.

(a) Agent.

(aa) Private.

The purchase from a client by a broker individually of stock which is held in pledge is not an act of bad faith, when done without concealment: *Ashbrooke v. Bank*, 6 O. N. P. (N.S.) 415, 18 O. D. (N.P.) 529.

Where the evidence shows that there was no active market for stock, and a client knew of no one who would give more for it than the quoted price, and the broker offered to take it at that price, and the sale was thereupon consummated, the client will be held to have known that he was selling to and not through the broker, and the sale will not be set aside and an accounting ordered on the ground of fraud: *Ashbrooke v. Bank*, 6 O. N. P. (N.S.) 415, 18 O. D. (N.P.) 529.

The rule that an agent to sell can not be the purchaser without the principal's consent is not relaxed where he was employed to sell at a fixed price and takes the goods at that price himself: *Iron Co. v. Harper*, 41 O. S. 100, IV Longsdorf's Notes, 52. See also AGENCY.

To relieve an agent from the suspicion of inconsistent duties, which *prima facie* will be assumed from the fact that he represents both parties, it is necessary that every circumstance connected with his employment by either party should be communicated to the other; and where the basis of the commission to be paid for his services was changed from usage, or custom of the business to contract, and the amount to be paid from \$3,000 to \$6,500, such change was a circumstance affecting the action of the agent, and the failure to disclose it was a fraud in law: *Jones v. Draper*, 4 O. C. C. (N.S.) 105, 16 O. C. D. 785 [affirmed, without opinion, *Draper v. Jones*, 73 O. S. 369]. See also AGENCY.

Payment to an agent to sell, who, not having possession, sells in his own name without authority, and the owner ships to the buyer, without knowledge that the broker has sold in his own name, does not bar recovery by the owner: *Crosby v. Hill*, 39 O. S. 100, III Longsdorf's Notes, 1010 [affirming *Crosby v. Hill*, 8 Dec. Rep. 663, 9 Bull. 156]. See also AGENCY.

Where in contemplation of abandonment of the wife a mortgage was executed by the husband to his brother-in-law, the consideration being a pretended indebtedness to his father to whom the mortgage was then assigned, who, however, did not know of, nor request the execution of such mortgage. It was held that the son was acting in the transaction as the agent of his father, and whether the father's claim was valid or not, he was bound by the fraud thus committed by his son on the rights of his wife whether he had knowledge of his son's intentions or not, and the mortgage in the father's hands will be set aside as against the rights of his son's wife for alimony: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526. See also HUSBAND AND WIFE.

A bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of the bank, thereby becomes the agent of said customer and can not thereafter himself become the purchaser of said stock without full disclosure of that fact to his principal and the latter's assent thereto: *Telling v. Sullivan*, 14 O. C. C. (N.S.) 1, 22 O. C. D. 312.

One who assumes to act as agent for the owner of certain property in affecting the sale thereof, can not sell such property to the son of such agent to whom he lends money to make such purchase without disclosing such fact to the owner of such property: *Telling v. Sullivan*, 14 O. C. C. (N.S.) 1, 22 O. C. D. 312.

One who induces another to believe that the former is endeavoring to find a purchaser

for the property of the latter is estopped to deny that he was agent of such person; and accordingly if he purchases such property himself without disclosing his identity, such sale may be set aside upon the application of the former owner: *Telling v. Sullivan*, 14 O. C. C. (N.S.) 1, 22 O. C. D. 312.

(bb) Public.

The register of the land office could legally buy lands at his own public sales. The act forbidding him to buy at private sales impliedly permits it at public sales: *Steele v. Worthington*, 2 O. 182, I Longsdorf's Notes, 115.

If an officer, prohibited from buying at the government sales, buys in the name of another on shares, and the other conveys part to him, such others' heirs can not impeach the conveyance, for the parties were *particeps criminis*, and, moreover, only the government could complain: *Steele v. Worthington*, 2 O. 182, I Longsdorf's Notes, 115.

Where some of a city's gas trustees are interested in a factory, a contract by them on buying a gas well to furnish gas to the factory at nominal prices as part of the consideration will not be enforced: *Dalsell v. Findlay*, 5 O. C. C. 435, 3 O. C. D. 214 [affirmed, without opinion, *Dalsell v. Findlay*, 27 Bull. 128].

An action by a prosecuting attorney to recover interest from a bank by way of damages for the unlawful use of county funds, obtained from county treasurers, is not an action for relief on the ground of fraud, and if it were, the statute would begin to run from the time the fraud was discovered or ought to have been discovered: *Welty v. Bank*, 7 O. N. P. (N.S.) 43, 19 O. D. (N. P.) 82.

Public policy requires that an agent shall not deal with or for himself, directly or indirectly, and renders contracts so made voidable as against his principal. This principle is applicable alike to private agents and public officials who are the agents of the public, and the latter will not be permitted to put themselves in a position antagonistic to the public interests which they represent and which it is their duty to protect: *State v. Pinney*, 13 O. D. (N.P.) 210.

(b) Attorney.

An attorney can not purchase at an execution sale made to collect his client's debt if the whole debt is not paid, for his interest and duty would conflict. But the client alone can object, and must do so in a reasonable time: *Wade v. Pettibone*, 11 O. 57, I Longsdorf's Notes, 540; *Wade v. Pettibone*, 14 O. 557, I Longsdorf's Notes, 689.

If the holder of a junior lien which is preferred to a senior lien employ the same attorney to marshal liens and sell, thus consummating the preference, the decree for sale is impeachable as for fraud: *Wilson v. Jennings*, 3 O. S. 528, II Longsdorf's Notes, 63. See also ATTORNEY AND CLIENT.

When, in partition proceedings, the parties are practically represented by one attorney, and the guardian *ad litem* a son of such attorney does nothing except to file a formal answer, and the property is sold to one of the adult parties at the appraisal who within a few months sold the same at more than double the appraised value and divided the proceeds among the adult parties, such partition proceedings are at least constructively fraudulent as to the minor, and the adult parties to the extent that they have profited by such partition are accountable to the extent of the minor's interest: *Murr v. Murr*, 17 O. D. (N.P.) 773, 5 O. L. R. 125. See also PARTITION.

(c) Executors and Administrators.

If at an administrator's sale of land a purchase is made for the benefit of the administrator himself, it will be held to be in trust for the heirs, and if the conveyance to them can not be decreed because *bona fide* third persons have acquired the title, the administrator must account for the difference between what he paid for the land and its then real value, which may be held to be its appraised value: *Glass v. Greathouse*, 20 O. 503, I Longsdorf's Notes, 922.

Where an administrator, having duly sold real estate on proceedings therefor, fails for six months to collect the purchase-money, and then assumes the buyer's bid and takes the property, the heirs can have the transaction set aside for violation of trust: *Barrington v. Alexander*, 6 O. S. 189, II Longsdorf's Notes, 229.

If an administrator acquires title under his own sale the heirs can insist on a resale without showing any fraud or unfairness. The fiduciary relation does not cease until a third person buys and fully pays. The administrator must account for rents and profits: *Barrington v. Alexander*, 6 O. S. 189, II Longsdorf's Notes, 229.

If an administrator procures a party to buy at his sale, and such party buys at two-thirds the appraisal, and at once conveys to a trustee for the administrator's wife and children, the transaction is fraudulent and void in the absence of clear explanation, of which the court is to decide: *Riddle v. Roll*, 24 O. S. 572, III Longsdorf's Notes, 192 [affirming *Roll v. Riddle*, 5 Dec. Rep. 232, 3 Am. L. Rec. 645].

An administrator can not be even indirectly interested as the agent of others in purchasing at his own sale with a view to profit, as where he advances the purchase money to be reimbursed on a resale, even though the profits are to go to the person in whose name the purchase is made: *Piatt v. Longcorth*, 27 O. S. 159, III Longsdorf's Notes, 349.

If an administrator procures the settlement of claims at less than their face, he can not credit himself with more than he paid. And so, though the attorney or agent effecting the settlement is acting for others, as well as the administrator, with a view to joint profit: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

If an administrator, *cum testamento annexo*, procures an order of sale in carrying out the will, and sells, and the sale is confirmed, and procures a deed to himself from the purchaser on assuming his obligation to pay, the transaction is void, and the lands are still unadministered and subject to the trust, whether he acted in good faith or profited by the transaction or not: *Caldwell v. Caldwell*, 45 O. S. 512, IV Longsdorf's Notes, 294.

An executor, after resignation, buying stock from his coexecutor, whose very confidential friend and adviser he was, and within a week thereof, the sale is nevertheless valid if for full value and without actual fraud, and no one else would give as much, and the sale was not of his seeking: *Hicks v. Stone*, 9 Dec. Rep. 132, 11 Bull. 67.

Where after an executor has procured an order of sale, and there is no sale for want of bidders and he resigns and buys the property himself, the sale will not be set aside, if he did nothing to prevent competition, and a fair price was given: *Woodward v. Curtis*, 19 O. C. C. 15, 10 O. C. D. 400 [affirmed, without opinion, *Woodward v. Curtis*, 63 O. S. 575].

Consent of the residuary legatee, who is most interested and is one of the executors, to a repurchase by his coexecutor from the buyer of stock, the sale being at a proper price, and designed to transfer the stock to such executor, renders the second sale valid: *Hicks v. Stone*, 9 Dec. Rep. 132, 11 Bull. 67.

On judicial sale of land mortgaged to decedent, if the executors buy it in, and resell at a profit, which they did not account for, the legatees lose their remedy against them by suing the purchaser, and compromising with him; for the claims are repugnant: *Kennock v. Miller*, 1 Dec. Rep. 456, 10 W. L. J. 85.

After setting aside a sale by an administrator, because the buyer had conveyed to the administrator, the latter must account for

all rents and profits obtained by him, deducting improvements made before action begun, but not those afterwards: *Caldwell v. Caldwell*, 45 O. S. 512, IV Longsdorf's Notes, 294. See also ACCOUNTING.

An administrator's petition in the probate court to sell to pay debts gives that court exclusive jurisdiction to determine all questions in the case and an independent suit will not lie in the common pleas to set aside the sale unless there was fraud upon the court itself as where an administrator collusively allowed a claim by his wife and allowed her to buy the property without paying anything, all of which was known to the probate court: *Baker v. Lamkin*, 11 O. C. C. 103, 5 O. C. D. 54. See also COURTS.

See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

(d) Guardian.

If a guardian convert his wards' land scrip into lands for himself and others, but accounting to the wards for the scrip, with interest from the time of investment, in good faith, he is not chargeable as a trustee of the profits, for he should not invest the ward's property in wild lands producing no income: *Davis v. Lowrey*, 15 O. 655, I Longsdorf's Notes, 737.

A guardian's acts in good faith in partition proceedings (requesting an appraiser to purchase) bind the ward: *Bohart v. Atkinson*, 14 O. 228, I Longsdorf's Notes, 664. See also GUARDIAN AND WARD.

(e) Guardian Ad Litem.

A guardian *ad litem* and trustee for infant heirs can not acquire their property for himself pending litigation as to it: *Massie v. Matthews*, 12 O. 351, I Longsdorf's Notes, 612.

A guardian *ad litem* may buy at the sale since he has no authority over the ward's person or property, and an alleged verbal agreement that he should buy as trustee, for the ward must be proved with certainty: *Marsh v. Marsh*, 5 Dec. Rep. 290, 4 Am. L. 257.

(f) Trustees.

If an administrator, trustee, or officer have a personal interest in a purchase at his own sale, the sale will be set aside: *Welsh v. Perkins*, 8 O. 52, I Longsdorf's Notes, 413.

A trustee can not so manage as to make a profit for himself, either directly or through an attorney, or alone or jointly with others: *Cox v. John*, 32 O. S. 532, III Longsdorf's Notes, 649.

If the trustee buys at partition sale he does not defeat the *cestui's* estate, and limi-

tations can no more run in his favor after than before: *Williams v. Van Tuyl*, 2 O. S. 336, I Longsdorf's Notes, 1057.

A *bona fide* buyer from a trustee who purchased trust property at a partition sale will only have to account to the *cestui* for unpaid purchase money: *Williams v. Van Tuyl*, 2 O. S. 336, I Longsdorf's Notes, 1057.

A trustee's indirect purchase at his own sale, that is, through another, is only voidable, and can not be set aside as against a subsequent *bona fide* buyer: *Harrison v. Heckler*, 6 O. C. C. 443, 3 O. C. D. 530.

The record of a sale by the trustee to the nominal buyer and his immediate reconveyance to the trustee, is not constructive notice to a subsequent buyer through intermediate buyers: *Harrison v. Heckler*, 6 O. C. C. 433, 3 O. C. D. 530.

If a trustee is authorized by statute to acquire an interest in the trust property his title depends on the *bona fides*: *Rammelsberg v. Mitchell*, 29 O. S. 22, III Longsdorf's Notes, 436.

A sale under a power in the will of the testator's interest in a firm to a stranger, though one of the trustees is the surviving partner, is not made void by the latter's repurchase from the vendee if there was no original intention to do so: *Rammelsberg v. Mitchell*, 29 O. S. 22, III Longsdorf's Notes, 436.

That the plaintiff in partition owning a moiety absolutely is also trustee of the defendants' shares will not render his purchase at the sale invalid if in good faith, for he does not control the sale, but the sheriff, under the court's approval: *English v. Monypeny*, 6 O. C. C. 554, 3 O. C. D. 582 [reversing *English v. Monypeny*, 11 Dec. Rep. 394, 26 Bull. 250].

A trustee having also an individual interest may buy at a sale instituted by a third person. Thus, a defendant parcener in a partition case, who is also guardian of other parcnens may be purchaser: *Glemser v. Glemser*, 5 O. N. P. 170, 5 O. D. (N.P.) 267.

A holder of but one of the notes secured by a chattel mortgage and in possession of the chattels, has no right to sell without foreclosure, and if he does so, and buys in himself, he must account for the value to the holders of the other notes, for his possession is in trust for all: *Beard v. Westerman*, 32 O. S. 29, III Longsdorf's Notes, 618. See also CHATTEL MORTGAGES.

A person who, from the relation in which he stands to another is capable of exercising an undue influence over him, can not be permitted to derive profit from any transaction with him, and will be held a construc-

tive trustee of any property so acquired: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845; *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631. See also TRUSTS.

If a trustee of a testamentary trust invests the trust fund according to the direction of the will of the testator; and without his fault the trust fund is imperiled by reason of want of bidders at a foreclosure sale of the property mortgaged to secure the fund, and for the purpose of protecting the fund, he purchases the property at sheriff's sale, taking the title to the same in his own name as trustee, and the *cestui que trust* then being under no legal disability to act for himself, without protest on his part, enters into the possession of the land and uses and occupies the same, or accept from the trustee the rents or revenues thereof in lieu of the interest earnings on the trust fund had the same been continued at interest, such *cestui que trust* is estopped by his conduct from questioning the right or the authority of the trustee to make such purchase, and from demanding from him an accounting of an amount equal to the interest such fund would have earned during the time he so occupies the land or accepts the rents and revenues therefrom: *Willis v. Holcomb*, 83 O. S. 254.

Where mortgaged realty has been bought in to protect the trust and it afterward appears that the trust fund is not in peril of diminution by reason of the land selling for a lesser sum than the amount thereof, it is the right of the *cestui que trust* to require the trustee to sell the land and reinvest the proceeds thereof according to the terms and provisions of the will creating such trust, and upon failure of the trustee to do this after demand made therefor a court of competent jurisdiction may compel him to do so: *Willis v. Holcomb*, 83 O. S. 254.

Out of the proceeds of the sale of such land the original trust fund must be first sequestered and no part thereof can be used for the purpose of paying any amount or installment of interest due the *cestui que trust*, but if there is any such interest due the *cestui que trust* that he has not estopped himself from demanding, then such amount must be paid him out of the surplus of the proceeds of the sale after first deducting an amount equal to the original trust fund, and any surplus then remaining of the proceeds after such payment must be added to the original trust fund, the sum of which will constitute a new trust fund to be invested and distributed according to the terms of the trust: *Willis v. Holcomb*, 83 O. S. 254. See also TRUSTS.

(g) *Promoters.*

A promoter is one who participates in bringing about the organization of an incorporated company and in getting it into condition to transact its business, and as such occupies a fiduciary relation thereto. He is bound to fully disclose his relations to the property which is the subject of the enterprise; and persons induced to become stockholders therein have the right to rely on the good faith and fair dealing of its promoters, and to assume that the latter have not secretly perverted the organization to the accomplishment of selfish purposes, personal gain, and the destruction of that equality of right which all stockholders are entitled to enjoy in the absence of some known modification: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198; *Bank v. Post Co.*, 3 O. C. C. (N.S.) 372, 13 O. C. D. 274.

A promoter of a corporation is chargeable with the duties of the trust relation for the benefit of stockholders from the time he begins to organize the company; and he is bound to act openly and fairly and in such a way that those having independent charge of the company, as well as those who are induced to become subscribers to its stock, may be fully advised of the relation he bears to the property which he proposes to sell and the true value thereof in like manner as one who assumes to act as the agent of another in the purchase of property. Any suppression, concealment or misrepresentation of material facts connected therewith made by the promoter thereof is a fraud upon the corporation: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198.

Those who participate in the organization of an incorporated company and enter the board of directors occupy a fiduciary relation thereto, and where such promoters and directors urge the sale of property to the corporation at three times its real value, and vote for its purchase, with full knowledge as to its actual value, there is such a lack of good faith toward the corporation, its stockholders and creditors as to constitute fraud *per se*, and the fact that other directors assisted in the deal and voted with them affords no defense in an action against them for the amount the company has lost by such conduct: *Bank v. Miller*, 1 O. C. C. (N.S.) 569, 14 O. C. D. 198.

Where a promoter, having made a secret arrangement with the owner of a patent right for the sale of the same for \$3,000, conceals such fact, and induces other persons to join with him in forming a corporation for its purchase for \$15,000, claiming that to be the lowest figure for which the patent right can be purchased, and investing them,

by his conduct, with the belief that he is interested in the enterprise with no other expectation of profit to himself than such as shall accrue to all stockholders therein, while in fact he is making a large profit by the sale, he is liable as a trustee for the profits thus fraudulently obtained: *Bank v. Post Co.*, 3 O. C. C. (N.S.) 372, 13 O. C. D. 274. See also CORPORATIONS.

(h) *Directors.*

If a corporation, during a period of great financial stringency, borrows money to save it from immediate ruin and pledges certain book accounts for such loan, such transaction, if *bona fide*, is valid; and such creditors should be given priority as to the accounts thus pledged to them after the corporation is in the hands of a receiver: *Bank v. Manufacturing Co.*, 11 O. C. C. (N.S.) 533, 21 O. C. D. 258.

Where the board of directors of a mill property enter into a contract with a selling agency for the disposal of the product of the mill, and some of the directors are interested in this agency, and thus make a profit which might and should have gone to the company, and the efforts of such directors are in the interest of the agency as against the interest of the corporation, such conduct constitutes a sufficient ground for the cancellation of the contract by the company: *Paper Co. v. Browne*, 1 O. C. C. (N.S.) 345, 15 O. C. D. 347.

Where the secretary of an insurance company, by voting proxies given him by the policyholders, elects a new board of directors, who, in turn, enter into a contract of employment with him for a term of ten years, it can not be said, because of the incidental benefits to the secretary, that the election of the new directors was a fraudulent collusion of which the re-employment of the secretary was a part, where it appears from the circumstances of the case that he was acting in good faith and for the best interests of the company: *Burch v. Coan*, 17 O. D. (N.P.) 717. See also INSURANCE.

The duty of directors who believe preferred stock to be illegal and fraudulently issued, is to resist its allowance, hence, they can not lawfully traffic in it, thus acquiring an interest to uphold it. If the selling price of the stock is reduced below its real value by the fraud of former officers, the directors as trustees should not enter a combination to buy the stock for their own benefit, and thus become interested to depress it, but should advance its value, restore confidence and advise selling holders of its real value: *Railway Co. v. Duckworth*, 2 O. C. C. 518

[affirmed, without opinion, *Duckworth v. Railway Co.*, 21 Bull. 36].

A purchase of property by directors, such as the stock of a mining company in which they are interested, with corporate funds raised for other purposes, is a void contract, and they are personally liable, though they are the only stockholders and ratify, for the fund is a quasi trust for creditors: *Railway Co. v. Burke*, 10 Dec. Rep. 136, 19 Bull. 27. See also CORPORATIONS.

(i) *Stockholders.*

A transaction by which a stockholder lends money to a corporation and takes as security therefor the pledge of certain book accounts is not of itself fraudulent or invalid: *Bach v. Manufacturing Co.*, 11 O. C. C. (N.S.) 533, 21 O. C. D. 258.

A contract with a subscriber to the capital stock of a corporation which attempts to secure advantages and privileges not common to all other stockholders or subscribers and without their knowledge and consent, is contrary to public policy and can have no effect to limit in any way his contract of subscription, and in so far as it attempts to do so will be treated as a fraud upon such other stockholders not consenting thereto: *Stunt v. Tube Co.*, 22 O. C. C. 120, 12 O. C. D. 170. See also CORPORATIONS.

(j) *Appraisers.*

An appraiser's purchase at administrator's sale will be set aside at the instance of the heirs without proof of unfairness, though the statute only excludes appraisers at execution sales: *Armstrong v. Huston*, 8 O. 552, I Longsdorf's Notes, 456.

Any person to whose integrity or judgment is committed any step needful to a sale, can not acquire title at it: *Armstrong v. Huston*, 8 O. 552, I Longsdorf's Notes, 456.

But this doctrine will not be extended to prohibit an appraiser in partition proceedings to buy unless there is actual fraud. A sale not following appraisal as a matter of course in partition: *Bohart v. Atkinson*, 14 O. 228, I Longsdorf's Notes, 664.

An appraiser's purchase of real estate at judicial sale is not void, but voidable only when directly attacked and by a party in interest and not collaterally. The words fraudulent and void in G. C., § 11606, mean voidable: *Terrill v. Auchauer*, 14 O. S. 80, II Longsdorf's Notes, 637.

The fact that one of the appraisers of the real estate did on the day of the sale obtain an option from the purchaser for a one-half interest in the premises, does not affect the regularity and validity of the sale, in the

absence of any showing that said appraiser did in any wise prevent any one from being present or bidding at said sale: *Ackerman v. Cornell*, 14 O. C. C. (N.S.) 525, 23 O. C. D. 102.

Where land has been bid in at a sheriff's sale by one who, unknown to the judgment debtor, owner of the land, has served as appraiser, and it is shown besides, that such bidder undertook to prevent others from bidding at the sale, and that the land brought less than its probable value, such sale will, on the petition of the judgment debtor, be set aside and a new sale ordered, even though the purchase money has been paid into court and distributed, a deed delivered by the sheriff, and no guaranty is afforded that the land will bring more at a resale: *Hurst v. Fisher*, 64 O. S. 530, IV Longsdorf's Notes, 877.

(k) *Parties to Antenuptial Contract.*

Where a man worth as much as \$131,000 executed an antenuptial contract with a girl without means or business experience, or knowledge of the value of his property, by the terms of which she is to receive an annuity of \$500 and \$10,000 at his death, the disproportion between the amount stipulated in the contract and the amount which she would receive under the law as his widow is so great as to stamp the contract as a fraud upon her, and does not bar her right to dower in his real estate as his widow: *Mettler v. Warner*, 11 O. N. P. (N.S.) 363, 21 O. D. (N.P.) 184.

(l) *Husband and Wife.*

A husband conveyed to his wife the homestead property which thereafter was always treated and spoken of by him as her property, but four years later, and a week before he separated from his wife, he filed for record a quitclaim deed by his wife to himself for the same property, claiming that the quitclaim deed was executed by her simultaneously with his deed to her for the property, but she denied the execution of such quitclaim deed and knew nothing of it. It was held that she, never having knowingly signed and executed such deed, it would be set aside and canceled: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526. See also HUSBAND AND WIFE.

A conveyance by a man, who has entered into a contract of marriage which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital

rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 O. S. 125, IV Longsdorf's Notes, 850. See also *HUSBAND AND WIFE*.

Where a husband, voluntarily and without consideration, disposes of his interest in real estate, though it be only an equity therein, during coverture, without the knowledge or consent of his wife, it is a fraud on her marital rights, and she, at his death, is entitled to dower in such property: *Fast v. Umbaugh*, 22 O. C. C. 409, 12 O. C. D. 434.

A *bona fide* purchaser of such property at judicial sale, without any knowledge or notice of an equitable claim of dower by the widow, would hold it free from such claim of dower: *Fast v. Umbaugh*, 22 O. C. C. 409, 12 O. C. D. 434. See also *DOWER*.

Where a husband, contemplating to abandon his wife, executes a mortgage covering all his property, to secure a pretended indebtedness, but in fact without consideration and for the purpose of defeating any judgment for alimony she might recover in a suit for divorce and alimony which she might subsequently institute on the ground of his abandonment of her, such mortgage is a fraud on her rights, and the rights of no innocent parties intervening, it will be set aside as against her claim for alimony, although the husband by false representations had induced his wife to join him in the execution of such mortgage: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where in such case the mortgage was executed by the husband to his brother-in-law, the consideration being a pretended indebtedness to his father to whom the mortgage was then assigned, who, however, did not know of, nor request the execution of such mortgage, it was held that the son was acting in the transaction as the agent of his father, and whether the father's claim was valid or not, he was bound by the fraud thus committed by his son on the rights of his wife, whether he had knowledge of his son's intentions or not, and the mortgage in the father's hands will be set aside as against the rights of his son's wife for alimony: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Under the circumstances of this case, mortgages executed by the husband on part of his property, to his father, before his marriage, and four years before the separation from his wife took place, will not be set aside as far as the wife's right to alimony is concerned, although these mortgages were executed voluntarily without request therefor from his father and although it seems probable that in executing them he was look-

ing forward to a time when he might be expected to respond in alimony to his intended wife: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

(m) *Pledge.*

The rule that a pledgee of securities can not become the purchaser thereof either at a public or private sale, except where authority so to do has been expressly conferred, is a bar to the purchase of such securities by a bank which received for collection the note to which the securities were attached, where the note authorizes the "holders" thereof, in the event of default of payment at maturity, to sell the securities in whole or in part with the right reserved to the holder to become the purchaser and absolute owner thereof, free of all trusts and claims: *Moore v. Bank*, 12 O. C. C. (N.S.) 529, 21 O. C. D. 614.

Where a pledgee of mortgage notes as collateral sells them at public auction to himself, he does not alter his relation to the pledgor or to the collateral by this unlawful act, and, hence, is not liable for conversion, being able and willing to return them on tender of the amount due on the original debt: *Leighton v. Burkham*, 7 O. C. C. 487, 4 O. C. D. 692. See also *PLEDGE AND COLLATERAL SECURITY*.

A pledgee, by selling to himself a pledged accommodation note and mortgage under a special power to do so, can not recover on foreclosure more than the principal debt. A's children made to him their note and mortgage for \$25,000 solely to enable him to pledge them. A pledged them to B to secure his debt of \$15,000, giving B a power to sell and buy them. The children assigned the extra \$10,000 to C. B agreed to deliver them to C on being paid his \$15,000. On nonpayment B sold them at public sale under the power and bought them at \$15,000, the children not knowing of the power or the sale, and C, not knowing of the sale. B thereupon foreclosed, claiming \$25,000 and interest. It was held that he was only entitled to \$15,000 and interest: *Handy v. Sibley*, 46 O. S. 9, IV Longsdorf's Notes, 308.

The pledgee of an accommodation note can only recover from the accommodation maker the amount intended to be secured. If this note is secured by mortgage, and the pledgee on foreclosure sale buys the property for the mortgagor, after being paid the debt due him he will be held trustee of the surplus: *Handy v. Sibley*, 46 O. S. 9, IV Longsdorf's Notes, 308.

(n) *Other Relations.*

A purchase by a party in possession claiming title at a sale for taxes which he suffered to become in arrears, confers no additional title upon him: *Douglas v. Dangerfield*, 10 O. 152, I Longsdorf's Notes, 497.

One reversioner's purchase of a tax title on neglect of the life tenant to pay taxes inures to his cotenants, but he is entitled to contribution of the cost and expense: *Clark v. Lindsey*, 47 O. S. 437, IV Longsdorf's Notes, 387.

Land belongs to the heir until actually subjected to pay the ancestor's debts and the heir is bound to pay taxes accordingly if the heir or his guardian suffers taxes to become delinquent and buys in the land at tax sale or has the sale made to another, the purchase accrues to the creditors and he can not take advantage of his own wrong. The transaction will be deemed the heir's method of paying taxes: *Piatt v. St. Clair*, W. 261, I Longsdorf's Notes, 22, 6 O. 227, I Longsdorf's Notes, 333.

Where a life tenant of an undivided share pending partition proceedings buys in the property at a street assessment sale, the court can not adjudge his purchase to be in trust for the other parceners as liable to pay under G. C., § 3894, until the other parceners file pleadings to disaffirm his purchase, for they may choose to affirm and seek a share in the purchase money: *Cook v. Gilpin*, 7 Dec. Rep. 291, 2 Bull. 82. See also TAXATION.

2. *Effect of Relationship.*(a) *Opinions.*

If a person who is the relative and confidential adviser of another, and knowing he is trusted by reason of such confidential relations, induces the other to contract to do work for him at a lower price by false representations of a material fact, the former is responsible for any loss thereby occasioned—though but for the relations these would have been dealer's talk: *Smith v. Patterson*, 33 O. S. 70, III Longsdorf's Notes, 658.

(b) *Statement of Law.*

It is not universally true that a misrepresentation of the law is not binding on the party who makes it. The exception consists in cases of transactions between parties to fiduciary and confidential relations and the like: *Bank v. Trust Co.*, 2 O. N. P. (N.S.) 525, 14 O. D. (N.P.) 577.

(c) *Duty to Make Disclosure.*

If an agent, to subdivide and ascertain values, hold back his information to enable

another to buy cheaper, this suppression is fraudulent. But if the vendor ratify after knowledge, the objection is waived: *Trimble v. Elliott*, W. 310, I Longsdorf's Notes, 24.

(d) *Ejectment.*

Where conveyances were made to defraud creditors, some to defendant and some to defendant's minor children, and a creditor of the grantor levied on the lands and filed a bill to remove the cloud and obtain a sale, the fact that defendant procured the sale to be of the lands conveyed to his minor children, instead of his own, and bid in their title, will not prevent him when sued in ejectment to set up his title acquired by the sale as against one of the children who had not been made a party to the suit: *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851.

B. WAIVER.

A beneficiary of the estate present in court during a settlement of the administrator's account, in which he charges himself with the price of such land, is not estopped thereby to demand that the deeds be set aside in order to obtain a resale. Nor is he estopped by delay or acquiescence where the sale was in August, 1878, and the settlement of the partial account was in December 1881: *Caldwell v. Caldwell*, 45 O. S. 512, IV Longsdorf's Notes, 294.

Though one executor can not buy at a sale by the coexecutors, yet if the heirs affirmatively acquiesce, they can not afterwards object. But acquiescence by the signatures of *femes covert* is not binding, and to that extent the sale can not be confirmed, but will be as to the others: *Dunlap v. Mitchell*, 10 O. 117, I Longsdorf's Notes, 493.

The maker of a note, which was not paid at maturity, can not be held to have been given notice of the sale of the securities pledged for its payment by the mere return to him of the canceled note, where it appears that he had requested the bank to pay the note for him and retain the securities for its own protection, notwithstanding the bank declined so to do at the time the request was made: *Moore v. Bank*, 12 O. C. C. (N.S.) 520, 21 O. C. D. 614.

C. LACHES.

Mere lapse of time, short of four years from the discovery by the principal that the agent bought the stock for himself, will not bar an action in equity for the restoration of the stock, notwithstanding meanwhile it has greatly increased in value: *Telling v.*

Sullivan, 14 O. C. C. (N.S.) 1, 22 O. C. D. 312.

Neither laches nor the bar of the statute of limitations runs against ignorant slaves emerging into a condition of freedom, with no knowledge of property rights or such an instrument as a will, and whose rights have been fraudulently concealed from them by an executor: *Moton v. Dewell*, 13 O. C. C. (N.S.) 81, 22 O. C. D. 31.

D. JURISDICTION.

The common pleas is the proper tribunal in which to ask an order setting aside the deeds by which an administrator acquired lands sold by him, in order to obtain a resale: *Caldwell v. Caldwell*, 45 O. S. 512, IV Longsdorf's Notes, 294.

Equity can not interfere upon the ground of fraud alone, but only where the party shows good reason why defense was not made at law: *Lacy v. Garrard*, 2 O. 7, I Longsdorf's Notes, 103.

E. PLEADING.

In a petition to set aside a trustee's settlement as constructively fraudulent, the facts constituting the fraud must be stated with distinctness and precision: *Roje v. Stratton*, 2 O. N. P. 27, 3 O. D. (N.P.) 156.

A charge of deceit and fraud against the trustee of an express trust by the beneficiary is good against a demurrer, though difficult to prove, and the representations were not as to a substantial fact nor alleged to be known by defendant to be untrue and not explicit: *Duhme v. Mehner*, 10 O. C. C. 107, 6 O. C. D. 126.

Where, in a suit brought in the court of common pleas upon a guardian's bond to recover the amount of a judgment of the probate court rendered against the guardian upon the settlement of his accounts, the defendant surety interposes an answer and cross-petition averring that the amount of the judgment is greatly in excess of the amount actually due from the guardian to his ward, and that the judgment was obtained by concealment and fraud by the guardian, the mere fact that the pleading fails to deny the amount so adjudged due in its entirety, does not deprive the court of power to grant relief if the facts so charged by the pleading are found upon trial to be true: *Gantz v. Gease*, 82 O. S. 34.

For the general discussion of the subject of pleading, see PLEADINGS.

F. EVIDENCE.

Fraud must be proved by clear and conclusive evidence. Hence the fact, that a

stockholder is active in inducing persons to take stock in a corporation to purchase and manufacture a patented article, together with other acts from which a suspicion of his participation in the fraud practiced would seem to be justified, is not sufficient to hold him jointly liable with the promoter, in the absence of evidence showing his knowledge of the fraudulent purchase: *Bank v. Fence Post Co.*, 3 O. C. C. (N.S.) 372, 13 O. C. D. 274.

For the general discussion of the subject of evidence, see EVIDENCE.

IV. CRIME.

A member of a firm or partnership can not be prosecuted for the forgery of a contract for advertising turned in to the company with intent to defraud it. One member of a partnership can not commit a fraud upon the other member or members for which he would be criminally liable: *State v. Pope*, 4 O. L. R. 532. See also FORGERY.

An indictment is not indefinite and vague which charges that the defendant permitted "slag cement" to be used on a public improvement instead of "Portland cement," and which avers that the specifications call for the "best grade of Portland cement" and that "slag cement" is a different material from "Portland cement": *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735. See also INDICTMENT.

Under G. C., § 12918, which makes it unlawful for an officer whose duty it is to superintend the construction of a public improvement knowingly to permit materials to be used therein different from the plans and specifications, an indictment charging that the defendant did "unlawfully and knowingly permit a certain material to be used in the making of the improvement aforesaid different from the plans and specifications, to-wit, slag cement, which was different from the material, to-wit, Portland cement, required by the plans and specifications" is sufficient: and it is not indefinite or vague: *State v. Henkel*, 22 O. D. (N.P.) 735; *sub nomine*, *State v. Sundmaker*, 11 O. N. P. (N.S.) 97.

The conducting of a bucket shop with intent to defraud may be punished under R. S. U. S., § 5480, if intentional efforts to dispoil through the medium of the postoffice establishment are shown notwithstanding the carrying on of a bucket shop business may not be illegal under the federal statute: *Foster v. United States*, 9 O. L. R. 66. See also GAMBLING.

FRAUDS, STATUTE OF

Scope Note.—Includes statutory provisions making a note or memorandum, signed by the party to be charged, or his duly authorized agent, necessary to charge a defendant on certain classes of promises and contracts enumerated by the statute; operation and effect of such provisions in general and effect of failure to comply therewith; requisites and sufficiency of the instrument, agreement, memorandum or note required by statute to be in writing; statutory provisions relating to the method of conveying or assigning of interests in land, tenements or hereditaments; nature and effect of part performance; pleading the statute; and judgment. *Excludes* necessity of writing to bar statute of limitations, and part performance of a contract on one part as a ground for compelling performance on the other.

Cross References.

For the admissibility of parol evidence to correct a mistake in omitting a lot from a deed, see **EVIDENCE; REFORMATION**.

For the effect of the statute of frauds upon contracts of novation, see **NOVATION**.

For the purchase of land with funds belonging to a third person, see **TRUSTS**.

For contracts to make a will, see **WILLS, LEGACIES AND DEVISES**.

That an express trust is provable by parol, see **TRUSTS**.

For the form of a contract to devise, see **WILLS, LEGACIES AND DEVISES**.

For the validity of oral partition, see **PARTITION**.

For deeds, see **DEEDS**.

For leases, see **LANDLORD AND TENANT**.

For oil and gas leases, see **OIL AND GAS**.

For contracts for the sale of realty, see also **VENDOR AND PURCHASER**.

For nature of crops, timber, etc., as a part of the realty, see **EMBLEMENTS**.

For the effect of judgment liens upon a parol contract to sell land, which was but partly paid for, see **VENDOR AND PURCHASER**.

For the necessity of writing to prevent the bar of the statute of limitations, see **LIMITATIONS, STATUTE OF**.

For the part performance of a contract on one part as a ground for compelling performance on the other, see **SPECIFIC PERFORMANCE**.

ANALYTICAL OUTLINE.

I. Scope of Statute and Place in Law, 8075.

II. Contracts Within the Statute, 8076.

A. *Promise to answer for the debt of another*, 8076.

1. Debt, 8076.
2. Of another, 8077.
3. Promise, 8079.
4. Distinction between primary and secondary liability, 8079.
5. Indemnity contracts, 8081.

B. *Promise of executor*, 8081.C. *Agreement upon consideration of marriage*, 8081.D. *Contract for sale of land, tenements or hereditaments*, 8083.

1. Rule prior to statute, 8083.
2. Rule under statute, 8083.
 - a. Lands, tenements and hereditaments, 8083.
 - aa. Lands, 8083.
 - bb. Articles annexed to or produced by realty, 8084.
 - cc. Articles severed from realty, 8085.
 - dd. Consideration or rent for realty, 8085.

- ee. Use and management of realty, 8086.
- ff. Boundary line, 8086.
- gg. Party walls, 8086.
- hh. Contract for land or personal property, 8087.
 - ii. Land and personalty, 8087.
- b. Interest in or concerning land, 8087.
 - aa. Equitable interests, 8087.
 - bb. Certificate of entry, 8089.
 - cc. Parol license, 8089.
 - dd. Partition, 8090.
 - ee. Permanent leaseholds, 8091.
- E. *Agreement not to be performed within one year*, 8091.
- F. *Contracts of record*, 8093.
- III. **Note or Memorandum**, 8093.
 - A. *Contents*, 8093.
 - B. *Memorandum consisting of different instruments*, 8095.
 - C. *Signature*, 8095.
 - D. *Authority of agent*, 8097.
 - E. *Necessity of delivery*, 8097.
- IV. **Effect of Failure to Comply with the Statute**, 8098.
 - A. *Action on contract*, 8098.
 - B. *Recovery of consideration*, 8099.
- V. **Effect of Performance**, 8100.
 - A. *Performance on one side*, 8100.
 - 1. *Executory covenants within statute of frauds*, 8100.
 - 2. *Executory covenants not within statute of frauds*, 8101.
 - B. *Part performance*, 8102.
 - 1. *In equity*, 8102.
 - a. *Sale of land*, 8102.
 - aa. *What constitutes*, 8102.
 - bb. *Oral license*, 8108.
 - b. *Agreement upon consideration of marriage*, 8108.
 - c. *Promise to answer for debt of another*, 8109.
 - d. *Agreement not to be performed within one year*, 8109.
 - 2. *At law*, 8109.
 - a. *Where no estate created by operation of law*, 8109.
 - b. *Where estate created by operation of law*, 8110.
- VI. **Reformation**, 8111.
- VII. **Law Controlling**, 8111.
- VIII. **Who Can Take Advantage of Statute**, 8112.
- IX. **On Whom Binding**, 8112.
- X. **Rescission and Modification**, 8112.
- XI. **Conveyance of Interest in Land**, 8113.
 - A. *Common-law rule*, 8113.
 - B. *Interests within statute*, 8113.
 - 1. *What is realty*, 8113.
 - 2. *Method of transferring title*, 8114.
 - 3. *Equitable interests*, 8114.
 - 4. *Entire contract*, 8115.
 - C. *Deed or note in writing*, 8115.

D. *Failure to comply with statute*, 8115.

1. At law, 8115.

a. Contract executory, 8115.

b. Payment of consideration, 8115.

2. Part performance in equity, 8116.

E. *Parol license*, 8117.F. *Lost deed*, 8118.G. *Rescission*, 8118.XII. *Pleading*, 8118.A. *Petition*, 8118.B. *Answer*, 8119.C. *Demurrer*, 8120.XIII. *Judgment*, 8120.I. SCOPE OF STATUTE AND PLACE
IN LAW.

The statute of frauds and perjuries (G. C., § 8621), was enacted as a means of preventing fraud and perjury by requiring, as a matter of evidence written evidence as distinguished from oral evidence in the cases included within the statute: *Woods v. Dille*, 11 O. 455, I Longsdorf's Notes, 581; *Cooper v. Cooper*, 6 O. N. P. 99, 8 O. D. (N.P.) 35.

The object of the statute is said to be undoubtedly to secure the highest and most satisfactory species of evidence: *Crawford v. Edison*, 45 O. S. 239, IV Longsdorf's Notes, 272.

The statute (G. C., § 8621), does not deal with the formation of the contract, but merely with the evidence whereby such contract is to be proved. Accordingly if a contract is enforceable in another jurisdiction, in which it is made, but action is brought thereon in Ohio, in which jurisdiction it is within our statute of frauds, the law of Ohio must be applied, since rules of evidence are governed by the law of the forum; and such contract can not be proved in this state: *Heaton v. Eldridge*, 56 O. S. 87, IV Longsdorf's Notes, 683 [reversing *Eldridge v. Heaton*, 7 O. C. C. 499, 4 O. C. D. 698].

The statute of frauds prescribes a rule of procedure and relates to the remedy: *Barr v. Poor*, 7 O. C. C. (N.S.) 333, 18 O. C. D. 257 [affirming *Barr v. Poor*, 2 O. N. P. (N. S.) 208, 15 O. D. (N.P.) 217; affirmed, without opinion, *Poor v. Barr*, 76 O. S. 630, 77 O. S. 639, and following *Heaton v. Eldridge*, 56 O. S. 87, IV Longsdorf's Notes, 683].

Where in condemnation proceedings the record shows that the owner withdrew all claim for the necessity of fencing, in consideration whereof the company agreed to keep up the fences, this is a legitimate part of the record, having the force of a contract of record, and is not void under the statute of frauds as not signed by the party to be

charged: *Huston v. Railroad Co.*, 21 O. S. 235, III Longsdorf's Notes, 26. See also CONTRACTS.

II. CONTRACTS WITHIN THE STATUTE.

A. PROMISE TO ANSWER FOR THE DEBT
OF ANOTHER.1. *Debt*.

There is no contract to answer for the debt of another within the meaning of G. C., § 8621, unless a debt is shown to be due from a third person to the promisee: *Moorehouse v. Crangle*, 36 O. S. 130, III Longsdorf's Notes, 835.

A promise by a president of a corporation who is selling its stock whereby he guarantees that certain dividends will be paid upon such stock is not within this section, since future dividends are not a debt of a corporation: *Moorehouse v. Crangle*, 36 O. S. 130, III Longsdorf's Notes, 835.

A defendant's compromise of a case promising to pay plaintiff's attorney fees, is not a promise to pay the debt of another: *Connell v. Brumback*, 18 O. C. C. 502, 10 O. C. D. 149 [for opinion below, see *Hurd v. Railway*, 4 O. N. P. 404, 6 O. D. (N.P.) 545].

If by agreement of the parties to the transaction an advance is made by one person to another, which is to be charged to the account of a third person, this is a primary liability on the part of such third person, since no debt existed from the second person to the first: *Brooks v. Walker*, 4 O. N. P. 147, 6 O. D. (N.P.) 301.

The fact that the promisee gives credit to the promisor is the test, and the fact that he charged the advances to the promisor on his books is important evidence of his intent to credit the promisor: *Brooks v. Walker*, 4 O. N. P. 147, 6 O. D. (N.P.) 301.

If the contractor abandons the contract, a promise by the owner to the subcontractor

to pay him directly if he would finish the work is not a promise to answer for the debt of another within the meaning of G. C., § 8621: *Crawford v. Edison*, 45 O. S. 230, IV Longsdorf's Notes, 272; *Fritz v. Lamping*, 8 Dec. Rep. 520, 8 Bull. 270.

A promise made by an administrator to pay an attorney as fees a certain percentage of the amount recovered on a claim against a railroad company for the death of his decedent, the latter dying intestate and without wife or children, is the creation of an original debt and is not a promise to pay decedent's debt. Such a contract is not, therefore, within the statute of frauds or required to be in writing: *Armstrong v. Siddall*, 12 O. C. D. 627.

Where there is enough due a subcontractor from a principal contractor to meet time checks issued to laborers, the promise of the principal contractor to take them up is not a promise to answer for the debt of another, but to pay to a third party a debt due from the principal contractor to the subcontractor, and is therefore not within the statute of frauds: *Bridge Co. v. Lippert*, 13 O. C. C. (N.S.) 79.

A promise by a principal contractor to pay the time checks issued to the laborers employed by a subcontractor must be interpreted only as a promise to pay such checks in the event there is something due the subcontractor: *Bridge Co. v. Lippert*, 13 O. C. C. (N.S.) 79.

2. Of Another.

To come within the operation of G. C., § 8621, the promise must be to answer for the debt of another; and if the promisor is promising to pay his own debt, such promise is not within this section, even though, as a result of such performance, the debt of another will be discharged: *Swihart v. Shaum*, 24 O. S. 432, III Longsdorf's Notes, 182; *Teeters v. Lamborn*, 43 O. S. 144, IV Longsdorf's Notes, 154; *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386.

An assumption of the debt of another as part of the consideration of a transfer by the latter to the promisor is a promise to pay his own debt, and not collateral, though the promise is not to the creditor: *Laws v. Scales*, 7 Dec. Rep. 220, 1 Bull. 314.

A partner's promise to guarantee the firm's contract is a promise to answer for the debt of another: *Smith v. Bowler*, 2 D. 153, 13 Dec. Rep. 95 [affirming *Smith v. Bowler*, 12 Dec. Rep. 770, 1 D. 520].

An oral promise whereby one who buys realty assumes and agrees to pay a mort-

gage thereon is not within G. C., § 8621, since this is a promise by the vendee to pay the purchase price for such land, which is his own obligation, to the holder of such mortgage: *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386.

A debtor executed a note and second mortgage to his creditor, and afterward, in consideration that the creditor would relieve him from personal liability on the note, and look solely to the mortgage for payment, agreed to remove and discharge the first mortgage, so that the second should become the first lien on the premises, whereupon the creditor released, in writing, the debtor from personal liability on the note. It was held that the promise of the debtor to remove and discharge the first mortgage is valid, and that such promise is not within the statute of frauds, and need not be in writing: *Teeters v. Lamborn*, 43 O. S. 144, IV Longsdorf's Notes, 154.

A promise by children to pay their father's debts, in consideration of an advancement made by him to them, is not within G. C., § 8621: *Swihart v. Shaum*, 24 O. S. 432, III Longsdorf's Notes, 182.

A promise by the purchaser of a manufacturing plant to perform the contracts of the vendor as a part of the consideration of the transfer is not within G. C., § 8621: *Jarmusch v. Iron Co.*, 3 O. C. C. (N.S.) 1, 13 O. C. D. 122 [affirmed, without opinion, *Jarmusch v. Iron Co.*, 68 O. S. 720].

If a subcontractor refuses to continue work upon a house, unless the owner promises to pay him directly out of funds due from the owner to the principal contractor, such promise by the owner is said not to be within G. C., § 8621: *Estabrook v. Gebhart*, 32 O. S. 415, III Longsdorf's Notes, 641.

If a subcontractor has done work in reliance upon the promise of the owner to pay him out of funds due from him to the principal contractor, and subsequently it is agreed by the owner, the principal contractor and the subcontractor, that the subcontractor would release his claim against the principal contractor and look to the owner alone for payment, such contract is not within G. C., § 8621: *Estabrook v. Gebhart*, 32 O. S. 415, III Longsdorf's Notes, 641.

A contract of novation by which it is agreed that an existing party to a transaction shall be discharged and a stranger shall take his place, needs no other or further consideration: *Bacon v. Daniels*, 37 O. S. 279, III Longsdorf's Notes, 912.

If a buyer of goods gives in payment the note of another, payable to the seller, verbally guaranteeing its payment, the verbal promise is an original one, and not within

the statute: *Rarey v. Cornell*, 2 Dec. Rep. 315, 2 W. L. M. 415.

3. Promise.

The acknowledgment of a pre-existing liability is not a promise within G. C., § 8621. Accordingly an agreement that a creditor will apply upon a debt due to him, a debt from him to a third person, is not within the statute: *Hoover v. Morris*, 3 O. 56, I Longsdorf's Notes, 148.

A surety bound in writing but having a valid defense waives it by a parol promise to pay on valid consideration. The promise is not within the statute, for it is in effect a mere promise to stand by the original writing: *Rindskopf v. Doman*, 28 O. S. 516, III Longsdorf's Notes, 418.

4. Distinction Between Primary and Secondary Liability.

When it is doubtful on the facts whether the contract was exclusively on defendant's credit or not, the question is for the jury: *Estabrook v. Gebhart*, 32 O. S. 415, III Longsdorf's Notes, 641.

When the leading object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself, or damage to the other contracting party, his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another and its performance may incidentally have the effect of extinguishing that liability: *Crawford v. Edison*, 45 O. S. 239, IV Longsdorf's Notes, 272.

The question whether a contract is one to answer for the debt of the promisor, or to answer for the debt of a third person, depends upon the intention of the parties and upon the party to whom credit is in fact given: *Brooks v. Walker Co.*, 4 O. N. P. 147, 6 O. D. (N.P.) 301.

If the contractor abandons the contract, a promise by the owner to the subcontractor to pay him directly if he would finish the work is not a promise to answer for the debt of another within the meaning of G. C., § 8621: *Crawford v. Edison*, 45 O. S. 239, IV Longsdorf's Notes, 272.

A let a contract to B for furnishing materials and building a house for a stipulated sum. B employed C to furnish materials and to perform the labor of plastering. When the building was completed, except a small part of the plastering, C, in the absence of B, informed A that he would not finish the plastering unless A would agree to pay him; and A replied, "Finish the plastering and I will see you paid." The obligation of B to complete the house and to pay C not being

released, it was held that the verbal promise of A to see C paid was within the statute of frauds. The fact that there was due from A to B at the time the promise was made, a sum sufficient to pay the balance to C, did not take the promise out of the statute: *Birchell v. Neaster*, 36 O. S. 331, III Longsdorf's Notes, 855.

Where B, the head contractor, becoming financially shaky, A, the owner, induces C, a subcontractor, to go ahead by assuring C that there would be funds of B retained to pay C and that he (A) would pay if B did not, it was held that A is estopped to deny that he has funds to pay C, also that the promise is original and not within the statute of fraud: *Hilts v. Scully*, 13 Dec. Rep. 718, 1 C. S. C. R. 555.

If a subcontractor refuses to furnish labor and materials unless the owner promises that he will pay therefor out of funds due from him to the main contractor, such promise is not within the statutes; especially if after the work had been done it was agreed that the subcontractor would discharge his claim against the main contractor and look to the owner for payment: *Estabrook v. Gebhart*, 32 O. S. 415, III Longsdorf's Notes, 641.

If an administratrix brings an action against a railway company for wrongful death, and such case is settled by an oral agreement whereby a certain sum is to be paid to the administratrix for damages and the railway company agrees to pay the fees of her attorneys, but the attorneys do not agree to release the administratrix, such contract is within the statute and the attorneys can not maintain an action against the railway company: *Hurd v. Railway*, 4 O. N. P. 404, 6 O. D. (N.P.) 545.

Where there is enough due the subcontractor from the principal to meet the time checks presented, the promise to take them up is not a promise to answer for the debt of another, but to pay to a third party a debt due from the principal contractor to the subcontractor, and is therefore not within the statute of frauds: *Bridge Co. v. Lippert*, 13 O. C. C. (N.S.) 79. See also CONTRACTS.

Where one of the considerations of the sale of an iron and steel plant from one company to another was that the new company should obligate itself to carry out the contracts and obligations of the old company, the obligation is a new one founded on sufficient consideration, and not necessary to be in writing, as required by the statute of frauds, G. C., § 8621, as to contracts to answer for the debt, default or miscarriage of another: *Jarmusch v. Iron Co.*, 3 O. C. C. (N.S.) 1, 13 O. C. D. 122. See also NOVATION.

5. Indemnity Contracts.

A contract whereby a person, who is in no way liable upon an obligation, agrees to indemnify another person against liability which he may incur by becoming a surety for the party who is originally liable upon such obligation, is within G. C., § 8621: *McGovney v. State*, 20 O. 93, I Longsdorf's Notes, 897; *Williamson v. Hall*, 1 O. S. 190, I Longsdorf's Notes, 964; *Easter v. White*, 12 O. S. 219, II Longsdorf's Notes, 558; *Kelsey v. Hibbs*, 13 O. S. 340, II Longsdorf's Notes, 612; *Ferrell v. Mazucell*, 28 O. S. 383, III Longsdorf's Notes, 413.

If the promisor is himself liable upon the obligation, a promise on his part to indemnify one who becomes surety thereon is in effect a promise to discharge his own liability and is not within G. C., § 8621: *Ferrell v. Mazucell*, 28 O. S. 383, III Longsdorf's Notes, 413; *Smith v. Robinson*, 3 O. C. C. 257, 2 O. C. D. 146.

A promise whereby an execution creditor agrees to indemnify the officer serving such execution from damage in case the property which he seizes should prove not to be the property of the judgment debtor is not within G. C., § 8621: *Mays v. Joseph*, 34 O. S. 22, III Longsdorf's Notes, 695.

A promise by one who claims personal property by which he agrees to indemnify an officer holding an execution against any loss which he may sustain by reason of failure to levy on such property as the property of a third person is not within G. C., § 8621: *Smith v. Robinson*, 3 O. C. C. 257, 2 O. C. D. 146.

B. PROMISE OF EXECUTOR.

For cases involving the liability of an executor but not presenting questions under the statute of frauds, G. C., § 8621, see *Westropp v. Westropp*, 13 O. C. C. 244, 7 O. C. D. 14; *Hurd v. Railway*, 4 O. N. P. 404, 6 O. D. (N.P.) 545.

If a promise by an administratrix to pay or see that certain labor claims connected with a business, in which her decedent was a partner were paid, amounts to a guaranty, it can not be enforced unless it is in writing, nor unless sued upon. Such a promise is not available in an action based upon averments that the administratrix was, by agreement or otherwise, a member of the partnership: *Russell v. Fenner*, 21 O. C. C. 527, 11 O. C. D. 754. See also PARTNERSHIP.

C. AGREEMENT UPON CONSIDERATION OF MARRIAGE.

A contract entered into between two persons whereby they agree to marry each other

is not a contract in consideration of marriage within G. C., § 8621: *Hellenthal v. Bleuhm*, 13 O. D. (N.P.) 513.

The statute of frauds, G. C., § 8621, as to contracts not to be performed within a year, has no application to an agreement to marry. Such agreement, until a breach terminating it is shown is regarded as a continuing contract by consent of the parties. Therefore, an agreement to marry made in the fall of 1898, the parties keeping company constantly and frequently repeating the promise to marry until March 17, 1902, when the defendant refuses to marry plaintiff, is continuing, and not within the statute: *Hellenthal v. Bleuhm*, 13 O. D. (N.P.) 513. See also BREACH OF PROMISE.

An agreement between two persons about to intermarry, by which they attempt to adjust their property rights so as to prevent them from being conveyed by the marriage, as they would be in the absence of such special agreement, is regarded in Ohio as a contract in consideration of marriage and comes within the provisions of G. C., § 8621: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457; *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

An oral antenuptial contract whereby the wife is to retain control of her personal property at a time when her personal property otherwise would have been subject to the control of her husband, in consideration of which she agreed not to claim any share of her husband's personalty or dower in his realty if she survived him, is upon consideration of marriage; and the fact that she has been permitted to dispose of her personal property during coverture does not withdraw the case from the operation of G. C., § 8621: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457.

An oral antenuptial contract whereby it was agreed that the parties should marry, and that the husband would enter upon his wife's realty and make valuable improvements thereon, in consideration of which she would convey such realty to him by deed, is a promise in consideration of marriage, and the fact that he makes such entry and performance is not such part performance as to withdraw the case from the operation of the statute (G. C., § 8621): *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

A contract between husband and wife whereby the husband agrees to devise certain real estate to his wife absolutely, in consideration that said wife will execute her last will and testament devising an estate in remainder in said real estate to the brothers and sisters of said husband, is a valid contract. The mutual promises con-

stitute a sufficient consideration to uphold the contract in equity: *Crary v. McCrory*, 9 O. N. P. (N.S.) 1, 20 O. D. (N.P.) 110.

Where the husband executes an oral contract by executing his last will and testament in conformity thereto and dies, leaving said will in effect, the devisees of the will will not be permitted to interpose the defense of the statute of frauds. The performance by the husband will be held to take the case out of the operation of the statute in such cases: *Crary v. McCrory*, 9 O. N. P. (N.S.) 1, 20 O. D. (N.P.) 110.

An oral contract made during coverture whereby in contemplation of immediate separation, the wife agrees to release her dower and to support three of the children, in consideration of which the husband agrees to convey to her a certain portion of his property is said to be enforceable specifically as against the husband if performed by the wife: *Thomas v. Brown*, 10 O. S. 247, II Longsdorf's Notes, 431.

D. CONTRACT FOR SALE OF LAND, TENEMENTS OR HEREDITAMENTS.

1. Rule Prior to Statute.

Even before the statute of frauds, the legal title to realty could not pass by parol: *Lindsley v. Coats*, 1 O. 243, I Longsdorf's Notes, 75.

Prior to the statute of frauds a trust might be created by parol: *Fleming v. Donahoe*, 5 O. 255, I Longsdorf's Notes, 277.

2. Rule Under Statute.

(a) Lands, Tenements and Hereditaments.

(aa) Lands.

The statute (G. C., § 8621), applies to contracts for the sale of land in its limited sense, that is, corporeal real property: *Pfanz v. Humburg*, 82 O. S. 1, IV Longsdorf's Notes, 1059.

An oral contract whereby one person agrees to buy land for another, the money to be furnished by the person who made the purchase and the person for whose benefit the land was bought to reimburse the person, this advancing the money is within the statute of frauds; gives no equitable interest to the person for whose benefit the land was to be bought; and is unenforceable: *Watson v. Erb*, 33 O. S. 35, III Longsdorf's Notes, 656.

A contract for compensation as agent in selling land is not for a sale of land within the statute (G. C., § 8621): *Koehler v. Hunt*, 8 Dec. Rep. 404, 7 Bull. 302.

A verbal contract to pay a real estate agent all he could get on a sale of lands above a stated sum is not within the statute

(G. C., § 8621): *Robinson v. Hathaway*, 2 Dec. Rep. 581, 4 W. L. M. 105.

An oral contract between A and B, who are husband and wife, on the one side and C, on the other, that A and B should purchase certain realty with their own funds and take title thereto in the name of the wife, and that subsequently the wife should convey an undivided one-half interest in such realty to C who was to pay one-half of the original purchase price, is within the statutes of fraud and is unenforceable as a contract; and since C furnished no part of the purchase money no resulting trust arises and A and B can not be compelled to convey such undivided interest: *Stockton v. Matson*, 15 O. C. C. (N.S.) 12, 23 O. C. D. 170.

A made a verbal agreement with B and wife, that the latter parties should purchase a certain piece of real property with their own funds and take title in the name of the wife, and after such purchase and conveyance, B and wife were to convey an undivided one-half interest in the property to A, he paying one-half the original purchase price. B and wife purchased the property with their own money, A paying no part of the purchase-money, and took title in the name of the wife. On refusal of B and wife to convey to him, A brought suit to recover an undivided one-half interest in the property. It was held that no trust resulted from the transaction and that the verbal agreement could not be enforced: *Stockton v. Matson*, 15 O. C. C. (N.S.) 12, 23 O. C. D. 170.

Formal absurdities in a written contract for the sale of land do not make the contract insufficient under the statute of frauds, where it leaves no doubt as to who was the purchaser, who the seller, what land was sold, and on what terms: *Lenman v. Jones*, 9 O. L. R. 538.

(bb) Articles Annexed to or Produced by Realty.

Growing trees are regarded as realty: *Jones v. Timmons*, 21 O. S. 596, III Longsdorf's Notes, 45; *Hirth v. Graham*, 50 O. S. 57, IV Longsdorf's Notes, 483; *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

If a conveyance for realty is given, oral evidence can not be introduced to show a reservation of growing trees. This is forbidden both by the statute of frauds, G. C., § 8621 (on which point the court expressed no opinion in this case) and by the parol evidence rule: *Jones v. Timmons*, 21 O. S. 596, III Longsdorf's Notes, 45. See also EMBLEMENTS.

A sale of standing timber, though to be severed, concerns an interest in lands, and

must be evidenced by writing: *Hirth v. Graham*, 50 O. S. 57, IV Longsdorf's Notes, 483.

Under a written agreement for the removal of timber trees, an oral extension of time is within the statute: *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

A sale of a growing crop is not within the statute of frauds. Crops raised by annual labor are personalty in view of the statute: *Wisely v. Barclew*, 1 Dec. Rep. 216, 4 W. L. J. 281 (supreme court).

A contract for the sale of earth *in situ* is within the statute: *Welever v. Detweiler*, 15 O. C. C. 680, 8 O. C. D. 668.

A contract for delivering oil from a certain tract of realty at the pipe line is said to be within the statute: *Lithgow v. Shook*, 57 O. S. 662, 39 Bull. 39.

Where an oil lease provides, that in consideration of the grant therein made, the lessees will yield and pay to the lessor as royalty a certain share of "the oil produced and saved from the premises," the parties to the lease may subsequently, for a consideration, increase or decrease the royalty by parol agreement, and such agreement is not within the statute of frauds: *Nonamaker v. Pipe Line Co.*, 73 O. S. 163, IV Longsdorf's Notes, 1000.

(cc) Articles Severed from Realty.

The statute of frauds can not defeat the recovery of the purchase money on a verbal contract for the sale of a dwelling house then annexed to real estate, but to be severed from the freehold and delivered on rollers, after the same has been so severed and delivered in accordance with the contract: *Long v. White*, 42 O. S. 59, IV Longsdorf's Notes, 91.

(dd) Consideration or Rent for Realty.

If the contract for the sale of realty has been so far performed that the interest has passed therein, an oral agreement for the payment of the purchase price is not rendered invalid by the statute: *Randall v. Turner*, 17 O. S. 262, II Longsdorf's Notes, 832; *Negley v. Jeffers*, 28 O. S. 90, III Longsdorf's Notes, 391.

The parties to an oil lease may alter the amount to be reserved as a royalty by an oral agreement made after such lease takes effect: *Nonamaker v. Amos*, 73 O. S. 163, IV Longsdorf's Notes, 1000.

An oral agreement made before the execution of a written lease, which provided that at the end of the year the lessee was to receive a rebate, was said to be within the statute of frauds: *Strong v. Schmidt*, 13 O. C. C. 302, 7 O. C. D. 233. (The parol evi-

dence rule seemed to be a sufficient reason for excluding such evidence.)

(ee) Use and Management of Realty.

An oral agreement by a railway to keep up fences and crossings on the right of way of such railway is not within the statute, if such agreement was made in open court in condemnation proceedings, and is entered upon the record of such court: *Huston v. Railway*, 21 O. S. 235, III Longsdorf's Notes, 28.

An agreement for altering the course of a stream of water and for restoring it to its original course upon demand is not within the statute: *Hydraulic Co. v. Railway*, 29 O. S. 341, III Longsdorf's Notes, 472.

An oral agreement made between owners of adjoining tracts of oil producing land, whereby they agree not to drill any wells within two hundred feet of their division line is said not to be within the statute: *Ware v. Langmade*, 9 O. C. C. 85, 6 O. C. D. 43.

(ff) Boundary Line.

If the boundary line between two adjoining tracts of realty is in dispute, an oral agreement between the owners thereof, locating such boundary, is valid, and is not rendered invalid by G. C., § 8621: *Walker v. Devlin*, 2 O. S. 593, I Longsdorf's Notes, 1088; *Hills v. Ludwig*, 46 O. S. 373, IV Longsdorf's Notes, 331.

Where the true boundaries are in fact unquestionable, and parties by mistake agree upon an erroneous line as their boundary, and suppose the line agreed upon to be their true line, and fence to it, their acts and declarations do not operate in the nature of an estoppel. A party will not forfeit his estate by a mere mistake; nor can the statute of frauds be thus evaded: *McAfferty v. Conover*, 7 O. S. 99, II Longsdorf's Notes, 274.

A boundary line may be fixed by parol agreement, for no estate is created but the parties hold to the agreed line by virtue of their title deeds and not of the parol transfer: *Bobo v. Richmond*, 25 O. S. 115, III Longsdorf's Notes, 213. See also BOUNDARIES.

An oral agreement whereby a boundary line is changed so as to be located at a point at which no one claims it was located originally, is invalid: *Walker v. Devlin*, 2 O. S. 593, I Longsdorf's Notes, 1088.

(gg) Party Walls.

An agreement for the maintenance and use of a party wall is an agreement for an interest in land: *Hall v. Geyer*, 14 O. C. C. 229, 7 O. C. D. 436.

(hh) Contract for Land or Personal Property.

A contract for furnishing compensation in land or in personal property is within the statute: *Howard v. Brower*, 37 O. S. 402, III Longsdorf's Notes, 924.

(ii) Land and Personalty.

A contract for compensation in land and personal property is within the statute: *Shahan v. Sawm*, 48 O. S. 25, IV Longsdorf's Notes, 400.

A contract to devise all one's estate in a certain way, being void as to the real estate under the statute of frauds is void also as to the personalty, for the contract is entire: *Hopple v. Hopple*, 3 O. C. C. 102, 2 O. C. D. 59.

(b) Interest in or Concerning Land.

(aa) Equitable Interests.

Even under the statute of frauds, oral evidence is admissible to show an express trust in realty: *Mathews v. Leaman*, 24 O. S. 615, III Longsdorf's Notes, 196; *Russell v. Bruer*, 64 O. S. 1, IV Longsdorf's Notes, 863; *Schaff v. Ensley*, 14 O. C. C. 492, 7 O. C. D. 714.

An absolute deed may be shown by parol to be on consideration to hold in trust for the grantor and reconvey on demand. The statute of frauds does not prevent, for the refusal would be a fraud on an unexecuted trust: *Mathews v. Leaman*, 24 O. S. 615, III Longsdorf's Notes, 196. See also TRUSTS.

The admissibility of oral evidence to show an express trust seems to be assumed; but as the evidence was not clear and convincing the court found that no trust was established, in *Miller v. Stokely*, 5 O. S. 194, II Longsdorf's Notes, 170; see also *Stall v. Cincinnati*, 16 O. S. 169, II Longsdorf's Notes, 766.

Where S made a verbal agreement with M that M should buy certain land with his own money and take title in his own name, and afterwards convey an undivided half to S upon his paying half the purchase-money, and M bought the property, S paying no part, and took title in his wife's name, and refuses to convey to S, no trust results and no fraud was involved. It is a mere breach of an oral contract to convey which can not be enforced: *Stockton v. Matson*, 15 O. C. C. N.S.) 12, 23 O. C. D. 170. See also TRUSTS.

A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the

trust, and must be clear, certain and conclusive as to its terms and conditions: *Russell v. Bruer*, 64 O. S. 1, IV Longsdorf's Notes, 863.

A trust in an absolute legacy may be established by parol evidence, and the contemporaneous declarations of the testator and the subsequent declarations of the legatee, that the bequest was made for the benefit of a third person upon the promise of the legatee to hold it in trust, are admissible for that purpose: *Winder v. Scholey*, 83 O. S. 204, [affirming *Scholey v. Winder*, 10 O. N. P. (N. S.) 642, 21 O. D. (N.P.) 59].

Equity requires that parol evidence to ingraft an express trust in land upon a deed absolute shall clearly and convincingly show that contemporaneously with the execution of the deed the terms of the trust were declared and the beneficiaries designated: *Boughman v. Boughman*, 69 O. S. 273, IV Longsdorf's Notes, 957.

If a grantor conveys property to a trustee to be disposed of as the grantor may direct for the benefit of the issue of a contemplated marriage, and the grantor dies without directing a conveyance of such property, equity will regard such grantee as holding for the benefit of the issue of such marriage: *Steele v. Lowry*, 4 O. 72, I Longsdorf's Notes, 204.

A mortgage by a buyer of real estate, the title of which remains in the vendor as security, is subject to all other burdens imposed upon it by oral contract between vendor and vendee before the mortgage was given: *Allemania Co. v. Frantzreb*, 56 O. S. 493, IV Longsdorf's Notes, 696. See also MORTGAGES.

If the legal title to the property remains in the vendor, a subsequent oral modification of the contract of sale is enforceable as against a mortgagee of such vendee who acquires his interest after such oral modification: *Loan & Building Co. v. Frantzreb*, 56 O. S. 493, IV Longsdorf's Notes, 696.

As dower, though not yet assigned, is an estate in lands, an oral agreement with the heirs not to claim it in consideration of being supported at the residence of one of them and receiving a cow and firewood, is void under the statute of frauds: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457.

Those possessory rights known in California in 1852 as "squatter's rights," were interests in lands, authority to convey which must be in writing: *Hayes v. Skidmore*, 27 O. S. 331, III Longsdorf's Notes, 359.

Assuming incumbrances by oral contract for a valuable consideration after the title has passed to the vendee, and waiving the right to compel the vendor to do so before claiming the balance of purchase money, is

not within the statute: *Negley v. Jeffers*, 28 O. S. 90, III Longsdorf's Notes, 391.

Changing the times of payment orally after the title of land sold has been passed, by deed or otherwise, thus merely modifying the pecuniary liabilities, is not affected by the statute: *Negley v. Jeffers*, 28 O. S. 90, III Longsdorf's Notes, 391.

A contract of a decedent giving the balance of the proceeds of real estate sold in due course of administration to another in consideration of care, maintenance, etc., is an agreement for an interest in lands and within the provisions of the statute of frauds: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882 [following *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400].

A verbal agreement for a lease and renewal, under which the lessee has made valuable improvements, can be subjected to a mechanic's lien for the improvements. It is enforceable by specific performance, and the mechanic can subject this right, and no surrender or transfer by the lessee can divest this: *O'Brien v. Meyer*, 8 Dec. Rep. 777, 9 Bull. 337. See also MECHANIC'S LIEN.

A member of an unincorporated religious society, communistic in character, can not demand and receive an interest in the property of such society upon withdrawing therefrom contrary to the rules thereof: *Gasely v. The Separatists*, 13 O. S. 144, II Longsdorf's Notes, 601.

(bb) Certificate of Entry.

A certificate of entry is not an interest in specific realty, and an oral agreement to sell the same is not within the statute: *Reed v. McGrew*, 5 O. 375, I Longsdorf's Notes, 291.

(cc) Parol License.

An executed license for the use of real estate does not constitute an exception to the operation of the statute of frauds and perjuries: *Mather v. Wright*, 21 O. C. C. 103, 11 O. C. D. 578 [questioning and distinguishing *Wilson v. Chalfant*, 15 O. 248, I Longsdorf's Notes, 709; following *Wilkins v. Irvine*, 33 O. S. 138, III Longsdorf's Notes, 662].

An executed parol license in land is irrevocable when granted for a valuable consideration. Such a license is not affected by reason of not being in writing, provided it is founded upon a definite understanding between competent parties; but where such an understanding is lacking, the claimant must establish his right by showing adverse possession for twenty-one years: *Smith v. Railway Co.*, 5 O. C. C. (N.S.) 194, 16 O. C. D. 44 [affirmed, without opinion, *Smith v. Railway Co.*, 73 O. S. 301].

The original Ohio doctrine was that an executed parol license was irrevocable: *Wilson v. Chalfant*, 15 O. 248, I Longsdorf's Notes, 709.

L conveyed to B certain premises by metes and bounds, with covenants of seizin, against incumbrances and warranty. A portion of the roof and eaves of a house standing on the land conveyed extended over upon the adjoining lot of M. In an action by L against B to recover the purchase-money, the latter alleged and claimed that the right to maintain and use the projection of said roof and eaves was conveyed to him by L; and that M's right to cut the same away, and to oust him from its enjoyment, constituted a breach of the covenants in said deed. It was held (1) That if the right to such projection and its use belonged to L at the time of the conveyance, it passed to B as an appurtenance to the parcel granted; (2) if it did not then belong to him, the projection not being within the description of the premises contained in the deed, the same did not pass, and hence he did not covenant to warrant and defend it: *Meek v. Breckenridge*, 29 O. S. 642, III Longsdorf's Notes, 506.

An oral agreement for the use of a party wall was said to be withdrawn from the operation of the statute by user of such wall: *Hall v. Geyer*, 14 O. C. C. 229, 7 O. C. D. 436.

These earlier cases have, however, been overruled; and an oral agreement for a license is said to be in legal effect a contract for an easement and within the statute; and performance on the part of the licensee does not render such license irrevocable: *Yeager v. Tuning*, 79 O. S. 121, IV Longsdorf's Notes, 1044.

Where a landowner orally gives permission to another to occupy and use certain land, but does not grant or attempt to grant any interest in the land, and the landowner assumes no obligation on his part with regard to such occupation or use, the possession and use of the land are under a bare license, which is revocable at the pleasure of the licensor; and this will be so, although the licensor has silently acquiesced in the making of valuable improvements and the erection of structures on the land by the licensee. Such a license is terminated by the death of either of the parties: *Fowler v. Delaplain*, 79 O. S. 279, IV Longsdorf's Notes, 1046.

(dd) Partition.

Oral partition is within the statute of frauds as far as the legal title of realty is concerned: *Berry v. Seawell*, 9 O. F. D. 100.

In equity, however, oral partition is valid if it is reasonable and fair, and if posses-

sion has been taken thereunder: *Piatt v. Hubbell*, 5 O. 243, I Longsdorf's Notes, 274; *Docktermann v. Elder*, 11 Dec. Rep. 506, 27 Bull. 195; *Williams v. Pope*, W. 406, I Longsdorf's Notes, 32; *Cummins v. Nutt*, W. 713, I Longsdorf's Notes, 55.

An agreement to defer the partition or sale of the premises until after a certain date must be in writing: *Jacob v. Fisher*, 5 O. N. P. 419, 7 O. D. (N.P.) 423.

(es) Permanent Leaseholds.

A permanent leasehold is said in *Loring v. Melendy*, 11 O. 355, I Longsdorf's Notes, 565, to be realty. Questions of execution were involved and not questions under G. C., § 8621. This view has subsequently been modified.

A holding over under an invalid lease makes a tenant a tenant from year to year for the time for which the rent was computed: *Railway v. West*, 57 O. S. 161, IV Longsdorf's Notes, 710.

Where a tenancy was begun under a written lease for a term of five years, with a privilege of renewal for another five years, and the lessee entered upon his fourth term by virtue of a verbal agreement for another five years under the same terms as before, his possession is referable to the former written lease, and he becomes a tenant from year to year: *Hopkins v. Carroll*, 11 O. C. C. (N.S.) 605, 22 O. C. D. 709.

An oral agreement to surrender a lease is invalid under the provisions of the statute: *Strong v. Schmidt*, 15 O. C. C. 233, 8 O. C. D. 551.

E. AGREEMENT NOT TO BE PERFORMED
WITHIN ONE YEAR.

A contract whereby the lessor agrees not to carry on the same business as that which the lessee is about to carry on, in the same locality, for a period of five years, is within the provisions of the statute: *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211.

An agreement which provides that a promissory note shall not be due and payable until the performance of certain covenants, which can not be performed within a year, is within the statute: *Harley v. Weber*, 2 O. C. C. 57, 1 O. C. D. 360.

Whether an oral contract for one year to begin in the future was within the statute was queried but not decided, as the question was not presented in the pleadings or at the trial below: *Bascom v. Skillito*, 37 O. S. 431, III Longsdorf's Notes, 926.

A provision for a lease to run for one year, and to begin about fifteen days after making the contract, was said to be within

the statute, in *Hafer v. Corbin*, 6 O. N. P. (N.S.) 468, 14 O. D. (N.P.) 674.

If a contract may or may not be performed completely within one year from the time of making it, such contract is not within the statute, even though actual performance may extend beyond the year: *Randall v. Turner*, 17 O. S. 262, II Longsdorf's Notes, 832; *Blakeney v. Goode*, 30 O. S. 350, III Longsdorf's Notes, 533; *Jones v. Pouch*, 41 O. S. 146, IV Longsdorf's Notes, 55; *Westropp v. Westropp*, 13 O. C. C. 244, 7 O. C. D. 14; *Slocumb v. Seymour*, 7 Dec. Rep. 563, 3 Bull. 991.

In *Jones v. Pouch*, 41 O. S. 146, IV Longsdorf's Notes, 55, it was said that an oral agreement to construct a section of a road in one year and twenty days from the date of the contract was enforceable, it being shown that the road could be completed within the year; the twenty days being added as a precaution against contingencies.

An agreement made ten months and a half before a note becomes due to extend such note for one year after maturity, upon consideration of the payment of interest in advance at an agreed rate, is within the statute; even if interest is paid in advance, in accordance with the terms of such agreement, within a year after the time of making such contract: *Reinheimer v. Carter*, 31 O. S. 570, III Longsdorf's Notes, 607.

An oral agreement whereby one party is to solicit subscriptions for a guaranty company in its department of guaranteed attorneys, and such party is to be paid a commission upon the original contract and a commission upon the renewals of such contracts thereafter, is said not to be within the statute: *Kurz v. Fidelity & Guaranty Co.*, 7 O. N. P. 118, 9 O. D. (N.P.) 741.

An oral lease of realty to be fully performed more than a year from the time of making such contract, is within the statute (G. C., § 8621), as well as within G. C., § 8620: *Hafer v. Corbin*, 6 O. N. P. (N.S.) 468, 14 O. D. (N.P.) 674.

A contract to be performed at the death of one of the parties is not within the statute. The fact that under the statutes controlling the administration, the administrators could not be compelled to pay such claim until eighteen months after the death of such party, does not bring such contract within: *Westropp v. Westropp*, 13 O. C. C. 244, 7 O. C. D. 14.

Where a plaintiff entered into a verbal contract for his services in procuring certain contracts for defendant, without any limitation as to time of service, and the services were rendered and completed and the contract fully performed within a year, the statute of frauds does not apply: *Frances*

v. *McCabe*, 8 O. N. P. 360, 11 O. D. (N.P.) 398.

A rehiring on December 12th, for a new year to begin January 1st, is clearly within the statute: *McCammon v. Manufacturing Co.*, 6 Dec. Rep. 1155, 10 Am. L. Rec. 688, 7 Bull. 321.

An oral contract of hiring for a year is not brought within the statute by delay in beginning the services, unless the completion is extended beyond the year: *Wolf v. Warrington*, 8 Dec. Rep. 219, 6 Bull. 338.

An oral agreement twenty days before a note matures, that it may be renewed for a year at eight per cent., is within the statute: *Jones v. McReynolds*, 4 Dec. Rep. 76, 1 Clev. L. Rep. 1.

An oral agreement if sufficiently proven will constitute a compact between the parties to support mutual wills, if not objectionable for other reasons: *Minor v. Minor*, 2 O. N. P. (N.S.) 439, 15 O. D. (N.P.) 264. See also WILLS, LEGACIES AND DEVISES.

F. CONTRACTS OF RECORD.

The statute of frauds (G. C., § 8621) is said to apply to simple contracts only and not to contracts of a higher class, such as contracts of record. Accordingly, a contract made in open court in appropriation proceedings whereby a railway undertakes to maintain fences and crossings forever is not within the statute; and such contract is valid if it is shown upon the record of the court, although it is not signed by the party to be charged therewith: *Huston v. Railway*, 21 O. S. 235, III Longsdorf's Notes, 26.

III. NOTE OR MEMORANDUM.

A. CONTENTS.

Several writings, though made at different times, may be construed together for the purpose of ascertaining the terms of a contract required, by the statute of frauds, to be in writing and signed by the party to be charged therewith. If some only of such writings be so signed, reference must be specifically made therein to those which are not so signed; but if each of the writings be so signed, such reference to the others need not be made, if, by inspection and comparison, it appear that they severally relate to or form part of the same transaction: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

An instrument in writing in the usual form of a deed of conveyance, but not delivered as such, may nevertheless be delivered as an executory contract, or as partial evidence of a contract to sell and convey the lands therein described; and if signed and so delivered by the vendor, and accepted by the

vendee, it is sufficient in an action thereon, against the vendor, to take the case out of the operation of the statute of frauds: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

Failure to describe or identify the property or subject of the contract is a fatal defect: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

An agent to make a contract to sell land may be authorized by parol: *Robinson v. Hathaway*, 2 Dec. Rep. 581, 4 W. L. M. 105; *Jones v. Lewis*, 8 Dec. Rep. 368, 7 Bull. 211.

Where an agent has been authorized, by an instrument of writing, to enter into a contract on the part of his principal with a third person therein named, and all the terms and conditions of the proposed contract are contained in the instrument, and the same is signed by the principal, or by some other person thereunto authorized, the agent may, in the execution of the power, deliver such instrument to the person named as and for the proposal of his principal; and when such person assents to and accepts the proposal thus made, the contract is complete; and the agreement thus entered into is "in writing and signed" by the proponent within the meaning of the statute: *Furnace Co. v. Railroad*, 22 O. S. 451, III Longsdorf's Notes, 93.

The memorandum in writing which is required by the statute of frauds, is a memorandum of the agreement between parties; and it is not sufficient unless it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memorandum itself or some other writing to which it refers, without the necessity of resorting to parol proof: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

To make a valid contract to leave an estate including real property to another by will, it is not only necessary that the contract, or a memorandum thereof, shall be in writing signed for the purpose of giving it authenticity as an agreement, but the terms of the agreement must be expressed with reasonable certainty in the writing, and it must contain a sufficiently definite identification of the property to be so disposed of: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

It is not necessary that the consideration be set forth in the note or memorandum (decided in case of contracts to answer for the debt of another): *Reed v. Evans*, 17 O. 128, I Longsdorf's Notes, 800; *Duckwall v. Rogers*, 15 O. S. 544, II Longsdorf's Notes, 747.

The written memorandum must show all the terms of the contract. A written agreement for the sale of an interest in realty, which is subsequently modified by an oral agreement, can not be enforced as modified: *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

If an auctioneer, by mistake, enters the wrong name of the owner of the realty in his memorandum made at the time of the sale, such mistake can be corrected in equity: *Pugh v. Chesseldine*, 11 O. 109, I Longsdorf's Notes, 545.

Parol evidence to identify the subject-matter is admissible, as in one's agreement to sell "his house," to show what house: *Graf v. Wirthweine*, 12 Dec. Rep. 4, 1 H. 19.

A receipt by defendant, thus, "received of B ten dollars as part purchase-money on house and lot No. 191, T street, as per agreement," does not show that defendant accepted the oral proposition to sell, and is therefore not sufficient: *Boest v. Doran*, 4 Dec. Rep. 525, 2 Clev. L. Rep. 313.

No hard and fast rule has obtained in this state requiring specific performance to be in the very letter of the contract, and where the contract renders it obvious what land it was proposed to convey, a pertinent description will be inserted by the court in its decree: *St. Xavier College v. Briggs*, 13 O. C. C. (N.S.) 401, 23 O. C. D. 468.

B. MEMORANDUM CONSISTING OF DIFFERENT INSTRUMENTS.

Several writings, though made at different times, may be construed together, for the purpose of ascertaining the terms of a contract required, by the statute of frauds, to be in writing and signed by the party to be charged therewith. If some only of such writings be so signed, reference must be specifically made therein to those which are not so signed; but if each of the writings be so signed, such reference to the others need not be made, if, by inspection and comparison, it appear that they severally relate to or form part of the same transaction: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

An unsigned instrument which is not incorporated by reference into an instrument which is signed, is not a sufficient memorandum or part thereof within the meaning of the statute: *Anderson v. Harold*, 10 O. 399, I Longsdorf's Notes, 523.

C. SIGNATURE.

Where the name of the agent, with whom a contract for the purchase of real estate was made, appears in the written memorandum of the agreement signed by the pur-

chaser, who is the party to be charged, the statute of frauds is satisfied, although the names of the principals are not disclosed therein: *Walsh v. Barton*, 24 O. S. 28, III Longsdorf's Notes, 157.

Under the provision of the statute the name of the person to be charged must appear somewhere upon the instrument: *Anderson v. Harold*, 10 O. 399, I Longsdorf's Notes, 523.

The auctioneer is the agent of both the vendor and the vendee at the time of the sale for the purpose of making a memorandum of such sale; and such memorandum made and signed by him at the time of such sale is sufficient to comply with the statute: *Pugh v. Chesseldine*, 11 O. 109, I Longsdorf's Notes, 545.

The statute merely requires the memorandum to be signed by the party to be charged therewith; and accordingly if such party signs the memorandum, it is not necessary that the adversary party should sign it: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57; *Brewing Co. v. Maxwell*, 78 O. S. 54, IV Longsdorf's Notes, 1038; *Egle v. Morrison*, 6 O. C. C. (N.S.) 609, 17 O. C. D. 497 [affirmed, without opinion, *Morrison v. Egle*, 73 O. S. 388]. See also *State, ex rel., v. Gilfillan*, 3 O. N. P. (N.S.) 153, 15 O. D. (N.P.) 756 [affirmed, *State, ex rel., v. Gilfillan*, 3 O. L. R. 476, 19 O. C. D. 709; modified, *Thomas v. State, ex rel.*, 76 O. S. 341, IV Longsdorf's Notes, 1025].

The fact that a memorandum, or proposition, being signed only by the party sought to be charged and not by the other, does not bind the latter, does not avoid the contract, or prevent specific performance by the want of mutuality. The statute has affected the remedy only as to the one sought to be charged: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57. See also CONTRACTS.

It appears to be held that a signature made by an agent is sufficient: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

If the contract was with an agent, and in his own name only, or is with a person acting for himself and another, the agency may be shown by oral testimony and the principal may sue: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

A written contract for the sale of real estate, made and signed by an agent in his own name and without disclosing his agency, or the name of his principal, satisfies the requirements of the statute of frauds, and is binding on and may be enforced by the principal: *Egle v. Morrison*, 6 O. C. C. (N.S.) 609, 17 O. C. D. 497 [affirmed, without opinion, *Morrison v. Egle*, 73 O. S. 388].

An owner's written authority to a broker to sell his house on certain terms, under which the plaintiff wrote an acceptance if the title proves good, satisfies the statute: *Forbis v. Shattler*, 13 Dec. Rep. 789, 2 C. S. C. R. 95.

Authority to close the sale is authority to sign the agreement, though the principal has said he would sign nothing: *Jones v. Lewis*, 8 Dec. Rep. 368, 7 Bull. 211.

D. AUTHORITY OF AGENT.

In the absence of specific statutory provision therefor, it is not necessary that the authority of an agent to sign a note or memorandum under the statute should be in writing: *Spengler v. Sonnenberg*, 88 O. S. 207; *Robinson v. Hathaway*, 2 Dec. Rep. 581, 4 W. L. M. 105; *Jones v. Lewis*, 8 Dec. Rep. 368, 7 Bull. 211.

This view seems to be assumed in *Walsh v. Barton*, 24 O. S. 28, III Longsdorf's Notes, 157.

Where the express authority of an agent to sign an agreement in writing for the sale of lands rests in parol, the proof must be clear and convincing not only of such parol authority, but also that the authority was such as to permit the inclusion of all of the material terms which are embodied in the instrument: *Spengler v. Sonnenberg*, 88 O. S. 207.

If an agent, acting under express authority to enter into a written contract for the sale of land, makes a contract for his principal which includes terms not authorized, the agreement is void, and its performance will not be enforced: *Spengler v. Sonnenberg*, 88 O. S. 207.

In a proceeding to enforce specific performance of a written contract for the sale of real estate, signed by an agent under express authority, it must be shown that the authority was such as to permit the making of the identical contract sued on, and not of a contract differing therefrom in a material respect: *Spengler v. Sonnenberg*, 88 O. S. 207.

E. NECESSITY OF DELIVERY.

An instrument of writing in the usual form of a deed of conveyance, but not delivered as such, may nevertheless be delivered as an executory contract, or as partial evidence of a contract to sell and convey the lands therein described; and if signed and so delivered by the vendor and accepted by the vendee, it is sufficient, in an action thereon, against the vendor, to take the case out of the operation of the statute of frauds: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

It is not necessary for a compliance with the statute that the written memorandum should have been delivered: *Hovekamp v. Elshoff*, 3 O. N. P. 158, 4 O. D. (N.P.) 171.

IV. EFFECT OF FAILURE TO COMPLY WITH THE STATUTE.

A. ACTION ON CONTRACT.

If a contract is within the scope of the statute and such contract is not in writing and no note or memorandum thereof is in writing, as required, no action at law, nor inequity in the absence of technical part performance (see V, B. c, post) can be brought upon such contract: *Easter v. White*, 12 O. S. 219, II Longsdorf's Notes, 558; *Kelsey v. Hibbs*, 13 O. S. 340, II Longsdorf's Notes, 612; *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211; *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347; *Birchell v. Neaster*, 36 O. S. 331, III Longsdorf's Notes, 855; *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400; *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

Such contract can not be used as a defense against what would have been a good cause of action but for such oral agreement: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457; *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607.

If an agent who is to receive a commission for selling land obtains an oral contract, whereby the vendee agrees to purchase such realty, such contract is not enforceable by the vendor, and the agent is not entitled to a commission for making such sale, even though the vendee has paid down earnest to bind the bargain: *Pfanz v. Humburg*, 82 O. S. 1, IV Longsdorf's Notes, 1059.

While a memorandum may be valid without delivery, a written contract or memorandum may be signed under an oral agreement that it shall not take effect until the happening of some other and further event; and unless such event happens such contract does not take effect. Such condition precedent may be shown by oral evidence: *Hovekamp v. Elshoff*, 3 O. N. P. 158, 4 O. D. (N.P.) 171.

A judgment based solely on the question of the statute of frauds is not a bar to a subsequent action upon the same contract in which the question of the statute of frauds is not present: *Barr v. Poor*, 2 O. N. P. (N. S.) 208, 15 O. D. (N.P.) 217 [affirmed, *Barr v. Poor*, 7 O. C. C. (N.S.) 333, 18 O. C. D. 257, which was affirmed, without opinion, *Poor v. Barr*, 76 O. S. 630].

The fact that a verbal agreement to sell land is void under the statute of frauds

does not make it illegal: *Gallagher v. Dettelbach*, 1 O. C. C. (N.S.) 598, 15 O. C. D. 342.

A promise to put in writing a contract which must be in writing, being broken, is not actionable unless this was prevented by fraud: *Smith v. Bowler*, 13 Dec. Rep. 95, 2 D. 153.

B. RECOVERY OF CONSIDERATION.

If a contract within the statute is broken, the party who is not in default may recover what he has parted with under such contract: *Fitch v. Sargeant*, 1 O. 352, I Longsdorf's Notes, 87; *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211; *Tousley v. Moore*, 30 O. S. 184, III Longsdorf's Notes, 523; *Murphy v. Adams*, 8 O. C. C. (N.S.) 583, 19 O. C. D. 405.

One who has performed labor under a contract not to be performed within the year may recover compensation for the work done, if he is discharged by his employer without just cause: *Tousley v. Moore*, 30 O. S. 184, III Longsdorf's Notes, 523.

By parol agreement an owner of land let another take possession and erect expensive improvements, agreeing to sell, or lease or make it right, but no time, or terms, or price, or rent was agreed on. The vendor then took possession and appropriated the other's improvements and sold to one with notice. It was held that assumpsit for work and labor will not lie to recover the value of the improvements, for there is no implied promise. But there is a remedy either at law by action for breach of contract, or in equity for specific performance or damages: *Welsh v. Welsh*, 5 O. 425, I Longsdorf's Notes, 297.

If a vendee in possession under an indefinite oral contract is evicted and seeks to recover compensation, he can recover at law only compensation paid by him and not the value of improvements made for his own benefit, for the implied promise is only to restore the former compensation for improvements made in reliance upon an oral contract must be sought in equity: *Welsh v. Welsh*, 5 O. 425, I Longsdorf's Notes, 297.

If the vendor under an oral contract for the sale of realty refuses to perform, the vendee may recover the consideration paid therefor: *Fitch v. Sargeant*, 1 O. 352, I Longsdorf's Notes, 87; *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211.

The fact that a verbal agreement to sell land is void under the statute of frauds does not make it illegal. If the vendor has the deed ready, and is able to and repeatedly offers to convey, but is prevented from so doing by the refusal of the vendee to accept

a deed, and six months later the vendor conveys the land to another, a suit can not thereafter be maintained by the vendee to recover the earnest money on the ground that it was paid without consideration: *Gallagher v. Dettelbach*, 1 O. C. C. (N.S.) 598, 15 O. C. D. 342. See also VENDOR AND PURCHASER.

A contract for the performance of services, a part of the agreed value thereof to be credited on the purchase price of real estate thereafter to be conveyed, although for the sale of real estate and not in writing, furnishes a basis for the value of the services rendered, provided the party agreeing to perform the work did not abandon it or fail to go forward with it through his own fault: *Murphy v. Adams*, 8 O. C. C. (N.S.) 583, 19 O. C. D. 405. See also SERVICES.

The party who is in default can not recover compensation for what he has done under an oral contract within the provisions of the statute: *Abbott v. Inskip*, 29 O. S. 59, III Longsdorf's Notes, 437.

One who has performed labor under a contract not to be performed within the year, and who has broken such contract, can not recover reasonable compensation for the labor performed prior to such breach: *Abbott v. Inskip*, 29 O. S. 59, III Longsdorf's Notes, 437.

Where an oral contract for services as housekeeper is on promise to compensate by giving a farm, and thus is within the statute of frauds, action lies on *quantum meruit*, and the value of the farm may be given to show the amount intended to be paid and that the services were worth it: *Berry v. Collins*, 9 O. C. C. 656, 6 O. C. D. 597.

The tenant having enjoyed the premises can not resist payment of rent during such time because there was no written lease. The statute does not apply: *Moore v. Beasley*, 3 O. 294, I Longsdorf's Notes, 171.

V. EFFECT OF PERFORMANCE.

A. PERFORMANCE ON ONE SIDE.

1. Executory Covenants Within Statute of Frauds.

Performance by one party even if complete which leaves executory covenants to be performed on the other side to do acts which are within the statute does not prevent its application to such contract: *Sites v. Keller*, 6 O. 483, I Longsdorf's Notes, 353; *Pollard v. Kinner*, 6 O. 528, I Longsdorf's Notes, 356.

In an oral contract for the sale of land, payment of the purchase price does not take such contract out of the statute of frauds: *Crabill v. Marsh*, 38 O. S. 331, III Longsdorf's Notes, 972; *Thomas v. Watt*, 15 O. D. (N.P.) 427.

If the vendee has performed labor under a contract for the sale of realty, he may recover reasonable compensation for such labor if the vendor makes default: *Murphy v. Adams*, 8 O. C. C. (N.S.) 583, 19 O. C. D. 405.

2. Executory Covenants Not Within Statute of Frauds.

Full performance by one side which leaves executory covenants on the other, which of themselves are not within the statute, removes the contract from the operation of the statute, even if, prior to such performance, it would have been within its provisions: *Randall v. Turner*, 17 O. S. 262, II Longsdorf's Notes, 832; *Negley v. Jeffers*, 28 O. S. 90, III Longsdorf's Notes, 391; *Nonamaker v. Amos*, 73 O. S. 163, IV Longsdorf's Notes, 1000.

If the vendor under an oral contract for the sale of realty has performed fully, such contract may be proved in an action to recover the purchase price: *Randall v. Turner*, 17 O. S. 262, II Longsdorf's Notes, 832.

If title to realty has been conveyed by deed in compliance with a contract to convey, an oral contract modifying the provisions for payment of the purchase price is valid: *Negley v. Jeffers*, 28 O. S. 90, III Longsdorf's Notes, 391.

An oral contract modifying the provisions of a written contract for the payment of royalties under an oil lease is valid: *Nonamaker v. Amos*, 73 O. S. 163, IV Longsdorf's Notes, 1000.

Where an oil lease provides that, in consideration of the grant therein made, the lessee will yield and pay to the lessor as royalty a certain share of "the oil produced and saved from the premises," the parties of the lease may subsequently, for a consideration, increase or decrease the royalty by parol agreement, and such agreement is not within the statute of frauds: *Nonamaker v. Amos*, 73 O. S. 163, IV Longsdorf's Notes, 1000. See also OIL AND GAS.

An agreement between landlord and tenant for an increase in rent if tenant holds over is operative if tenant retains possession after the expiration of the original term: *Moore v. Harter*, 67 O. S. 250, IV Longsdorf's Notes, 930.

An oral agreement made prior to the execution of a written lease, to the effect that at the end of the year the lessor should pay a rebate to the lessee, was said to be invalid under the provisions of the statute. Irrespective of the application of the statute, such a contract would apparently be invalid

under the parol evidence rule: *Strong v. Schmidt*, 13 O. C. C. 302, 7 O. C. D. 233.

When an owner contracts in writing with a broker to sell a parcel of land, and the broker secures a purchaser, who offers to take the land in accordance with such contract, and duly tenders the money to and demands a deed from the owner, such broker is entitled to his commission, although no memorandum in writing, of the contract between the broker and purchaser is signed by the purchaser: *Barber v. Heade*, 10 O. C. C. (N.S.) 342, 20 O. C. D. 127. See also REAL PROPERTY.

Where the husband executes an oral contract by executing his last will and testament in conformity thereto and dies, leaving said will in effect, the devisees of the wife will not be permitted to interpose the defense of the statute of frauds. The performance by the husband will be held to take the case out of the operation of the statute in such cases: *Crary v. McCrory*, 9 O. N. P. (N.S.) 1, 20 O. D. (N.P.) 110. See also WILLS, LEGACIES AND DEVISES.

B. PART PERFORMANCE.

1. In Equity.

(a) Sale of Land.

(aa) What Constitutes.

In contracts for the sale of land, a change of possession under such contract and referable thereto, whereby the vendee is put in possession of the realty to be sold, removes such contract from the operation of the statute and entitles the vendee to the relief of specific performance: *Wilber v. Paine*, 1 O. 251, I Longsdorf's Notes, 76; *Cullen v. Buckingham*, 1 O. 264, I Longsdorf's Notes, 79; *Waggoner v. Speck*, 3 O. 292, I Longsdorf's Notes, 171; *Moore v. Beasley*, 3 O. 294, I Longsdorf's Notes, 171; *Bridgman v. Wells*, 13 O. 43, I Longsdorf's Notes, 623; *Kelly v. Stanbery*, 13 O. 408, I Longsdorf's Notes, 644; *Wilson v. Chalfant*, 15 O. 248, I Longsdorf's Notes, 709; *Kay v. Watson*, 17 O. 27, I Longsdorf's Notes, 793; *Grant v. Ramsey*, 7 O. S. 157, II Longsdorf's Notes, 286; *Dominick v. Kane*, 4 O. N. P. (N.S.) 583, 17 O. D. (N.P.) 353; *Thomas v. Watt*, 15 O. D. (N.P.) 427.

A continuance of possession which did not begin under the oral contract of sale and which is not referable thereto exclusively does not take the contract out of the statute: *Armstrong v. Kattenhorn*, 11 O. 265, I Longsdorf's Notes, 554; *Crawford v. Wick*, 18 O. S. 190, II Longsdorf's Notes, 881; *Mather v. Wright*, 21 O. C. C. 103, 11 O. C. D. 578.

Delivery of possession is such a part performance as may take an agreement out of the statute: *Waggoner v. Speck*, 3 O. 292, I Longsdorf's Notes, 171; *Moore v. Beasley*, 3 O. 294, I Longsdorf's Notes, 171, *contra*, *Lenington v. Campbell*, T. 105.

Land being conveyed to one of two law partners for a fee due the firm, the other was put in possession and now claims a later parol transfer from the other of the latter's half. It was held that there is no change of possession constituting part performance: *Flinn v. Manning*, 13 Dec. Rep. 446, 1 C. S. C. R. 110.

If the realty is in the possession of a tenant, an oral contract of sale by one of the lessors to the other, the lessors being originally co-tenants, is not taken out of the operation of the statute: *Lefferson v. Dallas*, 20 O. S. 68, II Longsdorf's Notes, 980.

An oral contract with a tenant in possession under a prior oral lease for a new term is within the statute and the continued possession of the tenant does not alone take such contract out of the operation of the statute. There must be new possession taken to do this: *Schneider v. Curran*, 19 O. C. C. 224, 10 O. C. D. 239.

Exclusive possession by the vendee under the statute is necessary. Concurrent possession by the vendor and the vendee is not sufficient: *Thomas v. Watt*, 15 O. D. (N.P.) 427.

Acts to constitute part performance must of themselves be clearly referable to some contract in relation to the subject-matter, though it need not be to the one set up: *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400 [reversing *Swan v. Shahan*, 1 O. C. C. 216, 1 O. C. D. 119].

Under a contract whereby the owner of realty and personalty agrees to devise his property to a child, if such child was given to him and his wife, to bring up as their daughter, and if the mother of such child would give up such child completely, performance of such contract on the part of the mother, and the fact that such child was brought up as their daughter and knew of no other parents, was held not to take the case out of the statute: *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400 [reversing *Swan v. Shahan*, 1 O. C. C. 216, 1 O. C. D. 119].

A verbal agreement to adopt a child was faithfully carried out, but the statutory adoption was delayed until she was of age, and then a formal adoption by petition and entry was made in the probate court. It was held that though void, the writing and part performance take the case out of the statute of frauds, and the adopted daughter became the heir: *Swartz v. Steel*, 8 O. C. C.

154, 4 O. C. D. 321 [judgment reversed by the supreme court and that of the common pleas affirmed on authority of *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400, without opinion, *Steele v. Swartz*, 55 O. S. 685].

A verbal agreement to leave real property to another by will, or otherwise, in consideration of personal services to be rendered by the latter, is within the statute of frauds, and unenforceable, and the payment of the consideration by rendering the services is not such performance as will take the agreement out of the operation of the statute: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

There is, however, some divergence from this view. An oral contract whereby a married woman agreed to release her dower and to support three of her children in consideration of which her husband agreed to convey certain realty to her, was held to be enforceable by specific performance upon performance by the wife: *Thomas v. Brown*, 10 O. S. 247, II Longsdorf's Notes, 431.

If a husband performs an oral contract with his wife whereby he agrees to devise certain realty to her by executing his last will in accordance with such contract, and then dies leaving such will in effect, such performance is said to take the case out of the statute of frauds; and the devisees of the wife will be held as trustees for the persons to whom the wife had agreed to devise her realty by the terms of such contract: *Crary v. McCrory*, 9 O. N. P. (N.S.) 1, 20 O. D. (N.P.) 110.

Possession of one tract of realty under an oral contract for a lease takes the case out of the statute as to such tract but not as to other tracts included in the same contract: *Myers v. Croswell*, 45 O. S. 543, IV Longsdorf's Notes, 296.

Delivery of one of several parcels, under an oral contract, giving a right of present possession of them all, for a gross sum, is equivalent to possession of all, and is therefore a sufficient part performance: *Myers v. Croswell*, 45 O. S. 543, IV Longsdorf's Notes, 296.

Taking possession under an oral partition of the respective tracts set off to the co-tenants in severalty is sufficient in equity to take such case out of the statute: *Piatt v. Hubbell*, 5 O. 243, I Longsdorf's Notes, 274; *Docktermann v. Elder*, 11 Dec. Rep. 506, 27 Bull. 195; *Gillespie v. Johnston*, W. 231, I Longsdorf's Notes, 20; *Williams v. Pope*, W. 406, I Longsdorf's Notes, 32; *Cummins v. Nutt*, W. 713, I Longsdorf's Notes, 55.

Where the commissioners report a division and possession is taken thereunder in severalty, and improvements are made,

though no judgment of confirmation is entered, yet after long acquiescence this will not be disturbed if fair, though some of the parties were infants: *Piatt v. Hubbell*, 5 O. 243, I Longsdorf's Notes, 274.

An oral partition originally fair is binding in equity after possession and long acquiescence: *Piatt v. Hubbell*, 5 O. 243, I Longsdorf's Notes, 274; *Docktermann v. Elder*, 11 Dec. Rep. 506, 27 Bull. 195.

Though the record of partition proceedings shows no judgment, severance of the interests may be shown by possession under the proceedings: *Gillespie v. Johnston*, W. 231, I Longsdorf's Notes, 20.

An oral agreement among heirs for division of the estate, partly executed, will be enforced, though land is involved. The husband of one of the heirs can bind her as to the personality and his interest in her realty, and damages will be assessed against him if she refuse to comply: *Williams v. Pope*, W. 406, I Longsdorf's Notes, 32. See also PARTIES.

After oral partition, followed by fencing and possession for nine years, one party improving, inequalities not so gross as to show fraud will not be rectified, and releases will be decreed: *Cummins v. Nutt*, W. 713, I Longsdorf's Notes, 55.

The tender of a key to a house is not such part performance as to take the case out of the statute: *Burckhardt v. Greene*, 7 O. C. C. (N.S.) 515, 16 O. C. D. 315 [affirmed, without opinion, *Burckhardt v. Greene*, 68 O. S. 711].

Acts relied upon to constitute part performance, so as to take a contract out of the statute of frauds, must be done strictly with reference to the contract; if referable to anything else, they are not applicable: *Burckhardt v. Greene*, 7 O. C. C. (N.S.) 515, 16 O. C. D. 315 [affirmed, without opinion, *Burckhardt v. Greene*, 68 O. S. 711].

Breach of contract does not of itself constitute fraud so as to justify equity in enforcing the contract as against the provisions of the statute: *Watson v. Erb*, 33 O. S. 35, III Longsdorf's Notes, 656.

The fact that improvements were made upon land by the purchaser will not take a parol contract for the sale of land out of the statute of frauds because he can be compensated therefor by recovering their value: *Thomas v. Watt*, 15 O. D. (N.P.) 427.

Payment of the entire purchase price will not, of itself, take a parol contract for the sale of land out of the statute of frauds. The remedy of the purchaser, in such case, is to recover the principal with interest: *Thomas v. Watt*, 15 O. D. (N.P.) 427.

Actual and exclusive possession of land so as to take a verbal contract of sale out

of the statute of frauds must be established by clear and satisfactory evidence: *Thomas v. Watt*, 15 O. D. (N.P.) 427.

A tenant's erection of expensive improvements on the faith of an unsigned lease to be given for three years, is a part performance taking it out of the statute of frauds and entitling the tenant to the benefit of a condition for quiet enjoyment: *Clark v. Cincinnati*, 1 Dec. Rep. 10, 1 W. L. J. 53.

Payment of the price, whether in money or services, is not a part performance, taking an oral contract for the sale of lands out of the statute: *Crabill v. Marsh*, 38 O. S. 331, III Longsdorf's Notes, 972; *Sites v. Keller*, 6 O. 483, I Longsdorf's Notes, 353; *Pollard v. Kinner*, 6 O. 528, I Longsdorf's Notes, 356.

Nor is payment of rent: *Armstrong v. Kattenhorn*, 11 O. 265, I Longsdorf's Notes, 554.

A promise by a father to buy a home for his son, if the latter will give up a design to move to another state, and the son accepted, and the home was bought, and occupied by the son, this is sufficient part performance to warrant specific performance: *Hull v. Hull*, 16 O. C. C. 688, 9 O. C. D. 19.

Entering into possession of lands, occupying and cultivating them and making improvements under a verbal lease for five years takes it out of the statute of frauds, and these facts shown in evidence in forcible detainer should defeat it: *Dennis v. Hanson*, 12 O. C. C. 445, 5 O. C. D. 465.

Where an aged uncle orally agreed to convey his farm to his nephew, if the nephew would live thereon and support the uncle, and the nephew fully performed his part of the contract, and in addition thereto made many valuable improvements, but the uncle died without conveying the land to him, specific performance will be decreed as against the uncle's other heirs by compelling conveyances; there is no other adequate remedy: *Cooper v. Cooper*, 6 O. N. P. 99, 8 O. D. (N.P.) 35.

Possession under a parol lease of land takes the case out of the statute. This was so held where a party went in under an oral contract to clear and fence, in consideration of being permitted to raise a crop, but the owner gathered and converted the crop, and trespass against him was sustained: *Wilber v. Paine*, 1 O. 251, I Longsdorf's Notes, 76.

A parol agreement for a further tenancy by a lessee in possession is within the statute: *Gladwell v. Holcomb*, 60 O. S. 427, IV Longsdorf's Notes, 790.

A parol contract between father and son that a farm bought by the father should be the son's if he would move upon it and con-

tribute his crops and services towards paying for it, and would also work on the father's farm, having been performed by the son will be enforced in equity. There is sufficient part performance to avoid the statute of frauds. Such contracts between father and son are liberally treated: *O'Hara v. O'Hara*, 16 O. C. C. 367, 9 O. C. D. 293.

The son's going out of possession by reason of the father's orders and threats when the farm was nearly paid for, will not disentitle him to specific performance, and he will also be entitled to the rental value of the farm, less taxes, while so deprived of possession: *O'Hara v. O'Hara*, 16 O. C. C. 367, 9 O. C. D. 293.

An oral agreement to pay for part of a proposed party wall, when used by the promisor, is taken out of the statute by the building of the wall: *Hall v. Geyer*, 14 O. C. C. 229, 7 O. C. D. 436.

After an oral lease has been acted on, a liability for use and occupation may be enforced: *Sims v. Porter*, T. 77.

Where a tenancy was begun under a written lease for a term of five years, with a privilege of renewal for another five years, and the lessee entered upon his fourth term by virtue of a verbal agreement for another five years under the same terms as before, such verbal agreement is within the statute of frauds, his possession being referable to the former written lease, and he becomes a tenant from year to year: *Hopkins v. Carroll*, 11 O. C. C. (N.S.) 605, 22 O. C. D. 709. See also LANDLORD AND TENANT.

A bought B's property at sheriff's sale pursuant to a verbal agreement to buy for joint benefit. A had in possession property of B sufficient to pay his share, which was to be, and was, converted into money and so applied. It was held that a resulting trust arose. The statute of frauds does not apply, and B is entitled to have the contract enforced and a trust declared and a conveyance of an undivided half: *Turpie v. Lowe*, 4 O. C. C. 599, 2 O. C. D. 729.

If a lessor, relying on his lessee's offer to surrender the lease, verbally sells the property to another, such verbal sale, though not enforceable *inter partes*, would doubtless bar the lessee's right to specific performance of his option to purchase: *Longworth v. Mitchell*, 26 O. S. 334, III Longsdorf's Notes, 308.

A possession for a right of way continued by parol lease becomes binding upon subsequent purchasers from the lessor by a sale by such purchaser of a continuation of the strip which would be useless if the lease was void, for such sale being an expenditure on the faith of the oral lease, is a part performance: *France v. McKenzie*, 20 O. C. C. 209,

11 O. C. D. 245 [affirmed, without opinion, *McKenzie v. France*, 63 O. S. 565].

A parol agreement for a lease to begin in the future, made with one already in possession under a prior contract, is void, inasmuch as the landlord, by parting with possession under the subsisting contract, has put it beyond his power to give possession: *Hafer v. Corbin*, 6 O. N. P. (N.S.) 468, 14 O. D. (N.P.) 674 [affirmed, without opinion, *Corbin v. Hafer*, 72 O. S. 685]. See also LANDLORD AND TENANT.

(bb) Oral License.

Under a view now entertained in Ohio, an oral license does not give any enforceable interest in the realty, even after performance by the licensee in reliance thereon: *Yeager v. Tuning*, 79 O. S. 121, IV Longsdorf's Notes, 1044; *Fowler v. Delaplain*, 79 O. S. 279, IV Longsdorf's Notes, 1046. *Contra*, *Wilson v. Chalfant*, 15 O. 248, I Longsdorf's Notes, 709 [which was overruled in *Yeager v. Tuning*, 79 O. S. 121, IV Longsdorf's Notes, 1044, and *Fowler v. Delaplain*, 79 O. S. 279, IV Longsdorf's Notes, 1046]. See also, *Meek v. Breckenridge*, 29 O. S. 642, III Longsdorf's Notes, 506.

(b) Agreements Upon Consideration of Marriage.

An oral contract in consideration of marriage is not withdrawn from the operation of the statute by full performance on the part of the party who is seeking relief: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457; *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

Under a contract by which the wife is to retain possession and control of her realty, a right which at that time was not given by law in the absence of agreement, in consideration of which she is to release her dower, is not taken out of the statute by the fact that during coverture the husband permits her to dispose of her property as she sees fit: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457.

An oral contract in consideration of marriage, whereby the woman agrees to convey her realty to the man in consideration of the marriage and of his entering thereon and making certain valuable improvements thereon, is not taken out of the statute by such entry and such valuable improvements: *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

A defective deed of the wife in an attempted performance of such contract will not be perfected in the absence of a clear case for specific performance: *Henry v.*

Henry, 27 O. S. 121, III Longsdorf's Notes, 347.

Marriage is never a performance to satisfy the statute, for it would nullify the statute. Nor is her disposition of her own property during marriage a performance, for it is attributable to the husband's grace and favor: *Finch v. Finch*, 10 O. S. 501, II Longsdorf's Notes, 457.

(c) *Promise to Answer for Debt of Another.*

Performance on the part of the promisee does not take the case out of the statute in contracts by the promisor to answer for the debt of another: *Easter v. White*, 12 O. S. 219, II Longsdorf's Notes, 558; *Kelsey v. Hibbs*, 13 O. S. 340, II Longsdorf's Notes, 612; *Birchell v. Neaster*, 36 O. S. 331, III Longsdorf's Notes, 855.

(d) *Agreement Not to be Performed Within One Year.*

Performance on the part of the promisee does not withdraw a contract which is not to be performed within one year from the operation of the statute: *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211; *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607.

An oral contract by which the mother of an illegitimate child surrenders it wholly to the father on his promise to leave it a share of his estate equal with his other children, being wholly performed by the mother is enforceable; moreover it is capable of performance within the year. The child having died, its heirs and administrator may join as plaintiffs. Time does not begin to run on the contract until the father's death: *Ewing v. Richards*, 8 Dec. Rep. 357, 7 Bull. 183.

An oral agreement not to be performed within a year, as one for services for three years, is not strengthened by part performance: *Smith v. Bowler*, 12 Dec. Rep. 770, 1 D. 520.

2. *At Law.*

(a) *Where no Estate Created by Operation of Law.*

The doctrine of part performance is recognized in equity only. An action at law to recover damages for a breach of a verbal contract to convey land can not be maintained, notwithstanding full performance on the part of plaintiff: *Thomas v. Watt*, 15 O. D. (N.P.) 427. See also REAL ESTATE.

The doctrine of part performance obtains in equity only, and does not avail to render a contract which is void by the statute because unwritten or unsigned, capable of be-

ing sued on in a court of law: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882; *Breuer v. Berold*, 9 O. C. C. (N.S.) 350, 19 O. C. D. 502.

An action at law can not be maintained after breach of an oral contract whereby one sister agreed to devise and bequeath all her property to the other, if the other would give up her own home and take care of the promisor during her last illness; even if the promisee has performed fully in such case: *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

An oral contract for partition is inoperative at law: *Berry v. Seawell*, 65 Fed. 742, 13 C. C. A. 101, 9 O. F. D. 100.

Performance by one party does not authorize an action for damages for the breach of an oral contract which is not to be performed within one year from the time of the making thereof: *Kineon v. Rogers*, 16 O. D. (N.P.) 31, 3 O. L. R. 40, 1 Hosea, 420.

The doctrine of part performance can not be invoked to take a verbal contract out of the statute of frauds, where the action is for breach of the contract, and the remedy is purely legal, for damages in money: *Kineon v. Rogers*, 16 O. D. (N.P.) 31, 3 O. L. R. 40, 1 Hosea, 420.

In some cases, however, a view inconsistent with this general rule seems to have been entertained: *Wilber v. Paine*, 1 O. 251, I Longsdorf's Notes, 76.

A vendee in possession under an oral contract of sale may maintain trespass against the vendor: *Wilber v. Paine*, 1 O. 251, I Longsdorf's Notes, 76.

The user of a party wall is said to be such performance as takes a contract to construct and maintain the same out of the operation of the statute (so held in an action to recover one-half of the cost of constructing such wall): *Hall v. Geyer*, 14 O. C. C. 229, 7 O. C. D. 436.

(b) *Where Estate Created by Operation of Law.*

If the facts and the circumstances of the case are such that the law will create an estate from year to year, month to month, and the like, the oral agreement under which such tenancy was entered upon is to be considered in determining the character and the duration of such estate: *Railroad v. West*, 57 O. S. 161, IV Longsdorf's Notes, 710; *Hopkins v. Carroll*, 11 O. C. C. (N.S.) 605, 22 O. C. D. 709. See obiter, in *Wheel Co. v. Kelly*, 5 O. N. P. 310, 8 O. D. (N.P.) 551.

An agreement between landlord and tenant for an increase in rent if tenant holds over is operative if tenant retains possession after

the expiration of the original term: *Moore v. Harter*, 87 O. S. 250, IV Longsdorf's Notes, 930.

At common law covenant could be maintained in a lease which was not acknowledged or recorded, as required by statute, and which was therefore defective as a statutory lease, if entry and possession in accordance with the terms of such instrument had been taken: *Bridgman v. Wells*, 13 O. 43, I Longsdorf's Notes, 623.

VI. REFORMATION.

The statute of frauds does not prevent reformation of a written contract or conveyance in equity: *Pugh v. Chesseldine*, 11 O. 109, I Longsdorf's Notes, 545; *Davenport v. Sovil*, 6 O. S. 459, II Longsdorf's Notes, 247; *Clayton v. Freat*, 10 O. S. 544, II Longsdorf's Notes, 462; *Ormsby v. Longworth*, 11 O. S. 653, II Longsdorf's Notes, 539; *Broadwell v. Phillips*, 30 O. S. 255, III Longsdorf's Notes, 528; *Railroad v. Steinfeld*, 42 O. S. 449, IV Longsdorf's Notes, 123; *Stewart v. Gordon*, 60 O. S. 170, IV Longsdorf's Notes, 781; *McAdams v. McAdams*, 80 O. S. 232, IV Longsdorf's Notes, 1051.

A deed defectively executed by the wife in the attempt of performance of a contract, whereby she agrees before marriage to convey certain realty to her prospective husband upon consideration that he would marry her and would enter upon such realty and make valuable improvements thereon, will not be reformed in the absence of a clear case for the specific performance of the oral contract: *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

Where a mortgage by mistake omitted the intended land and covered land not owned by the mortgagor, but was foreclosed and the land bought in by the mortgagee before discovery of the mistake, it was held that it can be reformed and is not merged in the decree, but the original mistake makes all subsequent proceedings nugatory, and the proper land can now be appraised and sold subject to dower: *Davenport v. Sovil*, 6 O. S. 459, II Longsdorf's Notes, 247. See also REFORMATION.

VII. LAW CONTROLLING.

Since the statute of frauds is a rule of evidence, it applies to a contract made and to be performed in another state, which is not within the statute of frauds of that state, if action is brought upon such contract in this state: *Heaton v. Eldridge*, 56 O. S. 87, IV Longsdorf's Notes, 683 [reversing *Eldridge v. Heaton*, 7 O. C. C. 499, 4 O. C. D. 698].

A and B, to prevent a sacrifice of their stock in a corporation, orally agreed that B should buy up its bonds and A should have the right to buy half of them from him at cost, the New York statute of frauds would require a writing or earnest money for such a contract. It was held that the efforts of A in assisting in the purchase of the bonds and in coming from New York to Cincinnati and instituting suit to protect the bonds, is a sufficient part performance to take the case out of the statute: *Post v. Wilson*, 5 Dec. Rep. 191, 5 Am. L. Rec. 235.

VIII. WHO CAN TAKE ADVANTAGE OF STATUTE.

Only a party to the oral contract can take advantage of the fact that it fails to conform to the requirements of the statute: *Minns v. Morse*, 15 O. 568, I Longsdorf's Notes, 731; *Lefferson v. Dallas*, 20 O. S. 68, II Longsdorf's Notes, 980.

A creditor of the vendor can not set up the statute of frauds as against the vendee, if the vendor himself in good faith does not see fit so to do: *Minns v. Morse*, 15 O. 568, I Longsdorf's Notes, 731; *Lefferson v. Dallas*, 20 O. S. 68, II Longsdorf's Notes, 980.

A broker is entitled to commissions for the sale of land, even if such sale is oral, if the purchaser is willing to perform and does not take advantage of such defect: *Barber v. Heade*, 10 O. C. C. (N.S.) 342, 20 O. C. D. 127.

If, however, the purchaser refuses to perform the contract, the agent can not recover commission, if such contract is oral and if possession has not been taken thereunder: *Pfanz v. Humburg*, 82 O. S. 1, IV Longsdorf's Notes, 1059.

IX. ON WHOM BINDING.

The statute of frauds is said to apply to the state as well as to an individual in the absence of specific provision to the contrary: *State v. Baum*, 6 O. 383, I Longsdorf's Notes, 344.

The statute of frauds does not apply to a vendor who retains the legal title, and who subsequently enters into an oral agreement with his vendor modifying the terms upon which such legal title is to be transferred from the vendor to the vendee: *Loan & Building Co. v. Franztreb*, 56 O. S. 493, IV Longsdorf's Notes, 696.

X. RESCISSION AND MODIFICATION.

An oral rescission of a written contract within the statute of frauds is valid in the absence of such technical part performance as to give to the vendee an interest in realty:

Reed v. McGrew, 5 O. 375, I Longsdorf's Notes, 291.

A written contract under seal for the sale of realty may be rescinded by oral agreement, if possession has not been delivered thereunder: *Jones v. Booth*, 38 O. S. 405, III Longsdorf's Notes, 979. *Contra*, *McCulloch v. Topp*, 2 Dec. Rep. 678, 4 W. L. M. 575.

If the rescission was obtained by fraudulent representation it will not be enforced, although such fraudulent representation was a verbal offer to buy lands not enforceable under the statute: *Jones v. Booth*, 38 O. S. 405, III Longsdorf's Notes, 979.

An oral contract for the sale of realty which has been so far performed as to give to the vendee an equitable interest in the realty, enforceable by specific performance, can not thereafter be rescinded by oral agreement: *Kelly v. Stanberry*, 13 O. 408, I Longsdorf's Notes, 644.

An oral modification of a contract within the statute of frauds which leaves executory covenants to do acts which come within the terms of the statute can not be enforced: *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

A written contract for the sale of growing timber trees to be removed within a certain time can not subsequently be modified by oral agreement so as to give to the vendee the right to remove such trees after the expiration of the time fixed by written agreement: *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

Parol assent of guarantors or their ratification, or by conduct, to an extension of time for completing a railroad, will not by reason of the statute of frauds release them from liability for future monthly payments: *Rutherford v. Brachman*, 40 O. S. 604, IV Longsdorf's Notes, 44 [reversing *Rutherford v. Brachman*, 8 Dec. Rep. 109, 5 Bull. 696].

XI. CONVEYANCE OF INTEREST IN LAND.

A. COMMON-LAW RULE.

Legal title to real property could not be acquired by parol in Ohio, even before the enactment of the statute of frauds: *Lindsley v. Coats*, 1 O. 243, I Longsdorf's Notes, 75.

B. INTERESTS WITHIN STATUTE.

1. What Is Realty.

Standing timber is realty within the meaning of G. C., § 8620, and the following section (the statute of frauds): *Hirth v. Graham*, 50 O. S. 57, IV Longsdorf's Notes, 483; *Clark v. Guest*, 54 O. S. 298, IV Longsdorf's Notes, 636.

A building which the owner agrees to remove from its foundation and place upon rollers before delivery is under such circumstances to be regarded as personal property: *Long v. White*, 42 O. S. 59, IV Longsdorf's Notes, 91.

2. Method of Transferring Title.

G. C., §§ 8620, 8621 include oral devises of realty or agreement to devise realty: *Shahan v. Suan*, 48 O. S. 25, IV Longsdorf's Notes, 400; *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882.

An oral partition of realty is within G. C., § 8620 and the following section (the statute of frauds) as far as the legal title is concerned: *Berry v. Seavall*, 65 Fed. 742, 13 C. C. A. 101, 9 O. F. D. 100.

An oral partition of realty, if fair and reasonable and followed by possession thereunder, is valid in equity: *Pratt v. Hubbell*, 5 O. 243, I Longsdorf's Notes, 274; *Docktermann v. Elder*, 11 Dec. Rep. 506, 27 Bull. 195; *Cummins v. Nutt*, W. 713, I Longsdorf's Notes, 55.

An interest from month to month or from year to year is an uncertain interest within the meaning of G. C. § 8620: *Hafer v. Corbin*, 6 O. N. P. (N.S.) 468, 14 O. D. (N.P.) 674 [reversed, without opinion, *Corbin v. Hafer*, 72 O. S. 685].

3. Equitable Interests.

In Ohio, contrary to the general rule, an express trust in real property may be proved by oral evidence: *Nolan v. Urmston*, 18 O. 273, I Longsdorf's Notes, 847; *Matheus v. Leaman*, 24 O. S. 615, III Longsdorf's Notes, 196; *Broadrup v. Woodman*, 27 O. S. 553, III Longsdorf's Notes, 375; *Shaw v. Walbridge*, 33 O. S. 1, III Longsdorf's Notes, 655; *Harvey v. Gardner*, 41 O. S. 642, IV Longsdorf's Notes, 81; *Mannix v. Purcell*, 46 O. S. 102, IV Longsdorf's Notes, 314; *Russell v. Bruer*, 64 O. S. 1, IV Longsdorf's Notes, 863.

If a deed, absolute in form, is shown to be a mortgage to secure a debt, the subsequent oral release of the grantor of his equity of redemption is sufficient: *Shaw v. Walbridge*, 33 O. S. 1, III Longsdorf's Notes, 655.

A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain and conclusive as to its terms and conditions: *Russell v. Bruer*, 64 O. S. 1, IV Longsdorf's Notes, 863.

The grantor's declarations made at the time at which he executes the deed of conveyance are admissible to show an express

trust: *Harvey v. Gardner*, 41 O. S. 642, IV Longsdorf's Notes, 81.

4. Entire Contract.

If the transaction is an entire one, and real and personal property are provided for in the same contract, such contract can not be proved unless it is in writing, in compliance with the provisions of G. C., § 8620 and the statute of frauds: *Howard v. Brower*, 37 O. S. 402, III Longsdorf's Notes, 924; *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400 [reversing *Swan v. Shahan*, 1 O. C. C. 216, 1 O. C. D. 119].

C. DEED OR NOTE IN WRITING.

Two or more written instruments may be construed together as one, if on their face they show that they relate to the same transaction, and they are all signed by the party to be charged therewith; or if some of them are unsigned, express reference thereto and the incorporation thereof in the signed writings is sufficient: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

An undelivered deed may be sufficient as evidence of an executory contract: *Thayer v. Luce*, 22 O. S. 62, III Longsdorf's Notes, 57.

If a lease is not executed or acknowledged in compliance with G. C., § 8510, G. C., § 8620 does not render such lease valid: *Richardson v. Bates*, 8 O. S. 257, II Longsdorf's Notes, 340; *Railroad v. West*, 57 O. S. 161, IV Longsdorf's Notes, 710.

D. FAILURE TO COMPLY WITH STATUTE.

1. At Law.

(a) Contract Executory.

An oral contract for the transfer of an interest in land is unenforceable at law in Ohio: *Minns v. Morse*, 15 O. 568, I Longsdorf's Notes, 731; *Mathews v. Leaman*, 24 O. S. 615, III Longsdorf's Notes, 196; *Watson v. Erb*, 33 O. S. 35, III Longsdorf's Notes, 656.

Such fact can be taken advantage of only by the parties to the transaction. A third person, such as a creditor of the grantor, can not object: *Woods v. Dille*, 11 O. 455, I Longsdorf's Notes, 581; *Minns v. Moore*, 15 O. 568, I Longsdorf's Notes, 731; *Lefferson v. Dallas*, 20 O. S. 68, II Longsdorf's Notes, 980.

A parol contract for the possession of land can not be received in defense in ejectment: *McCoy v. Skinner*, T. 69.

(b) Payment of Consideration.

The fact that the consideration has been paid does not withdraw the case from the

application of G. C., § 8620 or the statute of frauds: *Sites v. Keller*, 6 O. 483, I Longsdorf's Notes, 353; *Pollard v. Kinner*, 6 O. 528, I Longsdorf's Notes, 356; *Crabill v. Marsh*, 38 O. S. 331, III Longsdorf's Notes, 916.

2. Part Performance in Equity.

Part performance which renders it inequitable to permit the party against whom relief is sought to repudiate the contract is said to take the case out of the operation of the statute of frauds in equity: *France v. McKenzie*, 20 O. C. C. 209, 11 O. C. D. 245 [affirmed, without opinion, *McKenzie v. France*, 63 O. S. 565].

Possession under an oral contract for the lease of lands removes the case from the operation of G. C., §§ 8620, 8621, although not from the operation of G. C., § 8510: *Wilbur v. Paine*, 1 O. 251, I Longsdorf's Notes, 76; *Cunningham v. Buckingham*, 1 O. 264, I Longsdorf's Notes, 79; *Waggoner v. Speck*, 3 O. 292, I Longsdorf's Notes, 171; *Moore v. Beasley*, 3 O. 294, I Longsdorf's Notes, 171; *Bridgmans v. Wells*, 13 O. 43, I Longsdorf's Notes, 623; *Kelly v. Stanbery*, 13 O. 408, I Longsdorf's Notes, 644; *Wilson v. Chalfant*, 15 O. 248, I Longsdorf's Notes, 709; *Grant v. Ramsey*, 7 O. S. 157, II Longsdorf's Notes, 286; *Dominick v. Kane*, 4 O. N. P. (N.S.) 583, 17 O. D. (N.P.) 353; *Mather v. Wright*, 21 O. C. C. 103, 11 O. C. D. 578.

In *Wilbur v. Paine*, 1 O. 251, I Longsdorf's Notes, 76, it was said that a vendee who was in possession under an oral contract could maintain trespass against the vendor.

In *Kling v. Bordner*, 65 O. S. 86, IV Longsdorf's Notes, 882, however, it was said that part performance was a doctrine of equity and not of law, and that part performance removed the case from the operation of the statute for equitable relief, such as specific performance, but that it did not render such contract enforceable at law.

To constitute part performance, there must apparently be a change of possession. A continuance of the former possession is not enough to take the case out of the statute: *Armstrong v. Kattenhorn*, 11 O. 265, I Longsdorf's Notes, 554; *Crawford v. Wick*, 18 O. S. 190, I Longsdorf's Notes, 881; *Schneider v. Curran*, 19 O. C. C. 224, 10 O. C. D. 239.

If an oral contract is made for the sale of several tracts of land, the delivery of possession of one of such tracts takes the case out of the statute as to that specific tract but not as to remaining tracts: *Myers v. Crosswell*, 45 O. S. 543, IV Longsdorf's Notes, 296.

If a lease has been given which is invalid by reason of failure to comply with G. C., § 8510, and possession is taken under such

lease, such lease is valid at least as an estate from year to year for the part of time for which the rent is agreed upon: *Railroad v. West*, 57 O. S. 161, IV Longsdorf's Notes, 710.

A lessee under a parol lease for five years, entered upon the land, tilled it and made improvements upon it, and paid the stipulated rent. The executors of the lessor then attempted to evict him by proceedings in forcible entry and detainer. It was held that the action would not lie: *Dennis v. Hanson*, 12 O. C. C. 445, 5 O. C. D. 465.

In a tenancy from year to year holding over operates as a renewal for the original period: *Railway v. West*, 57 O. S. 161, IV Longsdorf's Notes, 710.

If the tenant from year to year holds over under an oral contract, such oral contract can not have the effect of making the term for which such tenant holds over exceed the original period: *Schneider v. Curran*, 19 O. C. C. 224, 10 O. C. D. 239.

If a tenant is in possession under an agreement invalid by reason of the statute of frauds, it is said that he has no rights at law against the grantee of his lessor, even if it was agreed between the vendor and the vendee that the rights of such tenant should be preserved, but such stipulation is omitted from the deed, either by fraud or mistake; but that the vendor may probably have reformation in equity: *Young v. Miller*, 10 O. S. 85, I Longsdorf's Notes, 491.

The surrender of possession under an agreement whereby the father agreed to convey or devise certain realty to his son, if the son would live upon the same and contribute to the payment of the purchase price and assist his father upon the farm on which the father lived, is sufficient part performance to take the case out of the statute of frauds; and if the father subsequently, by threats, compels the son to leave such farm, such surrender of possession does not prevent the son from obtaining specific performance: *O'Hara v. O'Hara*, 16 O. C. C. 367, 9 O. C. D. 293.

E. PAROL LICENSE.

An oral license to make a specified use of realty, without conveying such realty, is within the statute; and such license is revocable, even though the party to whom it is given has performed in reliance thereon: *Yeager v. Tuning*, 79 O. S. 121, IV Longsdorf's Notes, 1044; *Fowler v. Delaplain*, 79 O. S. 279, IV Longsdorf's Notes, 1046. *Contra*, *Wilson v. Chalfant*, 15 O. S. 248, I Longsdorf's Notes, 709 [which was overruled in the foregoing cases].

F. LOST DEED.

G. C., § 8620, does not prevent the introduction of oral evidence to show the contents of a deed which has been lost or destroyed: *Blackburn v. Blackburn*, 8 O. S. 81, I Longsdorf's Notes, 414; *Dukes v. Spangler*, 35 O. S. 119, III Longsdorf's Notes, 764.

G. RESCISSION.

A written agreement for the transfer of land which has not been so far performed by the vendee as to grant him an equitable estate therein, may be rescinded by oral agreement: *Reed v. McGrew*, 5 O. S. 375, I Longsdorf's Notes, 291.

If an oral contract for the purchase of land has been so far performed as to give to the vendee an equitable interest in such land to give to him the right to specific performance, such contract can not be rescinded orally: *Kelley v. Stanberry*, 13 O. S. 408, I Longsdorf's Notes, 644.

A contract under seal for the sale of realty under which possession has not been delivered may be rescinded orally: *Jones v. Booth*, 38 O. S. 405, III Longsdorf's Notes, 979.

Oral rescission may, however, be set aside on the ground of fraud; as where the vendor is induced to rescind by a pretended offer by a third person to buy such realty at an advanced price, such third persons having no intention of making such purchase, but making such offer at the request of the vendee for the express purpose of inducing the vendor to rescind the original contract of sale: *Jones v. Booth*, 38 O. S. 405, III Longsdorf's Notes, 979.

XII. PLEADING.

A. PETITION.

A petition to enforce a sale of realty need not allege that the contract of sale was in writing: *Headington v. Neff*, 7 O. (pt. 1) 229, I Longsdorf's Notes, 376; *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607; *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346; *Schurick v. Fulton*, 6 Dec. Rep. 1168, 11 Am. L. Rec. 47, 8 Bull. 32; *Donaldson v. Donaldson*, 1 O. D. (N.P.) 289, 31 Bull. 102; *Rarey v. Cornell*, 2 Dec. Rep. 315, 2 W. L. M. 415; *McCullough v. Tapp*, 2 Dec. Rep. 678, 4 W. L. M. 575; *Hepworth v. Pendleton*, 5 Am. L. Rec. 285, 5 Dec. Rep. 386, 1 Bull. 300.

Only the parties to the transaction and those claiming under them can take advantage of the statute. If such parties are satisfied and are willing to perform, third persons can not take advantage of failure to comply with the statute of frauds: *Woods*

v. Dille, 11 O. 455, I Longsdorf's Notes, 581; *Minns v. Morse*, 15 O. 568, I Longsdorf's Notes, 731; *Lefferson v. Dallas*, 20 O. S. 68, II Longsdorf's Notes, 980; *Loan & Building Co. v. Frantzreb*, 56 O. S. 493, IV Longsdorf's Notes, 696.

It is not necessary that a petition upon a contract within the statute of frauds shall allege that such contract was in writing or was proved by writing; since in the absence of specific statutory authority to the contrary, a pleading which would have been good at common law is good under the statute: *Headington v. Neff*, 7 O. (pt. 1) 229, I Longsdorf's Notes, 376; *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607; *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346; *Epworth v. Pendleton*, 5 Dec. Rep. 386, 5 Am. L. Rec. 285, 1 Bull. 300; *Schurick v. Fulton*, 6 Dec. Rep. 1168, 11 Am. L. Rec. 47, 8 Bull. 32; *Donaldson v. Donaldson*, 1 O. D. (N.P.) 289, 31 Bull. 102; *Rarey v. Cornell*, 2 Dec. Rep. 315, 2 W. L. M. 415; *McCulloch v. Tapp*, 2 Dec. Rep. 678, 4 W. L. M. 575.

If the petition shows affirmatively on its face by fair inference that the promise was an oral one, and that there was no written memorandum, the defense of the statute of frauds can be interposed on demurrer: *Houcard v. Brower*, 37 O. S. 402, III Longsdorf's Notes, 924; *Myers v. Crosswell*, 45 O. S. 543, IV Longsdorf's Notes, 296.

A defense by way of counterclaim or cross petition on a contract is in the nature of a petition and not of a plea, and need not aver the contract to be in writing: *Broch v. Becher*, 5 Dec. Rep. 519, 6 Am. L. Rec. 380, 6 Dec. Rep. 1009, 9 Am. L. Rec. 482, 2 Bull. 262.

A promise to answer for a purchase by another, whether in writing or not, must be specially declared on, and can not be proved under assumpsit for goods sold: *Van Horne v. Brady*, W. 451, I Longsdorf's Notes, 36.

In pleading a contract between attorney and client for part of a future judgment it is not necessary to allege whether or not the contract was in writing, or if in writing to attach a copy thereof to the petition, but only to allege the substance of the contract: *Smith v. Railroad Co.*, 11 O. N. P. (N.S.) 65, 21 O. D. (N.P.) 480 [affirmed by the circuit court, without opinion, *Smith v. Railroad Co.*, 11 O. N. P. (N.S.) 65, 21 O. D. (N.P.) 480]. See also ATTORNEY AND CLIENT.

B. ANSWER.

If the answer admits the making of the contract and does not take advantage of the statute of frauds, such contract will be en-

forced: *Ogden v. Ogden*, 4 O. S. 182, II Longsdorf's Notes, 85.

An answer alleging that the promise was within the statute of frauds is insufficient, since such averment is a mere conclusion of law: *Houcard v. Brower*, 37 O. S. 402, III Longsdorf's Notes, 924.

It is said, however, that the answer must be more definite than the petition, and if such a contract is interposed as a defense, the answer must allege that such contract was in writing or was proved in writing: *Headington v. Neff*, 7 O. (pt. 1) 229, I Longsdorf's Notes, 376; *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607; *Harley v. Weber*, 2 O. C. C. 57, 1 O. C. D. 360 [affirmed, without opinion, *Weber v. Handy*, 25 Bull. 231]; *Donaldson v. Donaldson*, 1 O. D. (N.P.) 289, 31 Bull. 102; *McCulloch v. Tapp*, 2 Dec. Rep. 678, 4 W. L. M. 575.

A default will not generally be opened to let in a defense of the statute of frauds nor permission to make it, given after the issue is made up: *McCulloch v. Tapp*, 2 Dec. Rep. 678, 4 W. L. M. 575. See also JUDGMENT.

If the making of the oral contract is admitted, and the defendant does not seek to take advantage of the statute of frauds by a special answer, the sale will be enforced: *Woods v. Dille*, 11 O. 455, I Longsdorf's Notes, 581; *Minns v. Morse*, 15 O. 568, I Longsdorf's Notes, 731.

If advantage is not taken of the statute, either by demurrer, general denial, or specific denial, the statute is waived: *Ogden v. Ogden*, 4 O. S. 182, II Longsdorf's Notes, 85.

If a general denial is filed, the defendant may take advantage of the statute of frauds by objecting to the admission of oral evidence to prove the contract: *Birchell v. Neaster*, 36 O. S. 331, III Longsdorf's Notes, 855. *Contra*, *Robinson v. Hathaway*, 2 Dec. Rep. 581, 4 W. L. M. 105.

C. DEMURRER.

If a petition is dismissed on demurrer on the ground that it does not show that the contract was in writing or proved by writing, such judgment is said not to be a bar to a subsequent action wherein the petition alleges that such contract was in writing: *Barr v. Poor*, 2 O. N. P. (N.S.) 208, 15 O. D. (N.P.) 217 [affirmed, *Barr v. Poor*, 7 O. C. C. (N.S.) 333, 18 O. C. D. 257, and which was affirmed, without opinion, *Poor v. Barr*, 76 O. S. 630, 77 O. S. 639].

XIII. JUDGMENT.

A judgment in an action to enforce an oral agreement within the statute of frauds, dismissing such petition by reason of failure to comply with the statute, is not a bar to a

subsequent action to regard such contract as rescinded and to recover back the consideration paid thereunder: *Gottschalk v. Witter*, 25 O. S. 76, III Longsdorf's Notes, 211.

In a suit on a contract not to be performed within one year, but alleged to have been in writing, a former judgment between the same parties upon the same contract can not be pleaded in bar, where it appears that the petition in the former suit alleged that the contract was verbal and the dismissal was on demurrer, and solely on the ground that the contract was alleged to be verbal: *Barr v. Poor*, 2 O. N. P. (N.S.) 208, 15 O. D. (N.P.) 217 [affirmed, *Barr v. Poor*, 7 O. C. C. (N.S.) 333, 18 O. C. D. 257, and which was affirmed, without opinion, *Poor v. Barr*, 76 O. S. 630, 77 O. S. 639]. See also JUDGMENT.

FRAUDULENT ACCOUNT.

For the duty of probate court as to fraudulent account, see COURTS.

Where an account was due for which notes were given to extend the time of payment, and the holder was induced to accept such notes by false representation, or fraudulent concealment by the defendant, the plaintiff had a right at once to sue upon the original account: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668]. See also RESCISSION.

The fact that plaintiffs were induced to to accept notes in settlement of an account against defendants upon receipt of a letter representing that there was about to be an increase of capital stock, when there was neither intention or expectation of increasing such stock, justifies plaintiff in disregarding the notes and suing on the original account: *Litho-*

graphing Co. v. Belford, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668].

A note given for an account does not extinguish or discharge the account unless such is the express agreement of the parties, and the burden of showing such agreement is upon the debtor: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668]. See also PAYMENT.

The giving of notes by defendants in settlement of an account without intent to defraud, although knowing themselves to be insolvent, is not fraud in law, where there was no concealment of the insolvency, but simply a failure to disclose it, unless the insolvency was so gross as to lead to the presumption of an intent not to pay: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668]. See also FRAUD AND DECEIT.

FRAUDULENT CONVERSION.

For fraudulent conversion, see EMBEZZLEMENT.

For fraudulent conversion by brokers, see FACTORS AND BROKERS.

Where the averments in the petition unmistakably charge that there has been a fraudulent appropriation of the estate on the part of the devisee holding as trustee, lapse of time does not exclude relief unless the equity has become stale: *Scholey v. Winder*, 10 O. N. P. (N.S.) 642, 21 O. D. (N.P.) 59 [affirmed by the circuit court, without opinion; circuit court affirmed by supreme court, *Winder v. Scholey*, 83 O. S. 204].

FRAUDULENT CONVEYANCES.

Scope Note—Includes transfers made for the purpose of hindering, delaying or defrauding creditors, rights of parties and actions growing out of fraudulent conveyances. Excludes assignment for creditors, fraud in bankruptcy and criminal liability.

Cross References.

For fraudulent conveyances between husband and wife, see also HUSBAND AND WIFE.

For conveyances in fraud of creditors, see also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

For remedies in case of fraudulent conveyances, see EQUITY; RESCISSION.

For proceedings in aid of execution, see PROCEEDINGS IN AID OF EXECUTION.

For conveyances of life insurance, see also INSURANCE; EXECUTION, WRIT OF.

For fraudulent conveyances by corporations or to corporations, see CORPORATIONS.

For the consideration for chattel mortgages and the validity thereof, see CHATTEL MORTGAGES.

For the consideration for mortgages and the validity thereof, see MORTGAGES.

For fraudulent judgments, see JUDGMENT.

For the doctrine of resulting and constructive trusts in case of fraudulent conveyances, see TRUSTS.

For the right of an executor or a receiver to attack fraudulent conveyances, see **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES; RECEIVERS.**

For questions of evidence, see **EVIDENCE.**

For the time at which the period of limitations begins to run, see **LIMITATIONS, STATE OF.**

For questions of dower, see also **DOWER.**

For questions of homestead exemption, see **EXECUTION, WRIT OF.**

For fraudulent conveyances by a partnership, see **PARTNERSHIP.**

For the effect of fraud in bankruptcy, see **BANKRUPTCY.**

ANALYTICAL OUTLINE.

- I. **Definition, 8125.**
- II. **History of Legislation, 8126.**
- III. **Scope and Effect of Statutes, 8127.**
- IV. **Deeds to Use of Grantor, 8128.**
- V. **Conveyances to Defraud Creditors, 8129.**
 - A. *What is conveyance, 8129.*
 1. Deed, 8129.
 2. Mortgage, 8130.
 3. Assignment for benefit of creditors, 8131.
 - B. *Judgment, bond or execution, 8133.*
 - C. *Property conveyed, 8134.*
 - D. *Intent to defraud, 8137.*
 1. Actual fraud, 8137.
 2. Constructive fraud, 8137.
 3. Inadequacy of consideration, 8140.
 - a. Inadequacy of price, 8140.
 - b. Antecedent debt, 8141.
 - c. Support, 8142.
 - d. Assumption of debts, 8142.
 - e. Forbearance to sue, 8143.
 - f. Release of dower, 8143.
 - g. Excessive marriage settlement, 8143.
 - h. Sale on credit, 8143.
 - i. Other considerations, 8144.
 4. Gifts and advancements, 8145.
 5. Fraudulent intent of grantee, 8147.
 - E. *Debt or damage, 8148.*
 - F. *Deemed void and of no effect, 8149.*
 1. Meaning of "deemed," 8149.
 2. Meaning of "void," 8149.
 3. Effect, 8149.
 4. Who may attack conveyance, 8150.
 - a. In general, 8150.
 - b. Grantor and his heirs, 8150.
 - c. Grantee or purchaser, 8153.
 - d. Administrator of grantor, 8153.
 - e. Assignee or trustee, 8154.
 - f. Receiver, 8155.
 - g. Creditors, 8155.
 - h. Future creditors, 8159.
 5. Against whom rights of creditor may be asserted, 8161.
 - a. Grantee, 8161.
 - b. Purchaser from grantee, 8162.
 6. Release of dower, 8163.
 - G. *Restoration by grantee, 8164.*
 - H. *Estoppel, 8165.*

- VI. Preferences, 8166.
 - A. *By natural persons*, 8166.
 - 1. Secret trust, 8166.
 - 2. No secret trust, 8171.
 - a. Security by debtor, 8171.
 - b. Security by fraudulent grantee of debtor, 8174.
 - B. *By Corporations*, 8177.
 - C. *By partnership*, 8180.
- VII. Remedies, 8180.
 - A. *In equity*, 8180.
 - B. *Law*, 8181.
- VIII. Jurisdiction, 8182.
 - A. *Insolvency and probate court*, 8182.
 - B. *Common pleas court*, 8184.
 - C. *Circuit court*, 8186.
 - D. *Federal court*, 8186.
- IX. Venue, 8186.
- X. Parties, 8187.
- XI. Pleading, 8188.
- XII. Process, 8189.
- XIII. Defenses, 8191.
- XIV. Trial, 8192.
- XV. Evidence, 8192.
 - A. *Presumptions and burden of proof*, 8192.
 - B. *Admissibility*, 8194.
 - C. *Oral evidence and admissions*, 8195.
 - D. *Witnesses*, 8196.
- XVI. Limitations, 8196.
- XVII. Judgment and Execution, 8196.
- XVIII. Priorities, 8198.
- XIX. Costs, 8201.
- XX. Review, 8202.

I. DEFINITION.

Where a debtor, having title and possession of property, passes the possession and apparent ownership to another, with the intent upon the part of both to defraud the creditors of such debtor, the transaction is within the provisions of the statute on fraudulent conveyances, and it is wholly immaterial what device is resorted to for the purpose of consummating the fraud: *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

A mortgage is a "conveyance," and if given with intent to defraud creditors or purchasers is within the operation of the statutes concerning fraudulent conveyances: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

The purpose of the statutes on fraudulent conveyances is "simply to guard a creditor from the fraudulent attempt of his debtor to delay, hinder or defraud him in the recovery of his debt, by disposing of property which he would have a right to seize as soon as he obtains a judgment": *Bump on Fraudulent Conveyances*, *Shorten v. Woodrow*, 34 O. S. 645, III Longsdorf's Notes, 748.

II. HISTORY OF LEGISLATION.

"The common law of England, all statutes or acts of the British Parliament made in aid of the common law of a general nature not local to England, prior to the fourth year of James I, and the several laws in force in this territory" was declared, 1 Chase, 190, to be in force in Ohio, beginning October

1 1795. A similar statute was enacted February 14, 1805, found in 1 Chase, 512. The act of 1795 was repealed in 1806 (January 2; 1 Chase, 528), except as to pending suits. The present chapter on frauds and perjuries is substantially a copy of the act of February 19, 1810 (1 Chase, 693, 3 Curwen, 2283). The original act contained a sixth section, now included in G. C., § 8618. "Our statute of frauds was copied *verbatim* from § 3 of the English statute of 29 Chas. II;" see *Berry v. Seiwell*, 65 Fed. 742, 13 C. C. A. 101, 9 O. F. D. 100.

III. SCOPE AND EFFECT OF STATUTES.

G. C., § 8618, was intended to protect creditors and purchasers in good faith; and not for the protection of the interest of others: *Burgett v. Burgett*, 1 O. 469, I Longsdorf's Notes, 94.

G. C., § 13126, was not intended to prevent creditors from obtaining relief in civil proceedings: *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251.

Constructively fraudulent conveyances are within the scope and meaning of G. C., § 8618, as well as those executed with an actual fraudulent intent: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

G. C., § 8618, and amendments thereto, being remedial in their character, apply to fraudulent conveyances made before the passage of this act as well as to those made after: *Stanton v. Keyes*, 14 O. S. 443, II Longsdorf's Notes, 674.

The statutes are merely declaratory of the common law, and are literally construed, even though they subject to a penalty: *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251.

The statutes relating to fraudulent conveyances are remedial and not to be strictly construed: *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

Transfer by husband to wife of running life insurance policies is not a transfer in fraud of creditors under G. C., § 11102, for it is not then available, nor is he bound to keep it up. The only complaint creditors can have is where an excessive amount of insurance was taken out, hence the only remedy is under G. C., § 9393: *Lytle v. Baldinger*, 84 O. S. 1 [reversing *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

It is to be presumed that every amendment of a statute is made to effect some purpose, either to add new provisions to the statute or to make plain the meaning and intent thereof: *Lytle v. Baldinger*, 84 O. S. 1 [reversing *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

G. C., §§ 11104, 11106, as amended 93 v. 290, providing that every sale, conveyance, transfer, mortgage or assignment made by a debtor or debtors in contemplation of insolvency shall be void, or, in the event of a deed of assignment for creditors being filed within ninety days after the giving thereof, shall be void, if such debtor or debtors were actually insolvent at the time of such giving and providing that nothing therein contained shall affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be properly filed, as therein described, is constitutional: *In re Summers*, 8 O. N. P. 674, 10 O. D. (N.P.) 301.

The provisions of the constitution which require that laws regulating rights in property shall operate generally and equally extend to statutes which prescribe the presumptions and rules of evidence by which those rights are enforced: *Williams v. Preslo*, 84 O. S. 328, IV Longsdorf's Notes, 1063.

The act of April 30, 1908, 99 v. 241 (G. C., §§ 11102, *et seq.*), to render presumptively fraudulent sales in bulk of stocks of merchandise unless the seller shall, not less than seven days before the transfer, file with the recorder of the county a notice of his intention to make such sale, is repugnant to the first article of the constitution, and therefore void: *Williams v. Preslo*, 84 O. S. 328, IV Longsdorf's Notes, 1063 [approving and following *Miller v. Crawford*, 70 O. S. 207, IV Longsdorf's Notes, 972].

The act of April 4, 1902, entitled "An act to prevent fraud in the purchase, disposition or sale of merchandise" (95 v. 96), is repugnant to Art. I of the constitution because it places an unwarrantable restriction upon the right of the individual to acquire and possess property, and because it contains a forbidden discrimination in favor of a limited class of creditors: *Miller v. Crawford*, 70 O. S. 207, IV Longsdorf's Notes, 972.

It was held that a statute making transfers of property in good faith and for fair value invalid in case of subsequent insolvency within a stated time was constitutional where it was construed so as to protect a purchase made in good faith and for fair value from an insolvent debtor: *Bodilya v. Priddy*, 68 O. S. 373, IV Longsdorf's Notes, 945.

IV. DEEDS TO USE OF GRANTOR.

G. C., § 8617, renders invalid a deed of gift to the use of the person making it, but not any other kind of deed of gift: *Brown v. Whaley*, 58 O. S. 654, IV Longsdorf's Notes, 753.

G. C., § 8617, does not render advancements by a parent to a child invalid since they are not in trust to the use of the person making them; and accordingly unless in fraud of the creditors of the parent such conveyances are valid: *Miller v. Wilson*, 15 O. 108, I Longsdorf's Notes, 699; *Creed v. Bank*, 1 O. S. 1, I Longsdorf's Notes, 929; *Crumbaugh v. Kugler*, 2 O. S. 373, I Longsdorf's Notes, 1061; *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216; *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

G. C., § 8617, has no application to cases in which the parent causes a conveyance to be made to the child, and the parent pays the consideration for such conveyance: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216. (The question in this case was raised between the heirs of the child to whom such conveyance was made and a claimant under an invalid tax sale).

The fact that a conveyance to a child is recorded, and that the property is openly treated as that of the child serves to show notice of such conveyance: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216.

A transfer by a husband to his wife of certain stock does not create a trust for his benefit, although he may expect that he will be permitted to use the dividends thereon, and that his wife will bequeath the same to him by will: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, which was affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. —, and *Stevens v. Robinson*, 88 O. S. —].

V. CONVEYANCES TO DEFRAUD CREDITORS.

A. WHAT IS CONVEYANCE.

1. Deed.

G. C., § 8618, applies to gifts, grants or conveyances made by the debtor; and it does not apply where the debtor furnishes the consideration, but the conveyance is made by the owner of the realty through a trustee to the wife of the debtor: *Shorten v. Woodrow*, 34 O. S. 645, III Longsdorf's Notes, 748.

The mere fact that the grantor of real property was *bona fide* indebted to several persons at the time of the execution and delivery of the deed is not, alone, sufficient cause for setting aside the conveyance as being in fraud of creditors, but in addition it must affirmatively appear that the grantor was insolvent at the time of making the conveyance: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

A conveyance made by a father to his daughters in consideration of services ren-

dered by them to him in his business, in pursuance of a promise to convey made prior to a judgment in a breach of promise case, upon the faith of which they had expended money on the premises was held valid: *Fischer v. Boeckler*, 11 O. D. (N.P.) 807.

A deed from a married man to his wife's father in payment of his debts is not invalidated, or its *bona fides* impeached from the fact that the grantor's wife does not sign it: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

A sale of land by an administrator, for debts, to a trustee, to place it beyond the reach of creditors, under an agreement or understanding that he should hold it for the benefit of the heirs and such debts as the parties might agree, is fraudulent and void: *Piatt v. St. Clair*, 6 O. 227, I Longsdorf's Notes, 333.

Incorporating a partnership, the owners taking substantially all the stock in exchange for the business, and pledging it all but one share with favored creditors who know the facts, is a fraud on other creditors and may be set aside and the property administered for the benefit of all. A finding in good faith is an erroneous conclusion of law from the facts, for good faith must be determined from the legal effect: *Bank v. Trebein*, 59 O. S. 316, IV Longsdorf's Notes, 765.

The validity of a conveyance is determined by the circumstances of the grantor at the time it is made and a transfer by a solvent grantor will not be rendered fraudulent by his subsequent insolvency: *Bank v. Scott*, 13 O. D. (N.P.) 600, 1 Hosea, 481.

2. Mortgage.

A mortgage is a "conveyance" and if given with intent to defraud creditors or purchasers is within the operation of G. C., § 8618: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

A mortgage given by a debtor who is insolvent and unable to pay his debts, under an agreement whereby the mortgage is to be paid out of the proceeds of such mortgage, and the balance is to be paid over to the mortgagor, is invalid under G. C., § 8618: *Brown v. Webb*, 20 O. 389, I Longsdorf's Notes, 914.

A mortgage by a failing debtor to a trustee to convey to his wife in full payment of a debt inures to all creditors, for it is now legal to have made it to her direct. There is no difference between a mortgage to secure a debt, and one to pay a debt: *Building Association v. Hyndman*, 6 O. N. P. 197, 8 O. D. (N.P.) 573.

3. Assignment for Benefit of Creditors.

A creditor who receives payment from his debtor while such debtor is insolvent, and makes such payment in contemplation of insolvency, or with a design to prefer such creditor to the exclusion of others, or with a design to hinder, delay or defraud creditors, can not be compelled to surrender such payment for the equal benefit of all creditors under G. C., §§ 11102, *et seq.*, even though an assignment made by such debtor be filed within ninety days after such payment: *Bank v. Gettinger*, 68 O. S. 389, IV Longsdorf's Notes, 945.

An assignment made by an insolvent debtor to trustees for the benefit of certain preferred creditors containing a provision that those who do not within a certain specified time release the debtor in consideration of what they may receive from the proceeds of the assignment, is valid as against the creditors who do not assent thereto: *Atkinson v. Jordan*, 5 O. 293, I Longsdorf's Notes, 283.

An assignment under G. C., § 11103, made to prefer one or more creditors, is different from an assignment for the benefit of all creditors under G. C., § 11092; in the former case the trust character and intent must be first declared by a court of competent jurisdiction, while in the latter case no such declaration is necessary: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

G. C., §§ 11102, *et seq.*, either before or after the amendment of 93 v. 290, does not apply to an assignment, where it was not the purpose and intent of the assignment to prefer one or more creditors of the assignor: *Owens v. Taylor*, 3 O. C. C. (N.S.) 98, 13 O. C. D. 612 [affirmed, without opinion, *Taylor v. Owens*, 64 O. S. 577].

Although all the proceedings, in the matter of securing a loan from a bank through an intermediary, may have the appearance of a transaction by the intermediary on his own account, yet when subsequent acts discredited this theory, and at the last the bank buys in the property covered by the mortgage securing the loan, taking title in the name of the intermediary, the mortgage will be treated as an assignment to a trustee: *Goodman v. Rawson*, 2 O. C. C. (N.S.) 80, 15 O. C. D. 606.

Where an absolute deed, by reason of a secret preference or trust, operates as a general assignment for creditors, it does so at once, and hence is not affected by a subsequent settlement and release between grantor and grantee: *Maas v. Miller*, 58 O. S. 483, IV Longsdorf's Notes, 746.

Where the trustees under an assignment in trust to prefer creditors and the assignor

and all his creditors, consent and agree to the disposition of the assigned property, and such consent and agreement is carried into execution, the same will be a full and complete defense to an action thereafter instituted by a creditor for the purpose of having the assignment declared a trust for the equal benefit of creditors; but if one or more creditors do not so consent and agree, the assignment may be declared a trust for the equal benefit of all creditors: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

A trustee to whom an assignment has been made in trust in contemplation of insolvency with intent to prefer one or more creditors as provided in G. C., § 11102, prior to the amendment of 93 v. 290, is not required to file such assignment in the probate court to be administered under our insolvency statutes, but he may proceed under the assignment until one or more creditors make application to a court of competent jurisdiction to have such assignment declared a trust for the equal benefit of all creditors: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

Where the trustee in an assignment to prefer creditors permits the property covered by the assignment to him, to be taken in execution for the debts of the assignor, and sold according to law, substantially as an assignee for the benefit of creditors would sell it, all being done in good faith, such trustee is liable to account only for the net proceeds of such sale. In such case where the returns of an officer shows that there was included in his sale, property other than that covered by the assignment, the proceeds of the sale of such other property can not be the equal benefit of all creditors: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

Where the person to whom an assignment to prefer creditors has been made is designated as trustee in the application by a creditor to a court of competent jurisdiction to have the assignment declared a trust, and judgment is entered as applied for, in a subsequent action for the recovery of the assets, such person may be sued in his individual capacity, and the record in the first case will be competent evidence in the second: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

Where a mortgage is declared to be in fraud of creditors, it stands as a deed of trust for creditors, the mortgagee becoming a trustee who must account for all proceeds; hence, the debtor can not have five hundred dollars in lieu of homestead as against the general creditors: *Pease v. Schuh*, 5 O. N. P. 245, 4 O. D. (N.P.) 121 [affirming *In re*

Schuh, 2 O. N. P. 381, 4 O. D. (N.P.) 30]. See also EXECUTION, WRIT OF.

A transfer of property to a trustee for the benefit of creditors, though the grantor be fully solvent and without intent to hinder creditors, will be held an assignment for benefit of creditors, and its form in other respects is not material. It is not a trust or deed, and needs no suit to have it declared an assignment: *Wambaugh v. Insurance Co.*, 59 O. S. 228, IV Longsdorf's Notes, 764 [affirming *In re Jones*, 5 O. N. P. 102, 8 O. D. (N.P.) 123, 5 O. D. (N.P.) 233].

Where a deed in trust for creditors is declared to be an assignment for creditors, and the grantee is removed for failure to file the deed, and a trustee is appointed, the legal title to the property will follow the appointment and vest in the trustee, and a purchaser from him on confirmation and deed will take a good title: *Wambaugh v. Insurance Co.*, 59 O. S. 228, IV Longsdorf's Notes, 764. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

B. JUDGMENT, BOND OR EXECUTION.

A executed to B a promissory note and warrant of attorney, upon which judgment was rendered, and an execution having been issued on the judgment, the sheriff levied the same on A's goods. The note was without consideration and A was insolvent when it was executed. In doing and procuring to be done these various acts, both A and B concurred, and their object was to defraud A's creditors. It was held that the acts were within the statute, which provides that "all transfers, conveyances, or assignments made with intent to hinder, delay or defraud creditors, shall be declared void at the suit of any creditors": *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

No action will lie by an obligee against an obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of the fraudulent intent: *Goudy v. Gebhart*, 1 O. S. 262, I Longsdorf's Notes, 972.

Allowing property to be levied on, or a freehold to become forfeit for nonpayment of rent, and giving a son money to buy it in and continuing to occupy it under the son, is in fraud of creditors, and the son holds as trustee for the father: *Edgington v. Williams*, W. 439, I Longsdorf's Notes, 35.

Where a person procures or assists in procuring a judgment to be taken against him; and a lien is thereby obtained upon his property in favor of another, with intent to cover his property with liens, so as to defeat an anticipated or apprehended judgment that

may be recovered against him, and the person in whose favor such judgment is taken, for a valuable consideration, assigns such judgment to an innocent purchaser, without notice, of the fraud in its inception and rendition, such judgment debtor is estopped from assailing the judgment as against such innocent purchaser: *Wright v. Snell*, 22 O. C. C. 86, 12 O. C. D. 308.

A court of equity will not aid or relieve a judgment debtor who has allowed a judgment to be taken against him in order to defeat an anticipated judgment, from the payment of the judgments to such purchaser: *Wright v. Snell*, 22 O. C. C. 86, 12 O. C. D. 308.

If a judgment debtor who has allowed a judgment to be taken against him in order to defeat an anticipated judgment, should be innocent of any fraud in the obtaining or rendition of such judgment, but by permitting the judgment to remain of record as subsisting and valid, he permitted the judgment creditor to appear of record as the owner of such judgment, he is estopped by such acts and conduct from setting up any defense which would affect the rights of a bona fide purchaser or assignee from such creditor. The rule of equity, that where one of two equally innocent persons must suffer, the loss must be upon him who has put it in the power of another to do the injury, applies: *Wright v. Snell*, 22 O. C. C. 86, 12 O. C. D. 308. See also JUDGMENT.

C. PROPERTY CONVEYED.

G. C., § 9393, exempting from debts a certain amount of a person's insurance on his own life payable to widow and children applies to policies in companies of other states as well as of this state: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

A policy on a man's life purporting to have been effected by the wife for her sole use, in consideration of premiums paid and to be paid by her, is *prima facie* her sole property, and not governed by G. C., § 9393, though the husband paid the premiums: *Weber v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

G. C., § 9397, applies. Existing creditors must have been injured by the payments, and if their debts were incurred only a few weeks before the death, the fact that there had been creditors years before who were compromised with and are not complaining, is not proof of injury to any rights: *Weber v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

An assignment by a man of a policy on his life to his wife with intent to defraud creditors is voidable. G. C., § 9397, was not in-

tended to dispense with the *bona fides* of such assignment. If set aside the whole proceeds less the amounts permitted to the wife by G. C., § 9393, and not merely the premiums paid, go to creditors: *Child v. Graham*, 8 Dec. Rep. 294, 7 Bull. 43.

Where a person insured his life, payable to his wife, in one company, but the next year by agreement of all parties this was surrendered, and a new policy in another company taken out in the wife's name on the husband's life, he paying the premiums, it was held that though the first policy would have been governed by G. C., § 9393, the second policy was governed by G. C., § 9397, and creditors can only recover the premium for four years past: *Insurance Co. v. Eckert*, 5 Dec. Rep. 528, 6 Am. L. Rec. 452.

Life insurance for the benefit of a wife and three children, the premium exceeding one hundred and fifty dollars, exhausts the right to insure under G. C., § 9393, and the proceeds go to the wife and three children, notwithstanding the will, and the surplus of that policy and all of a later policy for the wife and four children, there being another child born, goes to the creditors: *Wagner v. Karman*, 5 Dec. Rep. 528, 7 Am. L. Rec. 670.

Where a husband, at his wife's suggestion and with her money, procured insurance on his life for her benefit, although he signed the application, it is within G. C., § 9397, and she holds it free of his creditors. He was her agent in obtaining it: *Jacob v. Insurance Co.*, 13 Dec. Rep. 696, 1 C. S. C. R. 519. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

A life insurance company sued in another state by the widow of the insured pays the money into court and obtains an order, requiring the administrator, a resident of Ohio, to interplead as to his claim for part not exempt from creditors. Service of such order and of citation on him in Ohio gives no jurisdiction of his person, and a judgment thereon debarring him from any claim as against such widow is void as to him: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238. See also JUDGMENT.

A transfer by an insolvent to his wife and children of policies of life insurance made payable to his estate, is in fraud of creditors and may be set aside, and the policies ordered paid to his administrator or to a trustee for the benefit of his creditors: *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305. See also INSURANCE.

A paid-up ten-payment life insurance providing for payment of the face to his wife at insured's death and an annuity to him after twenty years from date if living, can not be subjected by the trustee in bankruptcy as to the amount payable to the wife, but

the husband's future annuity only can be reached: *In re Shaefer*, 16 O. F. D. 637, 9 O. L. R. 357. See also BANKRUPTCY.

Whether life or beneficial insurance exceeds the amount exempt from creditors under G. C., §§ 9393, 11722, must be determined by considering each policy alone, and not by adding the premiums on all: *Hinsch v. D'Utassy*, 1 O. D. (N.P.) 372. See also EXECUTION, WRIT OF.

A debtor is under no legal obligations to insure his life for the benefit of creditors; and the statutory provision for the return to the debtor's estate of all the money used in the purchase of insurance gives to the creditor everything to which he is entitled or which he could have reached by any process of law: *Lytle v. Baldinger*, 84 O. S. 1.

A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of G. C., §§ 11104, *et seq.* In such case the only remedy of the creditor is found in the provisions of G. C., § 9395: *Lytle v. Baldinger*, 84 O. S. 1.

Creditors of the father can not subject earnings of an emancipated child invested in a home in the mother's name. And so, though the child live at home: *Geringer v. Heinlein*, 6 O. D. (N.P.) 26, 29 Bull. 339. See also PARENT AND CHILD.

A husband in debt began business on his wife's money in her name, as her agent, making large profits, principally from his services and skill, without contract as to his compensation or account with his wife. Part of the profits was invested in property in her name. It was held that the wife can not claim the whole as profits from her money. If a wife suffers her money to be blended with the products of the husband's skill and industry, she can at most stand as a preferred creditor in equity, and get back her money and interest: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796. See also HUSBAND AND WIFE.

Where a farmer has become insolvent and lost all he had, and his wife with her own means rents and stocks another farm and employs him at wages upon it, but she keeps control and superintends everything, and it is evident that her skill and not his makes it a success, and she invests the savings in real estate in her own name, this real estate is her separate property, and the husband's creditors can not reach it, and so although his wages contributed partly to support the family: *Lanning v. Fogler*, 16 O. C. C. 151, 8 O. C. D. 780.

Real estate of a wife, though paid for in part from the husband's monthly wages, can

not be subjected to his debts, for the wages were exempt: *Stump v. Frary*, 13 O. C. C. 619, 6 O. C. D. 357.

G. C., § 8618, applies to an unauthorized conveyance of partnership property made by one partner: *McGrath v. Cooven*, 57 O. S. 385, IV Longsdorf's Notes, 722.

Property which may be held as exempt under the homestead exemption act is nevertheless within the provisions of G. C., § 8618; since in Ohio the privilege of claiming property as exempt is personal to the debtor: *Roig v. Schultz*, 42 O. S. 165, IV Longsdorf's Notes, 101.

If property is conveyed to certain grantees in trust for others, and such trust is established only by oral evidence, it may nevertheless be shown for the purpose of showing that a transfer of such property by such grantees in return for stock taken in the name of such beneficiaries is not in fraud of the creditors of such grantees: *Harvey v. Gardner*, 41 O. S. 642, IV Longsdorf's Notes, 81.

G. C., § 8618, does not apply to a building constructed by the owner of realty upon such realty, although he permits his son to make use of such building. Such building can not be subjected to the debts of such son: *McLain v. Starbuck*, 54 O. S. 637, 35 Bull. 127.

For priorities, see XVIII, herein.

D. INTENT TO DEFRAUD.

1. Actual Fraud.

A voluntary conveyance to a trustee for the benefit of the grantor's wife and children is not fraudulent against a creditor whose claim was at the time amply secured by mortgage. The fact that the mortgage security is subsequently lost by the creditor's laches, does not make such a conveyance fraudulent: *Stephenson v. Donahue*, 40 O. S. 184, IV Longsdorf's Notes, 16.

2. Constructive Fraud.

It is a settled principle of morals and of law that a man owns nothing until after his creditors are paid: *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305.

A conveyance by a debtor, without consideration, of so much of his property that he has not enough left with which to pay his debts is constructively fraudulent even though no actual fraud is intended by him: *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251; *Creed v. Bank*, 1 O. S. 1, I Longsdorf's Notes, 929; *Crumbaugh v. Kugler*, 2 O. S. 373, I Longsdorf's Notes, 1061; *Evans v. Lewis*, 30 O. S. 11, III Longsdorf's Notes,

512; *Stephenson v. Donahue*, 40 O. S. 184, IV Longsdorf's Notes, 16; *Sellew v. Chrisfield*, 12 Dec. Rep. 41, 1 H. 86.

If the debtor retains sufficient property to pay his subsisting debts, a gratuitous transfer of his property is not constructively fraudulent, even though he subsequently becomes insolvent: *Miller v. Wilson*, 15 O. 108, I Longsdorf's Notes, 699; *McCall v. Pixley*, 48 O. S. 379, IV Longsdorf's Notes, 421.

A creditor may avoid or set aside a fraudulent conveyance of his debtor's property for the satisfaction of his debt, without first exhausting the debtor's other property, or showing that the debtor has no other property liable to be taken: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256.

The fact that the vendor retains possession under a contract to pay rent, and with a secret option to repurchase in the future, does not show as a matter of law that the conveyance is fraudulent: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192.

A chattel mortgage under which possession is retained by the mortgagor with the power to sell the mortgaged property for his own benefit is fraudulent as against creditors: *Collins v. Myers*, 16 O. 547, I Longsdorf's Notes, 782; *Brown v. Webb*, 20 O. 389, I Longsdorf's Notes, 914; *Webb v. Brown*, 3 O. S. 246, II Longsdorf's Notes, 25; *Freeman v. Rawson*, 5 O. S. 1, II Longsdorf's Notes, 149; *Griefenkamp v. Beal*, 21 O. C. C. 788, 11 O. C. D. 377; *Morris v. Devou*, 13 Dec. Rep. 134, 2 D. 218.

If the mortgagor is to retain the goods with the power of sale, holding the proceeds as the agent of the mortgagee and paying them over to the mortgagee, such mortgage is not void as a matter of law: *Kleine v. Katzenberger*, 20 O. S. 110, II Longsdorf's Notes, 982.

A mortgage given by a railway company is not rendered invalid by a provision authorizing the sale of cast off articles, fragments, and old materials; since such sale is necessary to the proper management of the road: *Coopers v. Wolf*, 15 O. S. 523, II Longsdorf's Notes, 745.

While a power of sale given to a mortgagor may render such chattel mortgage invalid, the fact that the mortgagee subsequently acquires possession of such property before any liens have attached thereto, gives him priority as against the general creditors of the mortgagor: *Francisco v. Ryan*, 54 O. S. 307, IV Longsdorf's Notes, 636.

A chattel mortgage which an insolvent debtor gives immediately before making an assignment for the benefit of his creditors, in order to secure payment of attorney fees for

services in such management, is invalid as against the general creditors: *In re Merling*, 1 O. N. P. 35, 5 O. D. (N.P.) 390.

A statement by a business man at the time of making a conveyance of property to his daughter, to the effect that the business in which he was engaged was subject to fluctuations and that he desired to put the title to this property in such shape that it would afford a home for himself and his children in case anything unfavorable happened to him in his business, is not inconsistent with the theory that the conveyance was to the daughter absolutely, and not to her in trust for himself. But where it appears that at the time of the conveyance he was in an insolvent condition, and indebtedness existing at that time remained unpaid at the time of his death, the conveyance to the daughter must be regarded as in fraud of such pre-existing creditors: *Walston v. McCabe*, 11 O. N. P. (N.S.) 26.

Where a member of a firm, not actively participating in the business of the firm, executed a mortgage on his individual property for the purpose of raising money for the use of the firm, the question whether or not the mortgage was executed in contemplation of insolvency with intent to prefer one or more creditors, depends on what the mortgagor contemplated and intended at the time he executed the mortgage, rather than on the financial straits of the firm of which he may not have had full knowledge: *Goodman v. Rawson*, 2 O. C. C. (N.S.) 80, 15 O. C. D. 696.

Technical responsibility of a partner for disaster to a solvent business will not be accepted as indicating a fraudulent purpose on the part of such partner in transferring his property while the business was still solvent: *Bank v. Scott*, 13 O. D. (N.P.) 600, 1 *Hosea*, 481.

Incorporating a partnership is not a fraud on its creditors if there is no corrupt design: *Union Rolling Mill v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46.

Parties are presumed to intend the natural consequences of their own acts and to the extent that an act works a fraud to that extent a fraud is presumed intended, and need not be proved: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29. See also FRAUD AND DECEIT.

Property transferred by a stockholder of a corporation which was doing business at a profit, and whose available assets, had a sale been made thereof at a fair market value, would have more than paid its debts, can not be followed into the hands of *bona fide* purchasers and subjected to the payment of the debts of the corporation upon the subsequent insolvency of such corporation, as it

was solvent when the transfer took place: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

A corporation is a legal entity, separate from those composing it. But this fiction is limited to the purposes of its adoption, and a corporation can not be forced to accomplish a fraud. If this appears, the fiction will be disregarded, and the acts of the real parties dealt with as though no corporation had been formed, on the ground that fraud vitiates everything, as where a failing debtor incorporates his business in order to convey his shares to favored creditors: *Bank v. Trebein*, 59 O. S. 316, IV Longsdorf's Notes, 765.

Converting a partnership into a corporation on a capital of double the value of the business, and each partner receiving his share in paid up stock, is, though no wrong was intended, a fraud on corporate creditors, and each partner will be liable to the corporation, and therefore to its creditors, as if he had subscribed for the stock, and had only paid one-half his subscription: *Gates v. Stone Co.*, 57 O. S. 60, IV Longsdorf's Notes, 706 [affirming *Gates v. Stone Co.*, 9 O. C. C. 99, 6 O. C. D. 23].

3. Inadequacy of Consideration.

(a) Inadequacy of Price.

A great bargain in the purchase of a litigated property from an embarrassed debtor is not sufficient to render the sale fraudulent as to creditors: *Douglass v. Huston*, 6 O. 156, I Longsdorf's Notes, 329.

Inadequacy of consideration paid for a note by an indorsee does not make the purchase one of fraud on the payee's creditors unless so great as to impeach its good faith. That the indorsee took the note for a sale of land and retained the title of the land as security does not affect his title in the note: *Rooker v. Rooker*, 29 O. S. 1, III Longsdorf's Notes, 433.

Property worth fourteen thousand dollars, having been conveyed to pay a debt of ten thousand dollars, and thus working a fraud on other creditors, it was held that G. C., § 11106, applies to constructive, as well as actual fraud, but in the former case the conveyance will be upheld in favor of a party not guilty of actual fraud to the extent of the consideration, and vacated only as to the excess: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

A conveyance by a husband to a woman with whom he is living and whom he afterwards marries, for an inadequate consideration, of property occupied by the wife and owned by himself and wife in common, after the filing by the wife of a petition for di-

voiced, but before actual service of summons, grantor and grantee both having actual knowledge of the filing of such petition, will be set aside as fraudulent: *Hamilton v. Rudy*, 4 O. N. P. (N.S.) 427, 17 O. D. (N.P.) 179.

Inadequacy of price as the sole reason for declaring a transfer of a business to a creditor, as a credit on his claim, must be so great as to convince the understanding that it was not in good faith: *Bank v. Wehrle*, 18 O. C. C. 535, 9 O. C. D. 330 [affirmed, without opinion, *Bank v. Wehrle*, 61 O. S. 654].

Inadequacy of consideration will not constitute a ground for setting aside a conveyance by a debtor unless based on fraud is shown, and where the purchaser's good faith is not successfully attacked and the inadequacy is not so great as to shock the moral sense, and lead irresistibly to the inference of a fraudulent intent, the fact that he obtained a bargain will not avail creditors of the grantor: *Hamill v. Wright*, 5 O. N. P. 9, 8 O. D. (N.P.) 467.

Where a consideration of one dollar is stated in a deed passing property from debtor to creditor dealing in good faith and innocently with respect thereto, and it afterward developed that the grantor had other creditors, a conclusive presumption does not arise that the parties intended by the recital as to the amount of the consideration that the conveyance should be fixed as voluntary, even though in fact not voluntary; and thereby permit such other creditors to seize the property: *Cole v. Bank*, 15 O. C. C. (N.S.) 315 [affirmed, without opinion, *Bank v. Newton*, 82 O. S. 444, and affirmed, with opinion, *Bank v. Cole*, 83 O. S. 50].

(b) Antecedent Debt.

A creditor holding a note not yet due, with a surety, who surrenders the same, taking in place thereof a purchase money mortgage running to debtor, can not be said to have taken such mortgage to secure an antecedent debt without parting with anything of value upon the strength of it: *Bank v. Post*, 12 O. D. (N.P.) 232.

A transfer and bill of sale of goods, part of which was merchandise, made in consideration of a past debt, and within less than ninety days before an assignment for creditors by vendor, constitutes a conveyance fraudulent as to creditors: *Berk v. Hirsch*, 8 O. N. P. 459, 11 O. D. (N.P.) 768.

Real estate owned by a member of a corporation and conveyed for value to the grantor's father-in-law, in satisfaction of money loaned to the grantor, and part due, and which is subsequently deeded by the father-

in-law to his daughter, the wife of the first grantor as a deed of gift and advancement, can not be subjected to the payment of the debts of the first grantor: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121 [distinguishing *Glidden M. & Co. v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796; *Quigley v. Graham*, 18 O. S. 42, II Longsdorf's Notes, 864].

(c) Support.

A conveyance made in consideration of support is said to be invalid as against creditors: *Krider v. Koons*, 5 O. C. C. 221, 3 O. C. D. 110; *Bouclous v. Shanabarger*, 19 O. C. C. 137, 10 O. C. D. 167.

Only creditors can complain of such a transaction: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

A conveyance to one not shown to know his grantor is in debt, in consideration of supporting the grantor and his wife for life, and paying a sum to stepchildren at his death, is not voluntary where the plaintiff has slept on his rights for several years, during which the support has been furnished. If voluntary as to the children, they must be parties in order to adjudicate it: *Constable v. Weaser*, 8 Dec. Rep. 339, 7 Bull. 113.

A conveyance to a son on inadequate consideration, with agreement back for life support, is a mere gift as against creditors, but is valid if the grantor had ample means to satisfy existing creditors, and had no intent to defraud future creditors: *Bouclous v. Shanabarger*, 19 O. C. C. 137, 10 O. C. D. 167.

There can be no fraudulent conveyance of exempt property, accordingly, a conveyance of a homestead in consideration of future support is valid, and so, though it may rise in value, and a levy thereon is a nullity: *Stewart v. Wooley*, 2 Dec. Rep. 341, 2 W. L. M. 470.

(d) Assumption of Debts.

A conveyance for full value, in consideration that the buyer assume and pay certain debts of the seller, which he does pay, is valid: *Buckingham v. Bank*, 21 O. S. 131, III Longsdorf's Notes, 13.

Where an endorser conveys property mortgaged for about half its value to one who assumes the mortgage debt, but gives no other real consideration, and such indorser is not proved to have been solvent, the intent to defraud creditors is imputed, and the conveyance to the value of the equity of redemption will be held to be for benefit of all creditors: *Jones v. Leeds*, 7 O. N. P. 480, 10 O. D. (N.P.) 173.

(e) *Forbearance to Sue.*

An agreement on the part of a wife to refrain from bringing an action against her husband for divorce and alimony may constitute a sufficient consideration for a conveyance of property by him to her and an allegation setting up such consideration is not open to demurrer for its adequacy is a question of proof, depending upon circumstances. Such a conveyance will not be set aside where the wife was not aware at the time the conveyance was made of any fraudulent intent on the part of the husband with respect to creditors: *Whitacre v. Redmond*, 8 O. L. R. 165.

(f) *Release of Dower.*

Release of inchoate dower is a valid consideration to support a conveyance to a wife. The conveyance will not be held in fraud of creditors unless unreasonably disproportionate to the value of the contingent dower. Owing to the uncertainty of the value of such dower that a greater sum than the dower was required by the wife if there is no *mala fides*, will not avoid the conveyance: *Singree v. Welch*, 32 O. S. 320, III Longsdorf's Notes, 636; *Grote v. Meyer*, 6 Dec. Rep. 1025, 9 Am. L. Rec. 623.

(g) *Excessive Marriage Settlement.*

Where A sues B for breach of promise of marriage, and thereupon B marries C, who had knowledge of the suit, and having first, in consideration of C's consent, transferred to her all his property, worth about \$25,000, it was held that the marriage settlement was grossly disproportionate to B's circumstances, and therefore fraudulent as against A, and the property will be subjected to her judgment: *Fisher v. Schlosser*, 41 O. S. 147, IV Longsdorf's Notes, 56.

(h) *Sale on Credit.*

A sale by a failing debtor of his entire business to his mother for an adequate consideration in notes, which were paid out to creditors, is not fraudulent: *Rodgers v. Kinsey*, 8 Dec. Rep. 308, 7 Bull. 64.

Where a failing merchant transfers all his stock to a clerk of limited means on credit, without security, and goes into the store as clerk, the transaction is void as to creditors, however fair the intention. But if he subsequently gets from the clerk a mortgage on the stock as security for the price and assigns this and the notes for benefit of creditors, this is presumably fair, and cures the defect, and the clerk has sufficient title to sustain replevin against an attachment:

O'Connell v. Cruise, 12 Dec. Rep. 81, 1 H. 164.

A & B, partners, to prevent levy of execution, sold their goods to C, who, for the same purpose, bought them on credit; then D, a firm creditor, attached them for such cause and they were sold; then E, another creditor, sought injunction against distribution, making A, B, C and D parties. It was held that (1) The sale to C by statute became a trust for all creditors; (2) said statute does not qualify G. C., § 11819, as to attachments, but merely operates on the title: *Conrad v. Pancost*, 11 O. S. 685, II Longsdorf's Notes, 541.

(i) *Other Considerations.*

If the consideration of a mortgage is to repay a parent for advancements on becoming embarrassed, it is voluntary and void as to creditors: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

A firm may give its note and mortgage for a debt of a former firm, of which all the present partners were members, and therefore liable. It has sufficient consideration: *Greiss v. Wilkop*, 12 O. C. C. 481, 5 O. C. D. 544.

Where an executor holds the joint note of the members of a firm, and buys their business, having the means to pay for it, but by mutual agreement credits the price on the note, no money passing, is not on that account illegal or in fraud of creditors, but is a valid sale, especially as it was the only way to obtain any payment on the note: *Bank v. Wehrle*, 18 O. C. C. 535, 9 O. C. D. 330 [affirmed, without opinion, *Bank v. Wehrle*, 61 O. S. 654].

A mortgage by an insolvent to his father, who knew of the insolvency, to secure debts and indorsements already made, and which might be made in the future, it being the intention that the future indorsements were to be by the father's assuming such debts as should from time to time be pressed, and thus tide the son over, amounts to a general assignment under G. C., § 11102: *Churchill v. Russell*, 18 O. C. C. 832, 9 O. C. D. 145.

A conveyance of \$2,500 worth of stock to an attorney to secure a bill for past services, and services to be rendered with the intent also to protect it from other creditors will secure the past bill, but not later services, and the balance will be turned over to the trustee for creditors: *Bank v. Wehrle*, 18 O. C. C. 535, 9 O. C. D. 330 [affirmed, without opinion, *Bank v. Wehrle*, 61 O. S. 654].

An embarrassed debtor's voluntary conveyance of land to his father, himself re-

taining possession, and the father devising the land to the son's children, but devising his land outside the state to the son, indicates fraud: *Gray v. Tappan*, W. 117, I Longsdorf's Notes, 9.

Where the earnings of a husband are barely sufficient for the support of his family, but his wife by great industry extending through many years accumulates by her earnings as dressmaker a sum sufficient, with the aid of a loan from her relatives, to purchase a home the title to which for convenience is taken in the husband's name, the mutual though informal understanding between them that the property was to be regarded as hers is sufficient to create a trust therein in her favor, and to render a conveyance of the property to her valid as against the claim of a creditor of the husband: *Leibig v. Grosekopp*, 7 O. L. R. 267.

Where a home but partially paid for stands in the name of a daughter, and it appears that the payments which have been made thereon consisted of small contributions from the wages of the father, together with savings from ordinary living expenses through many years, due to industry and frugality of the mother and daughter, no analogy is presented to the case of a debtor who makes substantial gifts and allowances to his family beyond their reasonable necessities or daily use, and the property will not be subject to payment of an old claim against the husband, but a balance in bank in the name of the daughter, but used in connection with the father's business, is subject to his debts: *O'Hara v. Bell*, 8 O. N. P. (N.S.) 352, 20 O. D. (N.P.) 55.

Where a minor son of the bankrupt asserts title to an automobile, which he claims to have purchased from his father, more than four months prior to the filing of the petition in bankruptcy, with funds paid to him by his father for services as to which he can give no consistent account, and it is apparent that the father exercised all the rights of legal ownership of the machine after the pretended sale, an order will be made that the machine be surrendered to the trustee in bankruptcy, with leave to the guardian *ad litem* of the son to file a petition for review: *In re Baumgarten*, 8 O. L. R. 310.

4. Gifts and Advancements.

If a debtor has conveyed property to his creditor, and the parties subsequently treat the debt as still in existence, such conveyance is regarded as gratuitous: *Starr v. Starr*, 1 O. 321, I Longsdorf's Notes, 85.

A deed of gift by one who retains property wholly sufficient to discharge his debts is not a fraud upon his creditors: *Stevens v.*

Summers, 68 O. S. 421, IV Longsdorf's Notes, 946.

A voluntary conveyance by a debtor to his infant son is presumptively in fraud of creditors: *Humbert v. Church*, W. 213, I Longsdorf's Notes, 19; *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251; *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

An advancement to a son is void if the father is insolvent: *Godell v. Taylor*, W. 82, I Longsdorf's Notes, 6; *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251.

A father is entitled to the wages of minor children supported by him, and if he invests them in land in their names, his creditors can subject the land: *Bell v. Hallenback*, W. 751, I Longsdorf's Notes, 59.

If the children are emancipated their wages can not be reached by creditors, though they live at home. Emancipation is not in fraud of creditors and may be inferred: *Gerringer v. Heinlein*, 11 Dec. Rep. 787, 29 Bull. 339.

A gift is never upheld unless property clearly and beyond all doubt is retained sufficient to pay the donor's debts: *Crumbaugh v. Kugler*, 2 O. S. 373, I Longsdorf's Notes, 1061.

A purchase by a parent in a child's name, or advancement to a child, is not void because the parent is indebted, if he had sufficient other property to satisfy his debts: *Miller v. Wilson*, 15 O. 108, I Longsdorf's Notes, 699.

A creditor already secured by ample mortgage can not attack the debtor's voluntary conveyance to a trustee for wife and children. And the security becoming subsequently lost by the creditor's laches, does not make the conveyance fraudulent: *Stephenson v. Donahue*, 40 O. S. 184, IV Longsdorf's Notes, 16 [affirming *Stephenson v. Donahue*, 6 Dec. Rep. 828, 8 Am. L. Rec. 358].

Where a wife claims ownership of a credit attached by her husband's creditors, his voluntary release to her after attachment can not strengthen her title: *Ferguson v. Gilbert*, 16 O. S. 88, II Longsdorf's Notes, 762.

A conveyance by a man, who has entered into a contract of marriage which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 O. S. 125, IV Longsdorf's Notes, 850.

If a father while insolvent has gratuitously conveyed property to his daughter to defraud his creditors; and subsequently the daughter has been induced by undue influence

while her father was *non compos mentis* to reconvey such property to him, and if such conveyance was also induced by the fraudulent statement that it was necessary to make such conveyance to save her father's property, she can not have such conveyance set aside, if indebtedness of the father, existing when the original gratuitous conveyance was made, is still unsatisfied: *Walston v. McCabe*, 11 O. N. P. (N.S.) 26.

Where it appears that at the time of a gratuitous conveyance by a father to his daughter, he was in an insolvent condition, and indebtedness existing at that time remained unpaid at the time of his death, the conveyance to the daughter must be regarded as in fraud of such pre-existing creditors: *Walston v. McCabe*, 11 O. N. P. (N.S.) 26.

5. Fraudulent Intent of Grantee.

If the transfer is gratuitous, a creditor may set it aside, although the grantee is not a party to the fraud: *Harshamn v. Lowe*, 9 O. 92, I Longsdorf's Notes, 463; see, however, *Burgett v. Burgett*, 1 O. 469, I Longsdorf's Notes, 94, in which a contrary view is expressed.

A purchaser for value and without notice can not be deprived of the property conveyed on the ground that the grantor intended to defraud his creditors by making such conveyance: *Astor v. Wells*, 4 Wheat. 466, 1 O. F. D. 21.

One who buys in good faith and for value takes good title, even if the seller may intend by such sale or conveyance to hinder, delay, or defraud his creditors: *Bobilya v. Priddy*, 68 O. S. 373, IV Longsdorf's Notes, 945.

Where a girl who has just attained her majority innocently purchases from her brother at a price not appreciably inadequate his interest in property which has descended to them jointly, the conveyance will not be set aside as in fraud of creditors of the brother, notwithstanding an evident intention on his part to defeat their claims: *Wilby v. Hohman*, 7 O. L. R. 439.

An agreement on the part of a wife to refrain from bringing an action against her husband for divorce and alimony, constitutes a sufficient consideration for a conveyance of property by him to her, and such conveyance will not be set aside for want of consideration where the wife was not aware at the time the conveyance was made of any fraudulent intent on the part of the husband with respect to creditors: *Whitacre v. Redmond*, 9 O. L. R. 165.

Knowledge that taking security will impair the means to pay other creditors will

not affect recovery thereon: *O'Keefe v. Mahoney*, 20 O. C. C. 709, 10 O. C. D. 819.

E. DEBT OR DAMAGE.

A right of action for breach of promise which has not yet been reduced to judgment is a debt or damage within the meaning of G. C., § 8618: *Fisher v. Schlosser*, 41 O. S. 147, IV Longsdorf's Notes, 56.

A conveyance to defeat the collection of the damages is in fraud of creditors. The liability creates the relation of debtor and creditor: *McVeigh v. Ritenour*, 40 O. S. 107, IV Longsdorf's Notes, 7. See also BREACH OF PROMISE.

Mortgages executed by the husband on part of his property, to his father, before his marriage, and four years before the separation from his wife took place, will not be set aside as far as the wife's right to alimony is concerned, although these mortgages were executed voluntarily without request therefor from his father and although it seems probable that in executing them he was looking forward to a time when he might be expected to respond in alimony to his intended wife: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where a husband contemplating to abandon his wife executes a mortgage covering all his property, to secure a pretended indebtedness, but in fact without consideration and for the purpose of defeating any judgment for alimony she might recover in a suit for divorce and alimony which she might subsequently institute on the ground of his abandonment of her, such mortgage is a fraud on her rights; and the rights of no innocent parties intervening, it will be set aside as against her claim for alimony, although the husband by false representations had induced his wife to join him in the execution of such mortgage: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526. See also HUSBAND AND WIFE.

Where a husband in order to defeat an anticipated decree for alimony, sells his property for an inadequate sum to a purchaser who knew of his purpose, such sale is fraudulent and the sum awarded as alimony will be made a lien on such property: *Tate v. Tate*, 19 O. C. C. 532, 10 O. C. D. 321.

A husband may by gift *inter vivos* of all his property deprive his wife of any share therein at his death although done for the purpose of excluding her from inheriting anything from him for his dominion over his personality is absolute and she is not a quasi creditor: *Brodt v. Rannells*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

Where A conveyed to B, real estate, with intent to defraud C, a creditor of A, and

upon a secret trust that B was to hold the title for A; and where in a proceeding by the administrator of A to subject the land to the payment of A's debts the conveyance is adjudged to be void as against C, and also antecedent and subsequent creditors of A, and that it be subjected to the payment of the debts of A's estate and the costs of administration. It was held that an allowance for the support of the widow and her child (under G. C., §§ 10656 and 10714), is a debt of the estate, for the payment of which resort may be had to said land or its proceeds: *Allen v. Allen*, 18 O. S. 234, II Longsdorf's Notes, 884; *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693.

See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

An indebtedness against the grantor of real property which is barred by the statute of limitations at the time of the conveyance, is not such an indebtedness as will support an action to set aside the conveyance as in fraud of creditors: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 O. S. 125, IV Longsdorf's Notes, 850.

F. DEEMED VOID AND OF NO EFFECT.

1. Meaning of "Deemed."

The word "deemed" as used in G. C., § 8618, is said in *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572, to mean that such conveyance is void upon being adjudged void by the decree of court of competent jurisdiction.

2. Meaning of "Void."

The word "void" is said to mean voidable at the election of the parties injured: *Bank v. Wheelock*, 52 O. S. 534, IV Longsdorf's Notes, 582; *Mason v. Eichels*, 8 Dec. Rep. 436, 8 Bull. 7.

3. Effect.

Where the grantee, in a fraudulent conveyance made by a debtor, dies after the rendering of a decree in favor of a judgment creditor, setting aside such conveyance, and ordering the sale of the property so conveyed for the payment of the creditor, the failure to revive the decree against the

heirs of such grantee will not affect the title of a purchaser acquired by a sale under the decree: *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

A person indebted conveys his property, by way of gift or advancement, among his children. His two sons, in part consideration of the portion conveyed to them, agreed to pay his debts. In a suit by a judgment creditor, whose debts accrue before the division, to subject the lands so conveyed to the payment of his judgment, the land conveyed to the sons ought to be first subjected: *Scrihart v. Shaum*, 24 O. S. 432, III Longsdorf's Notes, 182.

It is not necessary that the creditor should first exhaust the property which the debtor has not conveyed in fraud of his creditors, or that he should show that he has no other property before a proceeding to set aside a conveyance in fraud of the creditors of such debtor: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256.

That an assignment with illegal preferences operates by the effect of the law for the benefit of all the creditors generally, see *Hallowell v. Bayliss*, 10 O. S. 536, II Longsdorf's Notes, 461.

That a conveyance in payment of a gambling debt inures to the benefit of the assignee for the benefit of creditors, see *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572.

There can be no recovery back by one who conveys property without consideration with intent to defeat a possible judgment against him, although the expected judgment was rendered in his favor. The courts will not assist him to recover the property: *Pride v. Andrew*, 51 O. S. 405, IV Longsdorf's Notes, 549.

If a receipt is made to show a transfer in order to cover property, the court will not restore the party nor assist either to get any advantage from its use, but will leave them where they have placed themselves: *Emrie v. Gilbert*, W. 764, I Longsdorf's Notes, 60.

4. Who May Attack Conveyance.

(a) In General.

Only creditors and purchasers may attack a conveyance under G. C., § 8618: *Burgett v. Burgett*, 1 O. 469, I Longsdorf's Notes, 94.

(b) Grantor and His Heirs.

Neither the grantor nor his heirs can attack a conveyance on the ground of its being in fraud of the grantor's creditors: *Burgett v. Burgett*, 1 O. 469, I Longsdorf's Notes, 94; *Barr v. Hatch*, 3 O. 527, I Longsdorf's

Notes, 192; *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501; *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851; *Tremper v. Barton*, 18 O. 418, I Longsdorf's Notes, 853; *Brown v. Webb*, 20 O. 389, I Longsdorf's Notes, 914; *Webb v. Brown*, 3 O. S. 246, II Longsdorf's Notes, 25; *Hall-orell v. Bayliss*, 10 O. S. 536, II Longsdorf's Notes, 461; *White v. Brocau*, 14 O. S. 339, II Longsdorf's Notes, 663; *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501.

A conveyance of real estate in fraud of creditors is good not only between the immediate parties, but also as against the estate or heirs at law of the grantor: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

The grantor's heirs, by averring the fraud can not have the grantee held as a trustee for them: *Barton v. Morris*, 15 O. 408, I Longsdorf's Notes, 717.

If a mortgage is given in fraud of creditors and the mortgagee seeks affirmative relief thereon, the mortgagor or those claiming under him may interpose the defense of illegality: *McQuade v. Rosecrans*, 36 O. S. 442, III Longsdorf's Notes, 867.

If in marshalling liens the court finds part of the claim of a prior mortgage to be fraudulent and void as to a subsequent mortgage, this will not avoid the whole of the prior lien unless there is positive illegality, for it may have been from a partial failure of consideration: *Black v. Kuhlman*, 30 O. S. 106, III Longsdorf's Notes, 523.

The grantor can not compel a reconveyance to himself of property conveyed by him in fraud of his creditors, even if the grantee has agreed to reconvey on demand: *Pride v. Andreu*, 51 O. S. 405, IV Longsdorf's Notes, 549.

The fact that the grantor has died does not prevent equity from setting aside a fraudulent conveyance: *Hampson v. Sumner*, 18 O. 444, I Longsdorf's Notes, 856.

The heirs of the grantor can not recover property which has been conveyed by their ancestor in fraud of his creditors: *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501; *Barton v. Morris*, 15 O. 408, I Longsdorf's Notes, 717; *Tremper v. Barton*, 18 O. 418, I Longsdorf's Notes, 853; *Robinson v. Robinson*, 17 O. S. 480, II Longsdorf's Notes, 845.

If a creditor, by falsely representing to the debtor that other creditors are about to attach, induces him to assign all his property to such creditor on pretense of securing him, but in fact to prevent attachment and on a secret trust, the debtor can not sue him on the trust or promise nor for damages for the fraud, though he was solvent and intended to pay all his debts: *Trimble v. Doty*, 16 O. S. 118, II Longsdorf's Notes, 763.

A defendant or fraudulent grantee sued by the grantor for damages for deceit in the transaction can not be estopped by his denial of fraud to defeat recovery. It is the law, and not the parties, that will not allow a plaintiff to found his case on fraud: *Trimble v. Doty*, 16 O. S. 118, II Longsdorf's Notes, 763.

No action to enforce the trust can be maintained by the debtor who conveyed his property to defraud creditors on a secret trust to hold it for his use. And so, though the property was acquired after insolvency or from resources not accessible to creditors: *Robinson v. Robinson*, 17 O. S. 480, II Longsdorf's Notes, 845.

A having when insolvent conveyed real estate to B in consideration of B's notes and mortgage thereon, to be reconveyed when A paid the notes, which he did, but left the title in B, who, to keep it from A's creditors, conveyed it three years later without A's knowledge, to C, a friend of A without consideration, and A ratified this, and fourteen years afterwards, having compromised with his creditors sought to recover it. The superior court in general term, in *O'Conner v. Ryan*, 9 Dec. Rep. 575, 15 Bull. 152, held that equity would not assist A to recover the title from C's heirs, but the supreme court reversed this without opinion, and gave judgment for plaintiff in *O'Conner v. Ryan*, 16 Bull. 270, and on rehearing, in *O'Conner v. Ryan*, 17 Bull. 80.

If a judgment has been taken against a grantee who holds under a fraudulent conveyance, and such property is sold upon such judgment, a purchaser who acquires such property at a judicial sale, with full knowledge of the transaction, can retain such property as against the grantor or one who has subsequently purchased from him with actual or constructive notice: *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501.

The presumption that a purchase in a son's name is a gift or advancement is not rebutted by the fact that the father intended to defraud creditors thereby, for no trust results to him but only for his creditors, and the son can eject a subsequent vendee of the father: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216.

Where a person, in order to delay creditors by the advice of his surety of some of the debts, uses his liability to the surety as an excuse to make an absolute conveyance of valuable property to a third person, who subsequently gives the surety a declaration of trust for his protection and benefit, the surety, who has afterwards obtained the legal title also from the trustee, can not set up that the original deed was in fraud of creditors, to prevent the grantor's heirs from

asserting an equity to redeem the property: *Irwin v. Longworth*, 20 O. 581, I Longsdorf's Notes, 926.

No action for failure to carry out a trust which necessarily tends to hinder and delay creditors lies in favor of the grantor: *Brinkerhoff v. Tracy*, 55 O. S. 558, IV Longsdorf's Notes, 672. See also *CONTRACTS*.

Where an owner of ancestral lands, to hinder and delay a possible creditor, conveys them to a third person, who after the death of the grantor, without issue, conveys them to his widow, the brothers and sisters of the grantor can not, for this additional reason, maintain an action against her to compel a conveyance of the lands to them. They stand in the shoes of the grantor and have no rights in law or equity to the lands, but such as could have been asserted by him; and he, by reason of his fraud, had none: *Kihlken v. Kihlken*, 59 O. S. 106, IV Longsdorf's Notes, 760.

(c) *Grantee or Purchaser.*

An inflated consideration in a bill of sale of goods inserted to defraud the seller's creditors will bind the buyer if the sale is fully executed, and estop him to attack a settlement or claim more than the surplus on other items in this account: *Schroeder v. Kisselbach*, 5 Dec. Rep. 158, 3 Am. L. Rec. 295.

No action will lie by the obligee against the obligor on a bond, the consideration of which is a sale made by the former to the latter to defraud creditors; both of them having been guilty of fraudulent intent. In such a cause, the proof of fraud may come from the defendant: *Goudy v. Gebhart*, 1 O. S. 262, I Longsdorf's 972; *Bradford v. Beyer*, 17 O. S. 388, II Longsdorf's Notes, 840.

(d) *Administrator of Grantor.*

The administrator of the grantor can not have a conveyance in fraud of his grantor's creditors set aside, if the creditors at whose instance could have been set aside have been paid: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

The powers of an administrator with respect to the real estate of his decedent are, in this state, purely statutory, and for this reason he can not impeach a fraudulent conveyance of his intestate, except when authorized by statute: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

An action can not be maintained by an administrator to set aside a conveyance in fraud of creditors for the benefit of the estate or the heirs at law, but may be maintained for the benefit of the creditors of the

estate when the personal assets are insufficient to pay debts: *Jones v. Lehman*, 15 O. D. (N.P.) 541.

An administrator can impeach a fraudulent conveyance by his decedent only if the property is required to pay debts. If the personal property is sufficient for all debts except those amply secured by mortgage, the administrator can not obtain an order to sell other lands conveyed in fraud of creditors in order to pay such mortgages: *McCall v. Pixley*, 48 O. S. 379, IV Longsdorf's Notes, 421.

A conveyance of personalty in fraud of creditors by the decedent can not be attacked by the administrator, for he only represents the decedent as to whom the transfer was valid. Since the vendor has no right to have such transfer set aside, the administrator has none: *Benjamin v. Le Baron*, 15 O. 517, I Longsdorf's Notes, 729.

The administrator in possession of chattels can protect that possession for the benefit of the creditors against an unfilled chattel mortgage, though the decedent could not have done so: *Kilbourne v. Fay*, 29 O. S. 264, III Longsdorf's Notes 465; *Whiteley v. Weber*, 2 O. C. C. 336, 1 O. C. D. 517.

If the estate is insolvent, the administrator as trustee for the creditors may, under G. C., § 10777, sue to set aside a fraudulent conveyance, or, if an innocent person has bought the land, may sue the fraudulent grantee for its value: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661 [reversing *Doney v. Dunnicks*, 8 O. C. C. 163, 4 O. C. D. 380].

(e) *Assignee or Trustee.*

The discharge of the bankrupt by the bankruptcy court does not affect the rights of the trustee to bring an action to set aside the fraudulent transfer: *Nye v. Hart*, 22 O. C. C. 427, 12 O. C. D. 419.

A transfer of property to pay a gambling debt, being absolutely void, and not good even between the parties, the grantor's assignee for benefit of creditors has the right to recover the property, and a creditor of the assignor has no right to proceed subsequently under G. C., § 11106, to have the transfer set aside, and obtain a preference thereby: *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572.

The assignee has capacity to claim that a conveyance was in fraud of creditors, or to require an account of money paid on incumbrances on the wife's property in fraud of creditors: *Spangenberg v. Schwartz*, 9 Dec. Rep. 244, 11 Bull. 283. See also *ASSIGNMENTS FOR BENEFIT OF CREDITORS*.

The act of the bankrupt's brother, although he was township trustee, in effecting a settlement of the defalcation which was fraudulent as to general creditors, not having been directed by the board of trustees, can not be imputed to the trustees as an official act, and as such act of the individual trustee was not necessary to make the township whole from the defalcation, the trustee in bankruptcy can not avail himself of it in an effort to have the settlement with the township declared to be a preference: *Painter v. Trustees*, 9 O. L. R. 273.

(f) *Receiver.*

A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and the recovery of possession thereof, and he may maintain such an action in his own name; all the authority in that behalf accorded to a receiver of a dissolved corporation is possessed by a receiver of an insolvent corporation: *Sayle v. Savings & Loan Co.*, 2 O. C. C. (N.S.) 401, 15 O. C. D. 503 [distinguishing *Benjamin v. LeBaron*, 15 O. 517. I Longsdorf's Notes, 729].

A conveyance of land worth \$1,000 by a husband direct to his wife in consideration of her release of dower in other lands conveyed worth \$20,000 will be supported against his subsequent creditors: *Williams v. Williams*, 2 Dec. Rep. 467, 3 W. L. M. 157. See also HUSBAND AND WIFE.

In March 1876, the Monitor Furnace Company, a corporation, was dissolved by a decree of the court of common pleas of Lawrence county, and J. P. S. was appointed and qualified as receiver, to administer the estate under the direction of the court, for the benefit of creditors and stockholders. Before that time the furnace company made a sale of its real estate and other property for the alleged purpose of defrauding its creditors. In August 1878, the receiver having taken no steps to have the sale declared void, L. B., a judgment creditor, commenced an action for that purpose in the same court that dissolved the corporation and appointed a receiver. The corporation and its stockholders, the receiver, the creditors and all persons interested were made parties defendant. It was held that this action was substantially an application to the court to direct the receiver appointed by it to do his duty in the case stated: *Furnace Co. v. Peters*, 40 O. S. 575, IV Longsdorf's Notes, 42.

(g) *Creditors.*

The creditors of the grantor whose claims existed when the conveyance was made, or

whose claims the grantor intended to defeat by the conveyance, may attack the same: *Clark v. Hubbard*, 8 O. 382, I Longsdorf's Notes, 443; *Myers v. Hewitt*, 16 O. 449, I Longsdorf's Notes, 774; *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851; *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256; *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501.

A creditor whose claim arises subsequently to a voluntary conveyance can have such conveyance set aside only by showing actual fraud or a secret trust for the benefit of the creditor under G. C., § 8617: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

A simple contract creditor can sue to set aside a fraudulent conveyance and appoint a trustee. G. C., § 11106, applies to all creditors: *Combs v. Watson*, 32 O. S. 228, III Longsdorf's Notes, 628 [affirming *Combs v. Watson*, 13 Dec. Rep. 1047, 2 C. S. C. R. 523]; *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

A creditor, who is induced to act as the channel through which the insolvent transfers his property to his wife to avoid creditors, is not estopped to attack the conveyance, if the debtor stood in *loco parentis*. By reason of such relation and difference of sex and disparity of age, their relation will be deemed fiduciary, and the act the result of undue influence, and they are not in *pari delicto*: *Schmelz v. Michelson*, 8 Dec. Rep. 538, 8 Bull. 304.

A judgment creditor having levied on land fraudulently conveyed may maintain a bill to remove the cloud in order to effect a better sale: *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501; *Beaumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

Attaching creditors of personal property held by the sheriff under the attachment may maintain suit to remove the cloud of fraudulent mortgages that would affect sale: *Voss v. Murray*, 50 O. S. 19, IV Longsdorf's Notes, 482.

A conveyance by a debtor in fraud of creditors being a nullity as to a creditor an execution on the land and sale thereunder passes the legal title, and, hence, although the creditor may file a bill to remove the cloud and effect a sale, this is not necessary—hence, the fact that in such a suit the fraudulent grantee was not made a party, and now brings ejectment against the purchaser under the decree in the chancery suit, will not avail him, for the purchaser can set up the decree in defense: *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851.

A lessee who contracts to enter into a lease is a debtor for the rent of the entire

term, and the lessor as creditor for such amount, may sustain action to set aside a fraudulent transfer by the lessee of his property: *Ohmer v. Heinz*, 1 Dayton Term Rep. (Iddings) 23.

If the lessee gave a note for the rent and claims novation, the burden is on him to show that it was in payment, and the lessor's receipt for the note is not sufficient: *Ohmer v. Heinz*, 1 Dayton Term Rep. (Iddings) 23.

Creditors of a decedent may bring suit against the administrator to set aside a fraudulent conveyance by the decedent, and to subject the property, and so especially after demand on and refusal of the administrator to bring such suit: *Perrine v. Pritz*, 1 Dayton Term Rep. (Iddings) 64.

An assignment of a public contract before completion of the work is perfected as against the assignor's creditors, being accepted by the public officials, though the contractor's bondsmen had not been notified nor any new bond given: *Coal Co. v. Kirchner*, 1 Dayton Term Rep. (Iddings) 125. See also ASSIGNMENTS.

Death of the debtor and appointment of an administrator does not deprive the creditor of the right to attack the fraudulent conveyance. G. C., § 10777, giving an administrator this remedy, is not exclusive. But after the conveyance is set aside, the assets can be administered through the personal representative: *Hoffman v. Kiefer*, 19 O. C. C. 401, 10 O. C. D. 304.

The right arising under G. C., § 11102, inures to the equal benefit of all creditors of the insolvent maker of the conveyance; and a right of action to enforce the trust created by this section accrues to each creditor, contemporaneously with the execution and delivery of the instrument upon which the trust arises, whether his claim has been reduced to judgment or not: *Brinkerhoff v. Smith*, 57 O. S. 610, IV Longsdorf's Notes, 729.

An indebtedness paid by reason of suretyship on the bond of a guardian relates back to the date of the bond so as to give sureties the rights of creditors in reference to fraudulent conveyances: *Boies v. Johnson*, 1 O. C. C. (N.S.) 451, 15 O. C. D. 331.

Mortgages executed by the husband on part of his property, to his father, before his marriage, and four years before the separation from his wife took place, will not be set aside as far as the wife's right to alimony is concerned, although these mortgages were executed voluntarily without request therefor from his father and although it seems probable that in executing them he was looking forward to a time when he might be expected to respond in alimony to his in-

tended wife: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where a husband contemplating to abandon his wife executes a mortgage covering all his property, to secure a pretended indebtedness, but in fact without consideration and for the purpose of defeating any judgment for alimony she might recover in a suit for divorce and alimony which she might subsequently institute on the ground of his abandonment of her, such mortgage is a fraud on her rights, and the rights of no innocent parties intervening, it will be set aside as against her claim for alimony, although the husband by false representations had induced his wife to join him in the execution of such mortgage: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where the mortgage was executed by the husband to his brother-in-law, the consideration being a pretended indebtedness to his father to whom the mortgage was then assigned, who, however, did not know of, nor request the execution of such mortgage, it was held that the son was acting in the transaction as the agent of his father, and whether the father's claim was valid or not, he was bound by the fraud thus committed by his son on the rights of his wife whether he had knowledge of his son's intentions or not, and the mortgage in the father's hands will be set aside as against the rights of his son's wife for alimony: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526. See also HUSBAND AND WIFE.

If the receiver of a dissolved corporation takes no steps to have a sale by the corporation alleged to be in fraud of creditors set aside, a suit for the purpose by a judgment creditor in the court that appointed the receiver making him and the stockholders and creditors and all persons interested defendants, will be treated as an application to the court to compel the receiver to do his duty: *Furnace Co. v. Peters*, 40 O. S. 575, IV Longsdorf's Notes, 42. See also RECEIVERS.

A judgment creditor buying land at the sale, the judgment being on attachment proceedings against a nonresident, now seeks to set aside prior deeds by the debtor as fraudulent. It was held that the judgment was conclusive, and that the buyer at the sale is a creditor and authorized to contest the deeds: *Starr v. Starr*, 1 O. 321, I Longsdorf's Notes, 85. See also JUDGMENT.

If a debtor transfers property to an agent of his creditor to pay the debt, the agent is a trustee for the principal, and the transfer inures to all creditors. Accordingly, a transfer to certain creditors, and to the president of a corporation creditor in consideration of a cancellation of their debts, is, by reason

of the latter's agency, covered by G. C., § 11102, etc.: *Gashe v. Young*, 51 O. S. 376, IV Longsdorf's Notes, 548.

A conveyance by chattel mortgage in contemplation of insolvency by a debtor to an agent of the creditor to secure the debt, inures to the benefit of all creditors, for such agent is a trustee for his principal: *Lee v. Hennick*, 52 O. S. 177, IV Longsdorf's Notes, 568.

A purchase from a debtor for the avowed purpose of preventing the creditor from realizing his judgment is void as to such creditor: *Brown v. Cutler*, 8 O. 142, I Longsdorf's Notes, 419.

A conveyance by a failing debtor to his son, who knew of some of his liabilities, but not of their extent, and neither party intended fraud, inures to all creditors: *Bank v. Miller*, 9 O. C. C. 111, 6 O. C. D. 1.

A mortgage by an insolvent to pay a debt owed by him to his wife is not a general assignment because made to her through a trustee, for she could not take it direct: *Hitesman v. Donnel*, 40 O. S. 287, IV Longsdorf's Notes, 23; *Bates v. Bennett*, 9 Dec. Rep. 727, 17 Bull. 64.

A conveyance to an infant son or any creditor under other disability, as lunacy is not a general assignment: *Bates v. Bennett*, 9 Dec. Rep. 727, 17 Bull. 64.

A mortgage by a failing debtor to a trustee for the use of his wife to secure a debt due her, must now be held to inure to all creditors, for it is now legal to have made the mortgage to the wife direct: *Bank v. Miller*, 9 O. C. C. 111, 6 O. C. D. 1.

(h) Future Creditors.

A conveyance of land, where the grantor has ample means left to satisfy all debts he has at the time of such conveyance, will not be set aside as fraudulent on the petition of a subsequent creditor, unless it is shown that such conveyance was made in contemplation of becoming a debtor of such subsequent creditor: *Hetrick v. Gregg*, 8 O. N. P. 24, 10 O. D. (N.P.) 462.

If the conveyance at the time was made with the intent to defraud the existing creditors of the grantor, a subsequent creditor may avail himself of this fraudulent character of the conveyance and have it set aside: *Hetrick v. Gregg*, 8 O. N. P. 24, 10 O. D. (N.P.) 462.

A gift, void as to existing creditors, may, in the absence of intentional fraud, be good as against subsequent creditors: *Crumbaugh v. Kugler*, 2 O. S. 373, I Longsdorf's Notes, 1061.

A voluntary conveyance, void as to creditors, is, after they have been paid off, valid

as to subsequent creditors, unless actual fraud or a secret trust is shown: *Webb v. Roff*, 9 O. S. 430, II Longsdorf's Notes, 387.

A voluntary settlement for wife and children is void as to previous but not as to subsequent creditors, but otherwise if made for that purpose with a fraudulent design: *Bank v. Ennis*, W. 604, I Longsdorf's Notes, 47.

If valid, a reconveyance by the trustee to the parent on the same trusts can not affect the *cestuis'* interests: *Bank v. Ennis*, W. 604, I Longsdorf's Notes, 47.

A gift is not void on subsequent insolvency. There must be an injury to existing creditors or a fraudulent intent to injure future ones to avoid it: *Creed v. Bank*, 1 O. S. 1, I Longsdorf's Notes, 929.

A voluntary conveyance to a wife is not void as to a subsequent creditor, unless made with intent to defraud such subsequent creditor. A claimant in tort, on which a judgment is subsequently got, is a subsequent creditor: *Evans v. Lewis*, 30 O. S. 11, III Longsdorf's Notes, 512.

Incumbered land being given by a man to his wife, with a promise to pay off the mortgage, is an executed gift only of the equity of redemption, and the promise is no gift until actual payment. If such payment is not until after he becomes insolvent, it is fraudulent as to creditors: *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

A claimant for damages for assault and battery is not until judgment thereon a creditor in the sense that a conveyance pending suit is as to him fraudulent, and he can not subject the buyer's title on that ground: *Detweiler v. Louison*, 18 O. C. C. 434, 10 O. C. D. 95.

A surety on appeal bond before judgment on appeal had been rendered is a debtor whose voluntary conveyance may be attacked under G. C., § 11106, etc., although in an action on the bond he may be found not liable, for his undertaking is to pay such judgment as is rendered on appeal: *Kerber v. Ruff*, 3 O. N. P. 165, 4 O. D. (N.P.) 406.

A voluntary conveyance on a secret trust by a person who has ample other property to pay all his debts is valid if the trust is executed before he incurs other debts, but if he incurs other debts before the trust is executed, such subsequent creditors can subject the property. This is not because it was fraudulent, but because of the grantor's present equity, so that such creditors are in fact existing and not subsequent creditors: *Bowlus v. Shanabarger*, 19 O. C. C. 137, 10 O. C. D. 167.

If a husband buys land in his wife's name, it is not like parent and child where advancement is presumed, but the general doctrine

applies that a trust results. Accordingly, even subsequent creditors can subject it to the payment of the husband's debts: *Parish v. Rhodes*, W. 339, I Longsdorf's Notes, 26. See also TRUSTS.

5. *Against Whom Rights of Creditor May Be Asserted.*

(a) *Grantee.*

A purchase made in good faith and for fair value from an insolvent debtor, while G. C., §§ 11102, *et seq.*, as amended, 93 v. 290, was in force, must be held valid as to such purchaser, even though the seller may have made the sale in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion of others, or with intent to hinder, delay or defraud his creditors, and even though a deed of assignment, made by such debtor, was filed within ninety days after such sale: *Bobilya v. Priddy*, 68 O. S. 373, IV Longsdorf's Notes, 945.

A *bona fide* mortgagee of husband and wife of property purchased by the husband in the wife's name in fraud of creditors, is not affected by the fraud. The possession of the husband is not notice to him, for it is not adverse to the wife, but referable to his marital rights. Executions against the husband levied on the property are not notice, for he is not in the chain of title: *Shorten v. Drake*, 38 O. S. 76, III Longsdorf's Notes, 958 [reversing *Shorten v. Drake*, 8 Dec. Rep. 184, 6 Bull. 202].

An innocent heir of the fraudulent grantee having made improvements on the premises is entitled to equitable compensation therefor if the conveyance is set aside and a sale is ordered, and the heir is entitled to relief in this suit, and it is error merely to save his rights under the occupying claimant law: *Bomberger v. Turner*, 13 O. S. 263, II Longsdorf's Notes, 607.

Improvements by curbing and guttering, though not on the premises, and also taxes paid by the heir, are to be compensated, even though the occupying claimant law would not have covered them: *Bomberger v. Turner*, 13 O. S. 263, II Longsdorf's Notes, 607.

Buying an overdue note from a payee in debt does not entitle a creditor of the payee to attack the indorsee's title: *Rooker v. Rooker*, 29 O. S. 1, III Longsdorf's Notes, 433.

A having a contract for land, subcontracted it to B. A being unable to complete his contract, and B refusing to do so, A's brother-in-law, M, to save the forfeiture and protect A's family, paid up and took title in his own name and ejected B after refusal by the latter to complete his contract. It was held

(1) B has lost all lien on the land for his payments to A. (2) M's purchase creates no resulting trust for A. (3) M's purchase it not in fraud of C's subsequent creditors. The court will not aid A and B in any combination to defraud M: *Carter v. Cook*, W. 443, I Longsdorf's Notes, 35.

One who with knowledge of the insolvency of another and his contemplated general assignment for the benefit of creditors, receives from the insolvent a large sum of money and gives due bills therefor, holds the money in trust for the creditors and can not absolve himself from liability therefor to the creditors by returning the money to the insolvent personally after the assignment has been made, especially where there was no disclosure to the assignee of such restoration: *Friedman v. Mitz*, 12 O. C. C. (N.S.) 41, 21 O. C. D. 146 [affirmed, without opinion, *Mitz v. Friedman*, 84 O. S. 461, and reversing *Friedman v. Mitz*, 21 O. D. (N.P.) 839]. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Where a wife deeded property to her husband for a consideration of \$1.00, and he sells it for half its value in anticipation of an alimony suit, her dower at present value and also alimony to the extent of the deficiency will be charged against the purchasers. They are chargeable with notice: *Tate v. Tate*, 19 O. C. C. 532, 10 O. C. D. 321. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

The immediate grantee holds subject to the rights of the creditors in accordance with the principles heretofore discussed. See cases in V, A, B, and C.

(b) *Purchaser From Grantee.*

A *bona fide* purchaser who acquires from the grantee land which such grantee has acquired in fraud of his grantor's creditors, who takes without notice of such fraud or of the rights of the creditor, has a right prior to that of a creditor, who has obtained a judgment against the debtor and levied execution upon the land after such fraudulent conveyance and prior to such conveyance to such *bona fide* purchaser: *Bank v. Teeters*, 31 O. S. 36, III Longsdorf's Notes, 561.

A surety who takes a mortgage to indemnify him against loss is a *bona fide* purchaser within the meaning of the rule granting protection to such *bona fide* purchaser: *Bank v. Teeters*, 31 O. S. 36, III Longsdorf's Notes, 561.

A *bona fide* purchaser of an interest in a mortgage given in fraud of the mortgagor's creditors has an interest therein prior to the rights of such creditors: *Holmes v. Gardner*, 50 O. S. 167, IV Longsdorf's Notes, 492.

A *bona fide* buyer of a fractional part of the amount represented by a note and mortgage made in fraud of creditors will be protected *pro tanto* as against general creditors of the mortgagor: *Baily v. Smith*, 14 O. S. 396, II Longsdorf's Notes, 668, that the transfer of a mortgage is subject to equities does not apply where the mortgagor is not innocent: *Holmes v. Gardner*, 50 O. S. 167, IV Longsdorf's Notes, 492.

If the fraudulent grantee sells to a *bona fide* buyer, who thus gets a good title, a resale by the buyer to the original grantee does not give him the buyer's good title, but he holds subject to creditors: *Schultz v. Brown*, 3 O. C. C. 609, 2 O. C. D. 353.

Where A, a debtor, conveyed his property to one B who at once reconveyed to A's wife, and the creditor then brought suit to subject it, making A and B parties, but not A's wife, and pending this suit A's wife, with her husband, mortgaged the property for value, the mortgagee's title is good against a buyer at sheriff's sale under the suit. A person is not obliged to look for pending cases against a former owner brought after he has parted with his title: *Detweiler v. Louison*, 18 O. C. C. 434, 10 O. C. D. 95.

A buyer at execution sale against the fraudulent grantee gets a good title as against the grantor, whether he had notice of the fraud or not: *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501.

6. Release of Dower.

A release of dower to a grantee under a fraudulent conveyance does not inure to the general creditors of the husband: *Ridgway v. Masting*, 23 O. S. 294, III Longsdorf's Notes, 124.

Where a wife in consideration of the scaling down of the claims of certain of her husband's creditors and an extension of time on the amounts so reduced, has joined in a trust deed, releasing her dower and said trust deed has been construed by the court under G. C., § 11102, to inure to the equal benefit of all creditors as a general assignment, to the extent of the amounts of the claims intended to be covered by said trust deed the wife's release of dower is operative; as to the other general creditors, it is not: *Case v. Hewitt*, 21 O. C. C. 730, 11 O. C. D. 823 [distinguishing *Woodworth v. Page*, 5 O. S. 70, II Longsdorf's Notes, 159; *Ridgway v. Masting*, 23 O. S. 294, III Longsdorf's Notes, 124. See also DOWER.

A release of dower in a deed executed by husband and wife, without consideration, to defraud his creditors, will not estop her to claim dower against the grantee, or any purchaser from him with notice. No fraud

can be imputed to her because of such release, for the reason that she releases nothing that could be taken by her husband's creditors: *Woodworth v. Paige*, 5 O. S. 70, II Longsdorf's Notes, 159.

A release of dower by a married woman, who joins her husband for that purpose in a deed to defraud purchasers, is binding only as against the releasee and his privies; and where such fraudulent conveyance is set aside at the suit of the party injured, and a transfer of the premises, as against her husband, is decreed to the plaintiff, the wife, in the event of her surviving the husband, is entitled to dower as against such owner: *Ridgway v. Masting*, 23 O. S. 294, III Longsdorf's Notes, 124.

G. RESTORATION BY GRANTEE.

A grantee who has restored property conveyed to him in fraud of his grantor's creditors and has surrendered such property for the benefit of such creditors thereby relieves himself from liability: *Swift v. Holdridge*, 10 O. 231, I Longsdorf's Notes, 506.

Equity treats with favor conduct on the part of a grantee who takes in fraud of the grantor's creditors showing his intention to surrender such property for the benefit of the grantor's creditors: *White v. Brocaw*, 14 O. S. 339, II Longsdorf's Notes, 663.

A mortgage to secure a creditor of the grantor, given by a fraudulent grantee, with the assent of such creditor, is valid, if such mortgage would have been valid if it had been given by the grantor himself: *Brown v. Webb*, 20 O. 389, I Longsdorf's Notes, 914; *Webb v. Brown*, 3 O. S. 246, II Longsdorf's Notes, 25.

An infant to whom property has been conveyed by his father in fraud of his father's creditors, and who reconveys such property for the benefit of his father's creditors, can not subsequently avoid such reconveyance on the ground of his minority: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982.

Where an owner of ancestral lands conveys them to another, on a written agreement that he will, upon request, reconvey them, the ancestral character of the land is thereby destroyed; and if a request to reconvey is made, but the grantor dies before it is executed, without issue, but leaving a widow, and brothers and sisters, a conveyance to the widow is a proper execution of the trust, and the brothers and sisters of the deceased grantor have, as heirs, no legal or equitable title to the land: *Kihlken v. Kihlken*, 59 O. S. 106, IV Longsdorf's Notes, 760.

Where an owner of ancestral lands, to hinder and delay a possible creditor, conveys them to a third person, who after the death

of the grantor, without issue, conveys them to his widow, the brothers and sisters of the grantor can not, for this additional reason, maintain an action against her to compel a conveyance of the lands to them. They stand in the shoes of the grantor and have no rights in law or equity to the lands, but such as could have been asserted by him; and he, by reason of his fraud, had none: *Kihlken v. Kihlken*, 59 O. S. 106, IV Longsdorf's Notes, 760.

The moral duty of the voluntary grantee to reconvey does not apply where the conveyance by an embarrassed debtor is of property derived from his wife, and the grantee is her daughter, and no creditors ever object. Such reconveyance is without consideration, and if induced by fraud, will be set aside: *Jaeger v. Herancourt*, 7 Dec. Rep. 1, 1 Bull. 10.

A grantee in trust to prefer a grantee may, before any steps are taken to have the conveyance declared an assignment for creditors, renounce the trust and restore the property without becoming individually liable for its value. This, however, will not affect the rights of other creditors to have the transfer declared an assignment and administered as such: *Robertson v. Desmond*, 62 O. S. 487, IV Longsdorf's Notes, 839 [reversing *Desmond v. Roth*, 16 O. C. C. 483, 9 O. C. D. 205].

A voluntary conveyance by parent to child can not be defeated here, unlike England, by a subsequent conveyance by the parent to a buyer for value, who had notice, and record is notice: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216; *Mattheis v. Rentz*, 5 Dec. Rep. 72, 2 Am. L. Rec. 371.

H. ESTOPPEL.

A creditor who has with knowledge of the facts dealt with the parties to a fraudulent conveyance upon the theory of its validity is estopped from subsequently attacking it on the ground of fraud: *Rennick v. Bank*, 8 O. 530, I Longsdorf's Notes, 452.

Inasmuch as an action will not lie on a note executed in furtherance of a scheme to defraud creditors, the administrator of the promisee is estopped from prosecuting such an action by evidence of fraudulent intent imported into the case though appeal is not pleaded: *Baker v. Hall*, 9 O. N. P. (N.S.) 396, 20 O. D. (N.P.) 445.

Where A, a bishop, and B, as his agent, were jointly and severally liable to many creditors, and others had a right to elect which to hold as debtor, and B had no other debts, and no property, and A, to avoid the public appearance of insolvency and to protect his creditors, conveyed all his property to B, who at the same moment assigned for

benefit of creditors, it was held, (1) A and B thereby waive the right to claim that a creditor by electing to hold either released the other; (2) B becomes absolutely liable for A's debts to the extent of the property conveyed, and A remained liable and no creditor by proving against B and taking a dividend loses the right to hold A for the balance. All creditors of A are entitled to get dividends: accordingly, taking judgment against A does not affect such right: *Brannan v. Purcell*, 41 O. S. 187, IV Longsdorf's Notes, 57 [affirming *Brannan v. Purcell*, 8 Dec. Rep. 159, 6 Bull. 67].

VI. PREFERENCES.

A. BY NATURAL PERSONS.

1. Secret Trust.

If a creditor goes beyond collecting or securing his own debt and attempts to secure any other, or becomes bound to account to, or is a trustee for any other creditor, the statute enlarges the trust so as to destroy his preference and inure to all creditors equally: *Bloom v. Noggle*, 4 O. S. 45, II Longsdorf's Notes, 70; *Harkrader v. Leiby*, 4 O. S. 602, II Longsdorf's Notes, 138; *Dickson v. Rawson*, 5 O. S. 218, II Longsdorf's Notes, 172; *Pendery v. Allen*, 50 O. S. 121, IV Longsdorf's Notes, 487.

A creditor who obtains from a failing debtor property in trust to pay himself and others must account for it to all creditors, though he has divested himself of it to others: *Mitchell v. Gazzam*, 12 O. 315, I Longsdorf's Notes, 611 [as limited by *Atkinson v. Tomlinson*, 1 O. S. 237, I Longsdorf's Notes, 968, and *Doremus v. O'Harra*, 1 O. S. 45, I Longsdorf's Notes, 938].

If a creditor receives notes of the debtor for his debt and assigns them to various persons, and afterwards obtains an assignment of all the debtor's effects, he takes as trustee for such noteholders, and, accordingly, the assignment inures to the benefit of all other creditors: *Doremus v. O'Harra*, 1 O. S. 45, I Longsdorf's Notes, 938.

A mortgage to three persons, conditioned to save them from certain indorsements, and also to pay certain other creditors named, is an assignment enlarged by the statute to the benefit of all creditors: *Harkrader v. Leiby*, 4 O. S. 602, II Longsdorf's Notes, 138; *Dickson v. Rawson*, 5 O. S. 218, II Longsdorf's Notes, 172; *Flour Feed Co. v. Shute*, 10 Dec. Rep. 198, 19 Bull. 180.

The result can not be evaded by becoming surety to other creditors. Thus, if an insolvent agrees with four of his creditors to give a mortgage to one who agrees to be surety to the other three, the mortgage would

inure to the equal benefit of all the creditors of the debtor: *Bloom v. Noggle*, 4 O. S. 45, II Longsdorf's Notes, 70.

A, in contemplation of insolvency, and to prefer certain creditors, conveyed most of his property to B, who, in consideration thereof, agreed to pay off debts on which B was surety, and to assume and pay certain other debts. It was held that this is not *per se* within the statute making the transaction a general assignment, for B and the creditors became debtor and creditors, and not trustee and *cestuis* by the transaction, no secret trust being averred: *Bagaley v. Waters*, 7 O. S. 359, II Longsdorf's Notes, 306.

So if a purchase, the consideration of which is a prior debt, and the assumption of other debts is valid: *Sack v. Hemann*, 6 Dec. Rep. 1104, 8 Dec. Rep. 269, 10 Am. L. Rec. 483, 6 Bull. 825; *Roberts v. McWilliams*, 3 Dec. Rep. 152, 4 Gaz. 97.

Where a surety takes an indemnity mortgage from the debtor, not only to secure the debt, but also to secure another debt which he assumes without having been originally liable thereon, the mortgage inures under, G. C., § 11102 to all creditors as a general assignment: *Pendery v. Allen*, 50 O. S. 121, IV Longsdorf's Notes, 487.

A conveyance by insolvent partners of all their property for \$4,500, to be paid to certain creditors in full, and the balance to the other creditors *pro rata*, creates an equal trust on all under the statute, either in the property or purchase-money. This effect can not be changed by the subsequent destruction of the conveyance and substitution of a different one: *Gaylord v. Cramer*, 12 Dec. Rep. 188, 1 H. 369.

A mortgage to one creditor to secure the claims of all the creditors except one, who had refused to assent to the extension, is equivalent to assignment for benefit of all. That the nonassenting creditor was offered the same terms as the rest is immaterial; he was not obliged to submit to the burden: *Hunnewell v. Scarborough*, 12 Dec. Rep. 712, 1 D. 427.

The character of an assignment is determined when it was made and is not changed by the property turning out only enough to pay the assignees without any surplus in trust. For as it subjects the assignee to account to another creditor it is in trust, and accordingly inures to all: *Dickson v. Rawson*, 5 O. S. 218, II Longsdorf's Notes, 172.

An assignment, in contemplation of insolvency, containing preferences of some creditors to the exclusion of others, becomes operative on delivery, and the statute makes it inure to the benefit of all, and the want of assent of the other creditors or a subsequent arrangement made to render the assignment

inoperative will not enable the trustee to disclaim, and escape accountability to such creditors for the property: *Hyde v. Olds*, 12 O. S. 591, II Longsdorf's Notes, 584.

Reasonable indemnity to some of several cosureties in contemplation of insolvency does not inure to all creditors, even though in law they are trustees for the particular creditors and for their cosureties for their personal benefit extends to the whole value of the trust: *Roberts v. McWilliams*, 3 Dec. Rep. 152, 4 Gaz. 97.

A mortgage to B, as collecting agent of a society, is not necessarily a trust equivalent to an assignment for creditors, the collector being responsible for money in his hands. If he had loaned the money to the mortgagor he is entitled to security for it, though the society is benefited: *Bates v. Bennett*, 9 Dec. Rep. 727, 17 Bull. 64.

A transfer of securities to three persons, in consideration of debts due them, to be used to pay one in full, balance to the next in full, and any surplus to the other, is not equivalent to a general assignment, for neither is a trustee any more than if three papers, one to each, had been made: *Coppock v. Kuhn*, 3 O. C. C. 599, 2 O. C. D. 347 [see also *Leonard v. Kebler*, 50 O. S. 444, IV Longsdorf's Notes, 506].

A mortgage to four persons to secure them, not on a debt on which they are jointly liable, but on which some are severally and others jointly liable, is an assignment in trust for all: *Brannon v. Brannon*, 13 Dec. Rep. 138, 2 D. 224.

A mortgage of realty or personalty, joint in form, to two creditors or sureties, to secure the several debts of each, is in law several and not joint, and each has an interest only for his own debt, and not in trust for the other, accordingly it is valid: *Roberts v. McWilliams*, 3 Dec. Rep. 152, 4 Gaz. 97 [denying *dictum* in *Brannon v. Brannon*, 13 Dec. Rep. 138, 2 D. 224].

A creditor may in good faith, for the sole purpose of securing himself, take an assignment of property from a failing debtor to sell, pay himself, and account to him for the balance. So held, where two sureties of the debtor procured such an assignment of his store in order to secure themselves. It is in effect a mortgage: *Atkinson v. Tomlinson*, 1 O. S. 237, I Longsdorf's Notes, 968 [overruling *Mitchell v. Gazzam*, 12 O. 315, I Longsdorf's Notes, 611, in so far as it makes such assignment inure to all].

The reservation of the surplus, after payment of a debt, does not render a conveyance fraudulent, for it only stipulates for the performance of a legal duty: *Floyd v. Smith*, 9 O. S. 546, II Longsdorf's Notes, 398.

That the creditor was a relative, and was to sell at auction, and pay any surplus to other creditors, will not invalidate: *Wilcox v. Kellogg*, 11 O. 394, I Longsdorf's Notes, 570.

A transfer by a debtor, of property, as of a credit, by drawing on it, where the transferee takes it on a secret trust for claimant is *prima facie* fraudulent, and the claimant must show adequacy of consideration and good faith. The mere production of a transfer does not put the burden on creditors: *Ferguson v. Gilbert*, 16 O. S. 88, II Longsdorf's Notes, 762.

Where a brother of the vendor knowing his insolvency bought his land, agreeing as consideration to pay a mortgage on it, release a debt due to himself and convey to the vendor a tract worth \$3,000, which in all was a full consideration, but also agreed to let the vendor remain in possession until the vendee could sell the land and reimburse himself out of the proceeds and pay the vendor the balance, if any, this makes the conveyance void as to creditors, although the vendee had no intent to defraud them, and it will be set aside under G. C., § 11106: *Loudenback v. Foster*, 39 O. S. 203, III Longsdorf's Notes, 1018.

A conveyance by an insolvent to a creditor in payment of the debt, but with a secret agreement that the surplus over the debt should be paid to the grantor, is void as to other creditors: *Schultz v. Brown*, 3 O. C. C. 609, 2 O. C. D. 353 [affirmed, without opinion, *Brown v. Schultz*, 28 Bull. 356].

A proposition or covenant by the grantor to repurchase within a certain time at the same price, is not evidence of a secret trust in his favor: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192.

A chattel mortgage to one in trust to sell at retail and pay certain creditors in full and then with the consent of other creditors to continue selling and pay them *pro rata*, the value of the property largely exceeding the preferred claims, though not made in contemplation of insolvency, yet in legal effect is a trust necessarily hindering and delaying creditors under G. C., § 11106. Accordingly, the mortgagee is not liable to the mortgagor for failure to sell as agreed, but to the creditors only, if to anyone: *Brinkenhoff v. Tracy*, 55 O. S. 558, IV Longsdorf's Notes, 672.

Where to prevent the sacrifice of a forced sale a debtor deeds his property to one who by separate writing agrees to sell it and apply the proceeds to pay his advances and also debts, preferring one of them, the transaction constitutes a general assignment: *Maas v. Miller*, 58 O. S. 483, IV Longsdorf's Notes, 746.

A cognovit note to a creditor for the amount of his debt and also for the amount of several other debts then transferred to him, and which he is to pay for when he realizes on the cognovit, inures to all creditors under G. C., § 11106: *Bank v. Daniels*, 38 Bull. 178 (without opinion, in the supreme court).

A conveyance to a creditor in consideration of the debt due him, and also of his assumption of and agreement to pay certain other debts is valid; the grantee is a purchaser and not a trustee for general creditors under G. C., §§ 11102, *et seq.*: *Desmond v. Roth*, 16 O. C. C. 481, 9 O. C. D. 204 [reversed, on other points, *Robertson v. Desmond*, 62 O. S. 487, IV Longsdorf's Notes, 839].

Where a person indebted to his son for \$1,200, transfers to him property worth \$8,000, the son assuming the mortgages upon it of \$6,400, but the grantor reserves a life estate, it was held that the reservation of the life estate under the circumstances is a constructive fraud on the grantor's creditors: *Berry v. Haas*, 12 O. C. C. 189, 5 O. C. D. 48.

A conveyance to one to secure a claim due him, and also to him as collecting agent of another creditor, amounts to a general assignment for creditors: *Desmond v. Roth*, 16 O. C. C. 481, 9 O. C. D. 204 [reversed, on other grounds, *Robertson v. Desmond*, 62 O. S. 487, IV Longsdorf's Notes, 839].

An action by the assignee of a claim assigned to collect and pay debts due to him and others named, should not be dismissed for want of jurisdiction when there is no evidence that the assignor was insolvent, and that therefore the assignment operated for the benefit of all creditors: *Acomb v. Clark*, 16 O. C. C. 662, 9 O. C. D. 395.

A grantee who was not aware that creditors were being defrauded, but receives a deed from her debtor of an interest in land worth twice the debt, and is to pay over the excess when she sells, will be protected to the extent of her debt, though she did not record the deed, and if she has sold the property to a *bona fide* buyer, his unpaid purchase money will be subjected. And if the original grantor has received part of the price on this last sale and demands homestead, such payment will be credited against the homestead claim: *Johnson v. Burnside*, 7 O. N. P. 74, 8 O. D. (N.P.) 412.

A conveyance to one partner to secure a debt due the firm is not in trust, for it is for the grantee's own claim, and accordingly does not become an assignment for creditors: *Churchill v. Russell*, 18 O. C. C. 832, 9 O. C. D. 145.

The private placing of the property of a debtor in trust in such a manner as to leave

the grantor insolvent and prevent his creditors from exercising their right to pursue the property for the satisfaction of their claims can not be given validity by any honest intention to preserve the interest of the creditors by so doing and ultimately pay them off in full: *Craydon v. Phonograph Co.*, 1 O. C. C. A. 22.

2. No Secret Trust.

(a) Security by Debtor.

A creditor or surety may get security or payment from a failing debtor, though the effect is to prefer him. He is entitled to the reward of his diligence, though others are thereby prevented from obtaining payment: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192; *Wilcox v. Kellogg*, 11 O. 394, I Longsdorf's Notes, 570; *Kemp v. Walker*, 16 O. 118, I Longsdorf's Notes, 754; *Doremus v. O'Harra*, 1 O. S. 45, I Longsdorf's Notes, 938; *Atkinson v. Tomlinson*, 1 O. S. 237, I Longsdorf's Notes, 968; *Bloom v. Noggle*, 4 O. S. 45, II Longsdorf's Notes, 70; *Harkrader v. Leiby*, 4 O. S. 602, II Longsdorf's Notes, 138; *Dickson v. Rawson*, 5 O. S. 218, II Longsdorf's Notes, 172; *Justice v. Uhl*, 10 O. S. 170, II Longsdorf's Notes, 426; *Cross v. Carstens*, 49 O. S. 548, IV Longsdorf's Notes, 469; *Hauel v. Mintzer*, 12 Dec. Rep. 191, 1 H. 375; *Brooks v. Todd*, 12 Dec. Rep. 84, 1 H. 169.

A mortgage by a failing debtor to a creditor is not void, *Kemp v. Walker*, 16 O. 118, I Longsdorf's Notes, 754; *Justice v. Uhl*, 10 O. S. 170, II Longsdorf's Notes, 426.

Successive mortgages on the same property to secure separate creditors are as legal as one mortgage to prefer one creditor, and do not constitute the mortgagees trustees for creditors generally: *Justice v. Uhl*, 10 O. S. 170, II Longsdorf's Notes, 426.

A preference must be (1) on adequate consideration; (2) in scrupulous good faith by the creditor; (3) with a sole purpose of securing his claim. Adequate consideration will not save a mortgage given and received for the purpose of saving the property to the family: *Walker v. Walker*, 4 O. N. P. 324, 6 O. D. (N.P.) 355.

A chattel mortgage made in pursuance of a prior agreement that a bank would advance certain money to a firm, and that the firm would secure the same by chattel mortgage whenever the bank should deem it necessary, is valid. A supposed tendency to create a fictitious credit will not make it fraudulent as to other creditors. Overdrafts permitted by the bank will not be included: *Campbell v. Bellman*, 11 O. C. C. 360, 5 O. C. D. 389.

A creditor may secure himself or obtain a preference; this he may do by obtaining a

judgment on a cognovit note and levying on the property of his debtor, but to be good against other creditors such preference must be valid in law. A preferential creditor must stand strictly upon his rights at law: *Cobble v. Bank*, 63 O. S. 528, IV Longsdorf's Notes, 861.

An agreement between the owner of a certain stock of goods for the sale thereof to a former employe, in consideration for which the latter has executed certain promissory notes, accompanied by a separate agreement to make monthly payments thereon, with a subsequent promise to prefer and protect the interests of the vendor for certain assistance whereby the latter was enabled to purchase more goods and for certain indorsements on his paper, a transaction by which the vendee thereof executed further notes due one day after date secured by chattel mortgages thereon to the former owner and certain other creditors separately, and whereby the store and goods were subsequently turned over to the agent of such creditors, is not fraudulent *per se* as to other creditors, notwithstanding the effect thereof deprives them of any part in the proceeds of such stock: *Bank v. Leise*, 3 O. C. C. (N.S.) 215, 13 O. C. D. 45.

An agreement by a borrower that in the event of financial disaster he will give the lender a chattel mortgage to secure him, does not make the chattel mortgage given on the eve of assignment for benefit of creditors void as furnishing a delusive credit, but it is valid: *In re Engle*, 1 O. N. P. 110, 1 O. D. (N.P.) 101.

That the debtor's chief inducement in preferring the creditor was fear of sacrifice by forced sale under the pending suit of another does not make the transfer fraudulent: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192; *Thacker v. Newell*, 7 Dec. Rep. 576, 3 Bull. 1150.

A conveyance of goods to defraud creditors is void as to creditors, but valid between the parties, and if a creditor of the seller can peaceably obtain a mortgage on the goods from the fraudulent vendee to secure his claim the mortgage is valid; he need not resort to adversary proceedings: *Brown v. Webb*, 20 O. 389, I Longsdorf's Notes, 914.

If the fraudulent vendee mortgage the goods to secure a debt of the vendor, no assent by the latter is necessary. Such mortgage before seizure by other creditors is valid. The greater diligence of such creditor is rewarded the same as if the vendor had made the mortgage. The vendor does not suffer thereby, for he can question the amount of the debt as allowed by the vendee: *Webb v. Brown*, 3 O. S. 246, II Longsdorf's Notes, 25.

An assignment by a canal company to a contractor of all its cash and future revenues in order to cover the cost of a necessary aqueduct to be thereupon built by him, is valid and will be protected from creditors: *Sedam v. Canal Co.*, 13 Dec. Rep. 190, 2 D. 309.

Orders given by a contractor upon the owner, with no intention at the time of making an assignment, do not inure to the benefit of all his creditors, and are payable in the order of their priority as to time. G. C., § 11104, does not apply: *In re Dunning*, 48 Bull. 39. See also NEGOTIABLE INSTRUMENTS.

A chattel mortgage given by an insolvent person to a bank to secure a certain sum of money, within ninety days before making an assignment for creditors, a part of which sum was an old debt owed by the insolvent to the bank, and a part was for money advanced by the bank to the insolvent at the time of the giving of the mortgage, is void as to the pre-existing indebtedness and valid as to the money so advanced: *In re Assignment of Summers*, 8 O. N. P. 674, 10 O. D. (N.P.) 301. See also CHATTEL MORTGAGES.

A valid preferential mortgage or deed may be made in Ohio by an insolvent, provided the grantee or mortgagee is not made a trustee for other creditors, and the grantee or mortgagee is in ignorance of a purpose to prefer, and the consideration is not so grossly inadequate in case of a deed as to justify a court of equity in regarding the conveyance as in a measure voluntary; or even with knowledge on the part of the mortgagee of the insolvency of the mortgagor, the mortgage may still be valid to secure loans made on the faith of a promise given at a time when the mortgagor was solvent that they should be so secured: *Cole v. Bank*, 15 O. C. C. (N.S.) 315 [affirmed, without opinion, *Bank v. Newton*, 82 O. S. 444].

Deeds will be deemed to have been held by the cashier to secure a preference to the bank, where so received with the understanding that they were not to be recorded, but the debtor was to continue in possession and manage the property as his own, and upon his selling any one of the tracts the deed therefor was to be returned to him upon payment of the *pro rata* amount of his obligation to the bank, and sales were so made, and the deeds by force of this arrangement continued to be to some extent under the control of the debtor for a period of five years; and the attempted preference will date from the time of the filing of the deeds for record: *Ragan v. Donovan*, 10 O. L. R. 353.

A bank is charged with knowledge of a debtor's insolvency, where it appears that

its cashier, without making inquiry as to encumbrances, accepted from the said debtor, deeds conveying different tracts of land, wherein the consideration was so apportioned as to cover the present indebtedness to the bank although in excess of the real value of the land, and the cashier knew that the visible resources of the debtor were thereby exhausted, and also that there were other matters outstanding as to which liability to the bank might result: *Ragan v. Donovan*, 10 O. L. R. 353.

Where a township trustee becomes aware that the township treasurer is short in his accounts for a large sum, and joins in conveyances and otherwise assists the treasurer in making the amount good, and the treasurer then goes into bankruptcy, the knowledge of the single trustee as to the insolvency of the treasurer becomes the knowledge of the township and places the township as a creditor of the treasurer in the same class as his general creditors: *Painter v. Trustees*, 9 O. L. R. 273.

(b) Security by Fraudulent Grantee of Debtor.

The right to recover on a note can not be affected by the fact that payee knew that the effect would be to take property that would have gone to other creditors, if she had not secured or enforced her claim: *O'Keefe v. Mahoney*, 20 O. C. C. 709, 10 O. C. D. 819.

The fact that certain creditors of an assignor for the benefit of creditors to whom he had executed promissory notes for goods purchased before the assignment had negotiated or discounted the notes at a bank and taken the proceeds and applied them to the purposes of their business, but which notes were not paid, does not extinguish the indebtedness of the maker of the notes. Therefore, the taking of other notes due in one day from date secured by mortgages on the maker's stock of goods, it being understood that the former notes should be returned to the debtor, gives none other than the payees of such notes any benefit under the mortgages: *Bank v. Leise*, 3 O. C. C. (N.S.) 215, 13 O. C. D. 45 [distinguishing *Pendery v. Allen*, 50 O. S. 121, IV Longsdorf's Notes, 487].

Under G. C., §§ 11102, *et seq.*, prior to the amendment of 93 v. 290, mortgages given to secure *bona fide* debts, and to give them preference over general creditors under a deed of assignment, made substantially at the same time but not recorded until after the mortgages were recorded, are not invalid and do not constitute the agent of such mortgages a trustee for the benefit of all the creditors;

under the law as it then stood, such preferred creditors, are entitled to hold property and apply it to the payment of their respective mortgages according to their respective rights and equities, although under the present law such transactions would be void or would inure to all creditors: *Bank v. Leise*, 3 O. C. C. (N.S.) 215, 13 O. C. D. 45.

The sales, conveyances and transfers made within ninety days of the filing of the deed of assignment which are void, under G. C., §§ 11102, *et seq.*, are such as are made in contemplation of insolvency or with a design to prefer one or more creditors, or, with intent to hinder, delay or defraud creditors: *Hunt v. Bode*, 66 O. S. 255, IV Longsdorf's Notes, 906.

If the pledgor or transferor of an interest in warehouse receipts or choses in action to secure a debt, file a deed of assignment within ninety days after making such pledge or transfer to secure a second creditor, the same will not be deemed and held to be fraudulent and void as to the assignee, under G. C., §§ 11102, *et seq.*, unless the pledge or transfer was in contemplation of insolvency, or, with a design to prefer one or more creditors to the exclusion in whole or in part of others; or, with intent to hinder, delay or defraud creditors: *Hunt v. Bode*, 66 O. S. 255, IV Longsdorf's Notes, 906.

G. C., §§ 11102, *et seq.*, as amended, 93 v. 290, is sufficiently broad to include "payment of money," made in contemplation of insolvency or with intent to prefer creditors, although the term "payment" is not specified in its inhibitions: *Gettinger v. Bank*, 13 O. C. D. 77 [reversed, *Bank v. Gettinger*, 68 O. S. 389, IV Longsdorf's Notes, 945].

Where an insolvent debtor mortgages his whole property for its full value to secure a loan from a third person, and upon the same day turns over to certain creditors the entire proceeds thereof, leaving more than one-half of his indebtedness unpaid, the effect of the transaction is to turn over to these creditors his entire property, and he will be considered as having done so in contemplation of insolvency and with intent to prefer such creditors, within the meaning of G. C., §§ 11102, *et seq.*, as amended, 93 v. 290, making such transactions void: *Gettinger v. Bank*, 13 O. C. D. 77 [reversed, *Bank v. Gettinger*, 68 O. S. 389, IV Longsdorf's Notes, 945].

A surety is governed by the same rule. He is a creditor, though the liability is only contingent: *Atkinson v. Tomlinson*, 1 O. S. 237, I Longsdorf's Notes, 968; *Harkrader v. Leiby*, 4 O. S. 602, II Longsdorf's Notes, 138; *Dickson v. Rawson*, 5 O. S. 218, II

Longsdorf's Notes, 172; *Hauel v. Mintzer*, 12 Dec. Rep. 191, 1 H. 375.

A conveyance in payment of a debt is valid if for a fair price and the debt is released, though it is of all the property the debtor had and a suit is pending against him ripe for judgment: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192.

Contra, if the parties afterwards treat the debt as still due and the land held on a secret trust for the grantor: *Starr v. Starr*, 1 O. 321, I Longsdorf's Notes, 85.

A preference made with the very purpose of defeating another creditor, and this was known to the preferred creditor, though for full consideration paid it was said would be void: *Webb v. Brown*, 3 O. S. 246, II Longsdorf's Notes, 25.

A failing debtor made chattel mortgages to certain creditors and on the same day made an assignment for benefit of creditors, the mortgages being filed a few moments before the assignment. It was held that he had power to do so, and the mortgages are not to be held void on the theory that the acts were in effect one transaction: *Cross v. Carstens*, 49 O. S. 548, IV Longsdorf's Notes, 469 [this necessarily overrules *Turner v. Reed*, 3 O. C. C. 660, 2 O. C. D. 384 and *Bank v. Bank*, 3 O. C. C. 513, 2 O. C. D. 295].

If the debtor voluntarily executes mortgages to certain creditors who are not asking them nor pressing him and then assigns for creditors, these mortgages are illegal preferences: *Sylvester v. Hesslein*, 5 O. C. C. 256, 3 O. C. D. 128.

An assignment of all goods then owned or thereafter acquired, to be delivered in case the grantee, as surety, had to pay, the goods then being in the hands of auctioneers, is a mere cloak to avoid legal process, and is void: *Shaw v. Lowry*, W. 190, I Longsdorf's Notes, 17.

A preference of creditors must be scrupulously honest with a sole eye to pay or secure the debt without unnecessarily hindering others. If the goods sold exceeded the consideration, or there is uncertainty in the value, and no estimate is shown, and there is probable insolvency, or the transaction is between relatives, all these tend to show an improper transaction: *Brooks v. Todd*, 12 Dec. Rep. 84, 1 H. 169.

That the preferred creditor is a near relative and the debtor is then being sued by another creditor, does not avoid the conveyance if *bona fide*, though it should be scrutinized: *Thacker v. Newell*, 7 Dec. Rep. 576, 3 Bull. 1159.

A mortgage to a creditor made by arrangement with him in order to compel other creditors to give time, is within the statute; it

forbids hindering as well as defrauding creditors: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337 [reversed, on other grounds, *Remington v. Press Association*, 13 O. C. C. 542, 7 O. C. D. 540].

Chattel mortgages of all the firm's tangible property to certain firm creditors by one partner without the consent of the other on the eve of a petition for dissolution by the former which is filed soon after, is a fraud on the latter and his right to avoid it inures to other firm creditors: *McGrath v. Cowen*, 57 O. S. 385, IV Longsdorf's Notes, 722 [affirming *McGrath v. Cowen*, 11 O. C. C. 441, 5 O. C. D. 256].

B. BY CORPORATIONS.

An insolvent corporation has not the same right to prefer a creditor that an individual has. The individual may get on his feet again and pay, but the corporation dies, and exhaustion of its assets leaves unpreferred creditors remediless; accordingly, it is a trustee for all creditors: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337.

A creditor of an insolvent corporation, not aware of the insolvency, and the business still being carried on may take a cognovit note from the corporation, and his judgment and levy on his assets will be upheld: *Ford v. Lamson*, 17 O. C. C. 539, 9 O. C. D. 374.

A transfer by an insolvent corporation, which is still carrying on its business, of the bulk of its assets to one creditor who is not aware of its condition, and there is no collusion, will be upheld: *Ford v. Lamson*, 17 O. C. C. 539, 9 O. C. D. 374.

A disposition of all its property by an insolvent corporation, thereby ceasing business, to some creditors only stands for the benefit of all creditors equally under G. C., § 11106. The doctrine of diligent creditor does not apply, for corporate property is a trust fund on thus ceasing business, and paying certain debts would relieve from double liability such stockholders as are bound for them, leaving other stockholders to respond in full: *Phillips v. Ammon-Stevens Co.*, 2 O. N. P. 187, 3 O. D. (N.P.) 418.

An insolvent corporation, though a going concern, and expecting to continue, and does continue for nine months, can not by mortgage or cognovit prefer a pre-existing debt, the object not being to obtain an extension of time. Such preference operates as an assignment for benefit of all creditors: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337 [reversed, on other grounds *Remington v. Press Association*, 13 O. C. C. 542, 7 O. C. D. 540].

Extension of credit can not be proved orally when the preferential document is silent: this would open the doors to an easy admission of fraud: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337.

A chattel mortgage by a corporation which is insolvent, but is going, and expects to continue going, to secure an antecedent debt, is not void as to other creditors as a preference, though it obtains a receiver to wind it up two weeks afterwards: *Bosche v. Display Horse Co.*, 14 O. C. C. 289, 7 O. C. D. 374.

Where a corporation is embarrassed, and gives a cognovit note to a creditor with an agreement that if compelled to assign for creditors it will notify him in advance, and it notifies him that it can not continue, and as soon as he has had judgment entered and execution levied it assigns for creditors. This is a void preference under *Rouse v. Bank*, 46 O. S. 493, IV Longsdorf's Notes, 341: *Benedict v. Bank*, 19 O. C. C. 408, 10 O. C. D. 505 [appeal from *Benedict v. Bank*, 4 O. N. P. 231, 6 O. D. (N.P.) 320].

An insolvent corporation, with no expectation of being able to continue business, can not rightfully secure or pay debts due to its directors or on which they are security, for they are like trustees; accordingly, they must account for assets received and used by them for such purpose, nor will a sale of it to others as paid up stock release them: *Ford v. Lamson*, 17 O. C. C. 539, 9 O. C. D. 374.

A corporation, after becoming insolvent and ceasing business, can not create valid liens by giving chattel mortgages for antecedent debts as against other creditors, or an assignee for creditors: *Rouse v. Bank*, 46 O. S. 493, IV Longsdorf's Notes, 341 [reversing *Bank v. Rouse*, 6 Dec. Rep. 1237, 14 Am. L. Rec. 425; *sub nomine, Bank v. Manufacturing & Supply Co.*, 9 Dec. Rep. 550, 15 Bull. 8, and following in *Smith Purifier Co. v. McGroarty*, 136 U. S. 237].

Where a foreign corporation, becoming insolvent, transfers all its Ohio property to pay an antecedent debt, Ohio creditors can not levy thereon on the theory that such transfer is void under *Rouse v. Bank*, 46 O. S. 493, IV Longsdorf's Notes, 341, for that would be simply turning the property over from one creditor to another. The transfer is voidable and not void, and the remedy is in chancery to have the transferee treated as trustee for all creditors: *Bryant v. Johnson*, 12 O. C. C. 102, 5 O. C. D. 333.

Assignment of accounts and other choses in action by an insolvent corporation of another state to a creditor in Ohio in order to prefer him, do not fall within the principle of *Rouse v. Bank*, 46 O. S. 493, IV

Longsdorf's Notes, 341: *Bank v. McKinney*, 16 O. C. C. 80, 9 O. C. D. 1.

A judgment note was given in Ohio by an insolvent corporation of another state to an Ohio creditor who enforced it in a third state, and brings the proceeds of the execution sale into Ohio, and other Ohio creditors of the corporation seek to subject such proceeds. It was held that the principles of *Homes v. Munger*, 40 O. S. 493, IV Longsdorf's Notes, 37, do not apply. The property has been adjudged to be paid to defendant, and is not now property of the corporation, and the transaction was legal, although a preference was intended: *Bank v. McKinney*, 16 O. C. C. 80, 9 O. C. D. 1.

A transfer of securities by an insolvent corporation is fraudulent as to its creditors, when the fact of insolvency was known to the manager who made the transfer for the corporation, and the said manager also had knowledge that the claim, in satisfaction of which the transfer was made was fraudulent: *Sayle v. Savings & Loan Co.*, 2 O. C. C. (N.S.) 401, 15 O. C. D. 503.

A mortgage to procure an extension of time on a pre-existing debt by a corporation insolvent in fact but still in business, is not void as a preference if it is intended in good faith to go on, though in fact a receiver was asked for next day by another creditor: *Damarin v. Iron Co.*, 47 O. S. 581, IV Longsdorf's Notes, 397.

A judgment, execution and levy on corporate property a few hours before its assignment for creditors, but on a cognovit note given some months before for a past debt, is valid and a good lien: *In re Manufacturing Co.*, 1 O. N. P. 136, 1 O. D. (N. P.) 310.

It is not affected by a resolution of directors on the eve of assignment, that the president confess judgment on the past-due note, and the secretary advising the creditor, who was his wife, to take judgment, there having been no previous arrangement that the creditor should be thus protected: *In re Manufacturing Co.*, 1 O. N. P. 136, 1 O. D. (N. P.) 310.

An arrangement entered into in good faith between a corporation and parties not creditors, whereby a loan was made and certain accounts and merchandise were transferred as security, and as these accounts were paid others were substituted, is valid, and where the corporation at a later date goes into the hands of a receiver, the parties making the loan should be preferred over the general creditors upon distribution of the fund arising from a sale of its assets: *Bach v. Manufacturing Co.*, 11 O. C. C. (N.S.) 533, 21 O. C. D. 258. See also CORPORATIONS.

C. BY PARTNERSHIP.

A transfer of firm assets to pay a joint debt of the partners not arising out of the business, and to the entire exclusion of firm creditors, is valid: *Bank v. Wehrle*, 18 O. C. C. 535, 9 O. C. D. 330 [affirmed, without opinion, *Bank v. Wehrle*, 61 O. S. 654]. See also PARTNERSHIP.

VII. REMEDIES.

A. IN EQUITY.

A conveyance in fraud of the grantor's creditors will be set aside in equity on the application of a creditor who is defrauded thereby: *McVeigh v. Ritenour*, 40 O. S. 107, IV Longsdorf's Notes, 7; *Friedman v. Mitz*, 12 O. C. C. (N.S.) 41, 21 O. C. D. 146 [appeal from *Friedman v. Mitz*, 9 O. N. P. (N. S.) 585, 21 O. D. (N.P.) 839, and affirmed, without opinion, *Mitz v. Friedman*, 84 O. S. 461]; *Mason v. Eichels*, 8 Dec. Rep. 436, 8 Bull. 7.

In such proceeding, equity will set aside the conveyance and order of sale of only so much as will satisfy the claim of the creditor who maintains such action: *Martin v. Elden*, 32 O. S. 282, III Longsdorf's Notes, 633.

If a fraudulent mortgagee seeks affirmative relief in equity to enforce his fraudulent mortgage, such relief will be denied: *McQuade v. Rosecrans*, 36 O. S. 442, IV Longsdorf's Notes, 867.

Equity will set aside a fraudulent conveyance although the creditor who seeks to set the same aside does not show that the debtor has no other property, or that it has exhausted such other property as the debtor may have: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256.

A person indebted conveys his property, by way of gift or advancement, among his children. His two sons, in part consideration of the portion conveyed to them, agreed to pay his debts. In a suit by a judgment creditor, whose debts accrue before the division, to subject the lands so conveyed to the payment of his judgment, the land conveyed to the sons ought to be first subjected: *Swihart v. Shaum*, 24 O. S. 432, III Longsdorf's Notes, 182.

A receiver will be appointed (G. C., §§ 11781, 11782) when the debtor has no property, not merely when it is proved that he has fraudulently transferred it, but when there is a strong probability that he has done so and that some of it could be recovered: *Hayes v. Moore*, 5 O. N. P. 220, 5 O. D. (N. P.) 520.

A conveyance purporting to be without consideration will not be reformed for mis-

take as against creditors by proof that it was made in payment of a debt. The equity of other creditors in favor of equality is equal to the one who seeks a preference: *Stolts v. Vanatta*, 32 Bull. 100. See also REFORMATION.

B. LAW.

Since G. C., § 8618 makes a conveyance a nullity, the creditor may levy execution on the realty thus conveyed and thus secure a lien. (The usual remedy is then to bring a proceeding to set aside the former conveyance or have it declared a cloud upon the title.): *Myers v. Hewitt*, 16 O. 449, I Longsdorf's Notes, 774; *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851; *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256; *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501; *McGrath v. Cowen*, 57 O. S. 385, IV Longsdorf's Notes, 722. See also *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572.

A fraudulent conveyance being void only as against creditors, the land may be sold on execution against the grantee, and the buyer gets title whether he had notice of the fraud or not: *Douglas v. Dunlap*, 10 O. 162, I Longsdorf's Notes, 501.

If lands are conveyed to defraud a creditor, his subsequent judgment is a lien thereon in the hands of any person taking with notice of the fraud: *Rennick v. Bank*, 8 O. 529, I Longsdorf's Notes, 452.

But a levy of execution on land bought by a husband in his wife's name is not notice to a subsequent mortgagee, for the execution debtor is not in the chain of title: *Shorten v. Drake*, 38 O. S. 76, III Longsdorf's Notes, 958 [reversing *Shorten v. Drake*, 8 Dec. Rep. 184, 6 Bull. 202].

A judgment against A and levy on land as his, which he had fraudulently conveyed to B, is not constructive notice to a buyer from B: *Bank v. Teeters*, 31 O. S. 36, III Longsdorf's Notes, 561.

Execution may be levied on land fraudulently conveyed, and it may be sold thereunder for the deed is void, and the buyer can maintain ejectment without first having the deed set aside: *McVeigh v. Ritenour*, 40 O. S. 107, IV Longsdorf's Notes, 7.

An execution can not be levied or proceeded with after a court has acquired jurisdiction by suit by another creditor to set aside the fraudulent transfer: *Bloomingtondale v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

Chattels conveyed by the debtor to a third person, in fraud of creditors, are subject to execution: *Bailey v. Swain*, 45 O. S. 657, IV

Longsdorf's Notes, 301; *Bradford v. Beyer*, 17 O. S. 388, II Longsdorf's Notes, 840.

A deed of conveyance was executed and delivered for the purpose of defrauding a creditor. Subsequently the grantor compromised and settled the claim of the creditor, and thereafter it was agreed between the grantor and grantee that the conveyance should be canceled and the notes representing the purchase price and the deed surrendered and destroyed. The notes were produced and destroyed, but the deed could not be found, because fraudulently abstracted by a son of the grantee. The grantor remained in possession, and he and the grantee lived for some years thereafter in the belief that the deed had been lost and destroyed, and both died in that belief. It was held that in an action in ejectment, brought against the heirs of the grantor by the heirs of the grantee, including the son who had concealed the deed, that the petition should be dismissed and the title to the land quieted in the heirs of the grantor: *Parkinson v. Parkinson*, 1 O. C. C. (N.S.) 425, 14 O. C. D. 297 [affirmed, without opinion, *Parkinson v. Parkinson*, 70 O. S. 501].

The probate judge found that A held money of the judgment debtor by fraudulent conveyance and ordered him to pay it to a receiver to be applied on the judgment. A, claiming it as a gift, refused to obey. It was held that the probate judge had no power to imprison A for contempt, but the receiver must resort to an action: *White v. Gates*, 42 O. S. 109, IV Longsdorf's Notes, 95. See also PROCEEDINGS IN AID OF EXECUTION.

VIII. JURISDICTION.

A. INSOLVENCY AND PROBATE COURT.

Courts of insolvency have exclusive jurisdiction in all matters of assignments for creditors, in which adequate remedy can be granted in such courts. Thus after a general assignment, and a suit by the assignee to reach property, fraudulently transferred and to marshal liens, the court of common pleas has no jurisdiction of a suit, under G. C., § 11107, to set aside the same conveyance as fraudulent, or to attack the validity of the order of the court of insolvency; the parties must abide by the judgment of that court or seek a review by proceedings in error: *Cornell v. Sulter*, 3 O. C. C. (N.S.) 570, 13 O. C. D. 384.

The probate court has jurisdiction of an action brought by an assignee for creditors to recover the possession of assets of the insolvent conveyed by the insolvent in fraud of creditors, and to adjudge such conveyance and a chattel mortgage on the same goods

to be fraudulent as to the insolvent's creditors: *Berk v. Hirsch*, 8 O. N. P. 459, 11 O. D. (N.P.) 768.

The probate court has no jurisdiction to set aside a fraudulent conveyance of lands made assets of a decedent's estate by G. C., § 10777, for paying his debts, though the administrator is in possession, and its order of sale on his application to sell to pay debts is wholly void and collaterally impeachable in action to recover the land: *Spoors v. Ooen*, 44 O. S. 497, IV Longsdorf's Notes, 226.

The probate court now has power on application of the assignor or a creditor to declare a deed to a trustee for benefit of creditors to be an assignment, and no proceeding for that purpose in the common pleas is necessary: *Wambaugh v. Insurance Co.*, 59 O. S. 228, IV Longsdorf's Notes, 764 [affirming *In re Jones*, 5 O. N. P. 102, 5 O. D. (N.P.) 233, 8 O. D. (N.P.) 123].

Where an administrator procures in a proper court in a suit by him to set aside a fraudulent conveyance by his decedent a decree ordering sale of the land to pay debts, but it is not sold in that court, the probate court has jurisdiction of a proceeding by the administrator to sell the land to pay debts, for the latter proceeding is not one to adjudge the conveyance to be fraudulent, for the former decree had in effect done so: *Lowman v. Sewall*, 16 O. C. C. 466, 9 O. C. D. 177.

All conveyances in trust for creditors are required to be administered in the probate court (G. C., §§ 11092, 11094) irrespective of fraud; and all transfers made to hinder creditors when set aside, and all assignments in contemplation of insolvency in trust to prefer one or more creditors are declared to be for equal benefit of all, and are to be administered in the same court. To this extent *Hoffman v. Mackall*, 5 O. S. 124, II Longsdorf's Notes, 165, and *Conkling v. Ooonrod*, 6 O. S. 611, II Longsdorf's Notes, 263, may be regarded as abrogated: *Bank v. Trebein*, 59 O. S. 316, IV Longsdorf's Notes, 765.

The decree should provide for a trustee and sale and administration for all creditors. It is error to find plaintiff's lien to be the first. But if it does not appear that there is any other creditor, the court may give time to adjust the controversy: *Kennedy v. Dodge*, 19 O. C. C. 425, 10 O. C. D. 360.

Where it appears that the assignee not only did not refuse to act, but did himself prosecute an action in the court of insolvency having jurisdiction of the subject-matter and the parties, to set aside certain fraudulent conveyances of the assignor and marshal the liens of creditors, every object sought by a

proceeding under G. C., § 11106, is accomplished, and there is no need for such a proceeding in the court of common pleas: *Cornell v. Sulter*, 3 O. C. C. (N.S.) 570, 13 O. C. D. 384.

The fact that the assignee is made a party in the proceedings in the court of common pleas, will not operate to change the rights of parties or extend the right of the creditor to maintain such an action, especially where the creditors prosecuting such action were parties to the action brought by the assignee in the court of insolvency, in which the rights of all parties were sought to be determined: *Cornell v. Sulter*, 3 O. C. C. (N.S.) 570, 13 O. C. D. 384.

While fraudulent transfers are not nominally and intentionally assignments for creditors, they are made so by statute, and when found and declared to be of that character, the adjudications applicable to general assignments for creditors are applicable to this class of assignments: *Bank v. Post*, 12 O. D. (N.P.) 232.

The probate court has no power in proceedings in aid of execution to set aside an assignment of a contract as being in fraud of creditors: *Coal Co. v. Kirchner*, 1 Dayton Term Rep. (Iddings) 125. See also PROCEEDINGS IN AID OF EXECUTION.

B. COMMON PLEAS COURT.

If a creditor receive preferences which the law would treat as an assignment for general benefit of creditors, and has disposed of the property, the common pleas has jurisdiction to entertain a suit by a creditor to have the preferences declared for general benefit. But the common pleas can only declare the trust. Its judgment must be certified to the probate court for the appointment of a trustee and administration of the trust: *Sylvester v. Hesslein*, 5 O. C. C. 256, 3 O. C. D. 128.

The court of insolvency has no jurisdiction to set aside a conveyance in fraud of creditors; hence, the common pleas has power to set aside a confessed judgment as fraudulent: *Benedict v. Bank*, 4 O. N. P. 231, 6 O. D. (N.P.) 320; *Benedict v. Bank*, 19 O. C. C. 408, 10 O. C. D. 505.

The statute (G. C., § 11104) acts only on conveyances by the debtor himself. His purchase in the name of another, as in his wife's name, can not be unseated, for it would throw the title back to the vendor. The wife holds the title subject to the claims of the husband's creditors: *Shorten v. Woodrow*, 34 O. S. 645, III Longsdorf's Notes, 748 [reversing *Woodrow v. Sargent*, 5 Dec. Rep. 209, 3 Am. L. Rec. 522].

But where the court erroneously applied G. C., § 11106, to a purchase in the wife's name, it is within the jurisdiction and can not be collaterally attacked. Hence, the probate court, in the subsequent administration by the assignees, is bound by the distribution ordered by the court setting aside the conveyance: *Hellebush v. Richter*, 37 O. S. 222, III Longsdorf's Notes, 908 [affirming *Hellebush v. Richter*, 7 Dec. Rep. 341, 2 Bull. 127].

That the probate court is administering an assignment for creditors does not prevent the common pleas having jurisdiction to declare an earlier preferential transfer to be equivalent to an assignment for creditors, inasmuch as the probate court (*Spoors v. Coen*, 44 O. S. 497, IV Longsdorf's Notes, 226) had no power to do so: *Bates v. Bennett*, 9 Dec. Rep. 727, 17 Bull. 64.

On vacating a fraudulent conveyance by suit against vendor and vendee and incumbancers, no notice being published, but the court finding there were no other creditors, it is error to order sale and payment in full of plaintiff's claim, but the court should have certified its finding to the probate court for settlement of the insolvent's estate: *Loudenback v. Foster*, 39 O. S. 203, III Longsdorf's Notes, 1018.

Property conveyed in fraud of creditors, and consequently attached by some creditors, and a sale enjoined by other creditors, can be distributed by the court if no creditor asks for appointment of an assignee: *Conrad v. Pancoast*, 11 O. S. 685, II Longsdorf's Notes, 541.

The common pleas, on setting aside a conveyance as in fraud of creditors, can not sell and distribute, but must certify the judgment to the probate court, where an assignee can be appointed: *Esterly v. Esterly*, 11 Dec. Rep. 206, 25 Bull. 250.

Where a person makes a fraudulent conveyance and dies, and the fraudulent grantee is made his administrator, equity may at the suit of a creditor take jurisdiction of a case to set aside the conveyance, although the probate court could compel the administrator to do his duty, for it may be necessary to order a resale: *Hampson v. Sumner*, 18 O. 444, I Longsdorf's Notes, 856.

The court declaring a conveyance to be a general assignment for creditors has a general equity jurisdiction and can determine all issues, both as to the character of the conveyance and as to whether one or other of the parties are, in fact, creditors, and this does not infringe on G. C., § 11106, that the probate court shall administer the trust: *Brinkerhoff v. Smith*, 57 O. S. 610, IV Longsdorf's Notes, 729.

Equity can look through the character of a transaction to ascertain if it is in fraud of creditors: *Eddington v. Williams*, W. 439, I Longsdorf's Notes, 35.

C. CIRCUIT COURT.

If the circuit court on error to the common pleas sets aside conveyances as in fraud of creditors, even if it can administer the trust or remand to the common pleas it will not do so, but will certify its findings to the probate court for the purpose: *Bank v. Miller*, 9 O. C. C. 111, 6 O. C. D. 1.

D. FEDERAL COURT.

An action by a trustee in bankruptcy to set aside a fraudulent transfer of property made by a bankrupt to a third party, before the institution of proceedings in bankruptcy, can not be brought in the federal courts, but must be brought in the state courts, except by defendant's consent: *Nye v. Hart*, 22 O. C. C. 427, 12 O. C. D. 419.

The bankruptcy court has jurisdiction to set aside a transfer of property and order its surrender by the transferee where all the parties are before the court. A plenary suit is not necessary where there is no adverse claimant, and the transferee having tried the question on its merits, can not object that the petition does not state a cause of action. (U. S. D. C.): *In re Alexander*, 10 O. L. R. 61, 17 O. F. D. 12. See also *BANKRUPTCY*.

IX. VENUE.

When the entire property described in a petition to set aside the transfer of real property as being in fraud of creditors and sought to be recovered in such proceeding is real estate, all of which is situated in one county, the action must be brought in that county and summons may be issued to any other county for the defendants: *Generator Co. v. Coblenz*, 86 O. S. 199.

A proceeding brought under G. C., §§ 11104, *et seq.*, to set aside a transfer of real estate as in fraud of creditors and to obtain the relief provided therein, is for the recovery of real property or of an estate or interest therein within the meaning of G. C., § 11268: *Generator Co. v. Coblenz*, 86 O. S. 199.

A suit to set aside a conveyance of land to defraud creditors is local and not transitory. Such action may be brought where the land lies, though the judgment was obtained and all the parties reside elsewhere: *Leaf v. Marriott*, 4 O. D. (N.P.) 402, 11 Dec. Rep. 784, 29 Bull. 225. See also *VENUE*.

X. PARTIES.

Where a debtor has made a fraudulent conveyance of his lands, and the judgment creditor, after levying on the same, applies to a court of chancery to aid him in making a sale to satisfy his judgment, a decree for the sale by a master will not be void, though the fraudulent grantees are not made parties, but may be set up by a purchaser under such decree, as a perfect defense in an action of ejectment: *Sockman v. Sockman*, 18 O. 362, I Longsdorf's Notes, 851.

Where the grantee, in a fraudulent conveyance made by a debtor, dies after the rendering of a decree in favor of a judgment creditor, setting aside such conveyance, and ordering the sale of the property so conveyed for the payment of the creditor, the failure to revive the decree against the heirs of such grantee will not affect the title of a purchaser acquired by a sale under the decree: *Baumont v. Herrick*, 24 O. S. 445, III Longsdorf's Notes, 183.

If the mortgagee is seeking to enforce a fraudulent mortgage, the defense of fraud may be interposed by the mortgagor or any person claiming under him: *McQuade v. Rosecrans*, 36 O. S. 442, III Longsdorf's Notes, 867.

In an action by the plaintiff upon a bond given in fraud of the defendant's creditors, the defendant may allege such fraud: *Goudy v. Gebhart*, 1 O. S. 262, I Longsdorf's Notes, 972.

It is only persons whose rights are interfered with, those who are injured by the transaction alleged to be fraudulent, that have the right to interfere to set it aside. Strangers have no interest, and, therefore, no right to question its validity. Between the parties and their privies it is valid: *Wright v. Snell*, 22 O. C. C. 86, 12 O. C. D. 308.

The assignee in insolvency proceedings is the proper party to prosecute an action to set aside a fraudulent transfer of property, or to have determined the rights of persons claiming liens on any of the assigned property by pledge or otherwise, and the priority thereof: *Cornell v. Sulter*, 3 O. C. C. (N.S.) 570, 13 O. C. D. 384.

A creditor under G. C., § 11106, may, on refusal of the assignee to prosecute an action to set aside a fraudulent conveyance of property by the assignor, made in contemplation of insolvency, and have the same declared a trust for the benefit of creditors, prosecute an action in equity as a *cestui que trust* for the protection of himself and others, but this he can do only when the assignee on request refuses to act: *Cornell v. Sulter*, 3 O. C. C. (N.S.) 570, 13 O. C. D. 384.

For parties plaintiff, see also V, F, 4, herein.

In a suit to set aside a fraudulent conveyance by A after judgment against A and B, B is not a necessary party: *Constable v. Weser*, 8 Dec. Rep. 247, 6 Bull. 666; *Constable v. Weser*, 8 Dec. Rep. 258, 6 Bull. 698.

Though creditors are not necessary parties to a suit under G. C., § 11106, R. S., § 6345 (executed), yet they may be proper parties, and any proper party though not necessary may appeal: *Bowlus v. Shanabarger*, 19 O. C. C. 137, 10 O. C. D. 167. See also APPEALS.

For the general discussion of the subject of parties, see PARTIES.

XI. PLEADING.

A fraudulent conveyance may be set aside upon a cross petition: *Clark v. Hubbard*, 8 O. 382, I Longsdorf's Notes, 443.

In an action to subject lands alleged to have been fraudulently conveyed, to the payment of a judgment, an answer by the debtor that he is a resident of Ohio, the head of a family, and entitled to hold the premises as a homestead, is not a defense: *Roig v. Schultz* 42 O. S. 165, IV Longsdorf's Notes, 101.

An action on a note and to set aside a fraudulent conveyance contains two causes of action, one at law and one under G. C., §§ 11102, *et seq.*, and they are joinable and may be heard jointly, and failure to state them separately is not available on error where no objection was made below: *Kennedy v. Dodge*, 19 O. C. C. 425, 10 O. C. D. 360.

Fraud or fraudulent intent will not be presumed; it must be pleaded and proved as a fact. In cases of fraudulent conveyances an intent may be held to exist by force of circumstances, where perhaps no conscious purpose existed, under the rule that a man must be held to intend the natural and inevitable consequences of his acts: *Bank v. Scott*, 13 O. D. (N.P.) 600, 1 Hosea, 481.

A suit by creditors of an insolvent firm to set aside a transfer made by one of the partners to his wife can not be maintained, where the petition makes no reference to prior efforts to realize upon the debt out of the partnership property, and does not allege insolvency or any other fact, justifying proceedings directly against the individual property of one of the partners: *Bank v. Scott*, 13 O. D. (N.P.) 600, 1 Hosea, 481.

A petition under G. C., §§ 11106, *et seq.*, is not demurrable which merely avers indebtedness on a certain note, as the statute only requires plaintiff to be a creditor: *Henn v. Milman*, 1 Dayton Term Rep. (Iddings) 83.

Where a petition prays that a conveyance may be declared a general assignment for creditors under G. C., §§ 11102, *et seq.*, creditors made defendant need not and should not restate the allegations of the petition in their answers and cross petitions, but may adopt them, and in such case the plaintiff has no right to dismiss without their consent, and any such nonconsenting cross-petitioner may proceed with the action as if he were plaintiff: *Brinkerhoff v. Smith*, 57 O. S. 610, IV Longsdorf's Notes, 729.

In a suit to compel a creditor holding assets of the debtor to hold them for the benefit of all creditors, a claim against such creditors by other creditors for having falsely represented the debtor as fit to be trusted is outside of the object of the case: *Doremus v. O'Hara*, 1 O. S. 45, I Longsdorf's Notes, 938.

A petition to set aside a fraudulent sale or transfer made in violation of the provisions of G. C., § 11105, which does not aver that the person to whom the sale, conveyance, transfer, mortgage or assignment is made knew at the time of the transaction of the fraudulent intent on the part of the debtor does not state facts sufficient to constitute a cause of action: *Lytle v. Baldinger*, 84 O. S. 1 [reversing *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

A sheriff may make any defense he has under a general denial, and may prove his writ and levy: *Moravee v. Buckley*, 9 Dec. Rep. 226, 11 Bull. 225. See also *REFLEVIN*.

Possession as an officer holding by levy of execution against one from whom the plaintiff obtained them by a transfer alleged to be in fraud of creditors, may be shown under a general denial: *Bailey v. Swain*, 45 O. S. 657, IV Longsdorf's Notes, 301; *Nenbrand v. Myres*, 7 Dec. Rep. 315, 2 Bull. 97.

Inasmuch as an action will not lie on a note executed in furtherance of a scheme to defraud creditors, the administrator of the promisee is estopped from prosecuting such an action by evidence of fraudulent intent imported into the case, although estoppel was not pleaded: *Baker v. Hall*, 9 O. N. P. (N.S.) 396, 20 O. D. (N.P.) 445.

For the general discussion of the subject of pleading, see *PLEADINGS*.

XII. PROCESS.

An action to set aside fraudulent conveyances under G. C., §§ 11106, *et seq.*, falls within the purview of G. C., §§ 11292, *et seq.*, authorizing service by publication when the debtor is a nonresident of the county in which suit is brought: *Colter & Co. v. Bogen*, 16 O. D. (N.P.) 381, 3 O. L. R. 122.

The *situs* of a chose in action involved in a proceeding to set aside a fraudulent conveyance is the domicile of the debtor, and where service is had upon such debtor in the county where he resides, the court has jurisdiction of the *res*, and other defendants claiming title to such credits may be brought in and served by publication: *Colter & Co. v. Bogen*, 16 O. D. (N.P.) 381, 3 O. L. R. 122.

The creditor bringing the suit under G. C., §§ 11106, *et seq.*, gets a preference only if he gives the notice therein required. Though the statute is mandatory, the only effect of want of notice is to prevent preference. Notice after decree is too late to give the plaintiff a preference. The decree fixes all rights: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

If no notice is given the assignee will take the fund, but the court will first provide for costs and expenses of the creditors who realized the fund: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

Where, on notice published in a suit to set aside a conveyance as in fraud of creditors, some other creditors came in and gave the security required by G. C., §§ 11106, *et seq.*, but on appeal to the circuit court the case was amended so as to claim that the grantee became trustee for all the creditors, this change probably prevents the plaintiff and creditors, who gave bond, from having a priority on distribution. This court will not give them a priority after the supreme court has denied there was any: *Pendery v. Allen*, 9 O. C. C. 245, 4 O. C. D. 268.

Where a creditor seeks to set aside a fraudulent conveyance, but does not publish a notice for other creditors, another creditor can not, by filing another suit and publishing, and then waiting until the first creditor proves the conveyance to be fraudulent, step in and take advantage thereof, and get a priority, but the court will deem the cases consolidated, and can now appoint an assignee, even after decree for sale, to distribute *pro rata*: *Hemann v. Schoenfeld*, 13 Dec. Rep. 756, 2 C. S. C. R. 40.

An action to place a store, a dock and certain city lots alleged to have been fraudulently conveyed, in the hands of a trustee appointed by the court and to have distribution thereof among all creditors of the transferee, is a proceeding *in rem*, which binds not only parties but the world; and all persons claiming interests in such property must take notice thereof, where the court has jurisdiction of such proceedings, and particularly where notice is published to all creditors to come in as is provided by G. C., § 11108: *Bank v. Post*, 12 O. D. (N.P.) 232.

Where in a creditor's suit in another court to set aside a fraudulent conveyance no notice was published for other creditors, but the court found the conveyance fraudulent, and ordered sale to satisfy plaintiff's claim, and the debtor thereupon settled said claim, it was held that the finding of the other court that the conveyance was in fraud of creditors, is still in full force, but the error of not finding absence of notice, and of not certifying the judgment to the probate or insolvency court to administer the trust can not be now corrected by the other creditors producing a certified copy of the judgment to the insolvency court, and asking administration thereof, and that court properly refused to administer: *In re Schumaker*, 5 O. N. P. 387, 6 O. D. (N.P.) 125. See also SUMMONS.

XIII. DEFENSES.

In an action under G. C., §§ 11102, *et seq.*, to declare an assignment as having been made in contemplation of insolvency with intent to prefer one or more creditors, the trustee may defend upon the ground that the assignment was not made in contemplation of insolvency, or that it was not made with intent to prefer one or more creditors, or that he renounced the trust or restored the assets to the assignor or that he has disposed of the property by and with the consent, acquiescence and agreement of the assignor and all the creditors: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

The heirs and personal representative of the grantor may stand upon a judgment in the bankruptcy proceeding to the full extent to which it would be available to the grantor, if living; and an equity remaining in the land after satisfying the indebtedness existing from the grantor to the grantee at the time of the transfer, it is the privilege of the heirs and personal representative to assert the plea of *res adjudicata* as a defense to an action in the state court to set the conveyance aside as in fraud of creditors; and inasmuch as the judgment in the bankruptcy court was in effect a finding that in making the transfer there was no intent on the part of the grantor to hinder, delay or defraud her creditors, that determination as between the parties and their privies is conclusive in all courts as long as it stands, and is therefore good against demurrer in an action in the state court to set the conveyance aside, based on the contingent liability of the grantor under a guaranty, of which liability the grantor could not be held to have had knowledge at the time of the transfer in the absence of actual knowledge of the default of her principals: *Cole v. Bank*, 15

O. C. C. (N.S.) 315 [affirmed, without opinion, *Bank v. Newton*, 82 O. S. 444].

Where a conveyance of property was made the basis of a proceeding to declare the grantor bankrupt, on the theory that the transfer was in fraud of creditors, and the result was a dismissal of the proceedings upon a finding that the grantor was not a bankrupt, the grantee not being a party to the proceeding and therefore not bound thereby, can not avail himself of the plea of *res adjudicata* and in so doing attempt to bind others, in a subsequent action in a state court to set the conveyance aside as preferential: *Cole v. Bank*, 15 O. C. C. (N.S.) 315 [affirmed, without opinion, *Bank v. Newton*, 82 O. S. 444].

XIV. TRIAL.

An action against the grantee of land in fraud of creditors for its value, he having conveyed to a *bona fide* buyer, is for money only, and accordingly a jury case: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

A creditor's suit under G. C., §§ 11106, *et seq.*, to set aside a conveyance is a chancery suit, and the defendant is not entitled to a jury, though the claim is not in judgment: *Schmels v. Michelson*, 8 Dec. Rep. 538, 8 Bull. 304; see also *Voss v. Murray*, 50 O. S. 19, IV Longsdorf's Notes, 482.

XV. EVIDENCE.

A. PRESUMPTIONS AND BURDEN OF PROOF.

If a child claims to be a purchaser from the parent a suspicion arises, and more proof of payment and adequacy of consideration is required than of a stranger: *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251.

If the son claims to have given value by paying debts of the father, but is unable to state when, to whom, or how much, it is a strong if not conclusive badge of fraud: *Godell v. Taylor*, W. 82, I Longsdorf's Notes, 6.

Continued possession of the parent strengthens the presumption that his voluntary conveyance to a child was in fraud of creditors: *Humbert v. Church*, W. 213, I Longsdorf's Notes, 19.

The debtor's subsequent deed to another of the same property is therefore competent as a circumstance of fraud: *Humbert v. Church*, W. 213, I Longsdorf's Notes, 19.

If an owner of land conveys it for a recited money consideration to his wife and children, but nothing was paid, and he continued to use the premises for many years, and till the deed was forgotten, and then conveys it for full value, the inference is that the first con-

veyance was on a secret trust for himself, or that as unpaid vendor he resumed possession without suit: *Burrage v. Beardsley*, 16 O. 438, I Longsdorf's Notes, 774.

Real estate sold, but the grantor remaining in possession, raises a presumption of fraud, but is rebutted by evidence that the grantor orally agreed to pay rent to the grantee: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192.

Proof beyond a reasonable doubt is not necessary to show that a conveyance was, in fact, illegal as to creditors, for it is not identical with the crime of defrauding: *Dougherty v. Schlotman*, 13 Dec. Rep. 557, 1 C. S. C. R. 292.

A preference by confession of judgment in open court would require more evidence to impeach it than one by private agreement, and the evidence of one party uncorroborated is not sufficient, he being *particeps criminis*. Two confessed judgments at the same time must share equally: *Hauel v. Mintzer*, 12 Dec. Rep. 191, 1 H. 375.

On account of the relation of husband and wife less evidence is required to raise a presumption in favor of the plaintiff in an action to subject to husband's debts property conveyed to his wife: *Van Ingen v. Peterson*, 12 O. C. C. (N.S.) 253, 21 O. C. D. 506 [affirmed, without opinion, *Peterson v. Van Ingen*, 84 O. S. 473].

Where circumstances raise a presumption that property conveyed to wife was paid for from husband's means, the fact that the wife remained silent during the trial when proof that her money was used in the purchase might easily have been produced if in existence, together with inconsistent statements previously made by her, is a sufficient basis for a decree against her: *Van Ingen v. Peterson*, 12 O. C. C. (N.S.) 253, 21 O. C. D. 506 [affirmed, without opinion, *Peterson v. Van Ingen*, 84 O. S. 473].

In an action by a creditor for the purpose of subjecting property in the hands of a donee to the payment of his claim, it being made to appear that the debt was contracted by the donor prior to the making of the gift, the burden of showing the solvency of the debtor at the time of making the gift rests upon the defendant: *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

The rule that the burden of proof rests upon the plaintiff, and does not shift to the defendant by reason of presumptions in his favor, applies to an action to subject to a husband's debts property conveyed to his wife under circumstances raising a presumption that the property was paid for from the husband's means: *Van Ingen v. Peterson*, 12 O. C. C. (N.S.) 253, 21 O. C. D. 506 [affirmed,

without opinion, *Peterson v. Van Ingen*, 84 O. S. 473].

The burden of proof rests upon those seeking to set aside a conveyance alleged to be fraudulent, and all doubts must be resolved in favor of the defendant: *Bank v. Young*, 17 O. C. D. 333, 3 O. L. R. 287.

The burden is on the donee, to show the solvency of the donor at the time of making the gift, if he was then in debt: *MacLaren v. Stone*, 18 O. C. C. 854, 9 O. C. D. 794.

If members of the debtor's family are made preferential creditors, the transaction is suspicious, and calls for the closest scrutiny. The burden in all cases is upon the creditor to show not only consideration, but good faith, and the mere transfer raises no presumption of good faith: *Walker v. Walker*, 4 O. N. P. 324, 6 O. D. (N.P.) 355.

Fraud is not presumed, but to be proved by the party setting it up, though seldom susceptible of direct proof: *Stitt v. Wilson*, W. 505, I Longsdorf's Notes, 40; *Landis v. Kelly*, 27 O. S. 567, III Longsdorf's Notes, 377; *Lake v. Doud*, 10 O. 415, I Longsdorf's Notes, 525.

But greater latitude in the proof must be given than in ordinary cases: *Lake v. Doud*, 10 O. 415, I Longsdorf's Notes, 525.

A donor of property who was in debt at the time, has the burden of proving that he was then solvent in an action by the creditor to subject the property: *Oliver v. Moore*, 23 O. S. 473, III Longsdorf's Notes, 134.

The presumption of fraud in a gift by a debtor to his child can be repelled by showing the debts to be small and sufficient property retained to pay them, and that the provision for the child was reasonable: *Brice v. Myers*, 5 O. 121, I Longsdorf's Notes, 251.

To set aside a gift as in fraud of subsequent creditors, the burden is on the creditor to show such intent, and mere suspicious circumstances are not sufficient: *Robinson v. Von Dolcke*, 1 O. N. P. 429, 3 O. D. (N.P.) 107.

B. ADMISSIBILITY.

The grantor may prove the fraud if it is sought to enforce an executory contract in fraud of his creditors: *Goudy v. Gebhart*, 1 O. S. 262, I Longsdorf's Notes, 972; see also *McQuade v. Rosecrans*, 36 O. S. 442, III Longsdorf's Notes, 867.

Evidence is admissible to explain the fact that the whole interest of a debtor was conveyed pending litigation under an agreement whereby the vendor had an option to repurchase; the vendor in the meantime remaining in possession, and paying rent; since such facts may be evidence of fraud,

but are not conclusive: *Barr v. Hatch*, 3 O. 527, I Longsdorf's Notes, 192.

Unless it appears that grantee acted from corrupt motives, the fact that he withheld a deed from record for a long time is not material: *Hetrick v. Gregg*, 8 O. N. P. 24, 10 O. D. (N.P.) 462.

To prove an assignment was an intent, though not in form, an agreement for benefit of all creditors, the subsequent conduct of the assignee is mere evidence of such intent or agreement. Hence, if the court below has made no finding as to such intent or agreement this court can not supply it from the facts found: *Justice v. Uhl*, 10 O. S. 170, II Longsdorf's Notes, 426.

In a subsequent creditor's suit to vacate a prior voluntary conveyance by the debtor to his wife, the grantor's promise a year before to his wife to convey the land to her may be proved by her as tending to account for the conveyance and show a presumptively honest purpose: *Evans v. Lewis*, 30 O. S. 11, III Longsdorf's Notes, 512.

The judgment against the debtor is binding on the donees and fraudulent grantees as to amount, though recovered after the conveyance, and they can not allege that the real debt was less if there was no fraud or collusion: *Swihart v. Shaum*, 24 O. S. 432, III Longsdorf's Notes, 182.

In contesting an attachment issued on the ground of transferring property, the debtor may testify to his intent to put it out of the reach of creditors, for this is a fact, and not a conclusion: *Pierce v. White*, 10 Dec. Rep. 552, 22 Bull. 98.

A motive for a conveyance to hinder creditors is not evidence of the fact, thus the creditor can not sustain his attachment by showing that the debtor is under indictment for embezzlement from others as showing a motive to pay other debtors in preference to the one in suit: *Pierce v. White*, 10 Dec. Rep. 552, 22 Bull. 98.

The debtor may show that he had reported the incorporation to a mercantile agency, and noted it on the letter heads to show that he was not concealing the fact: *Mill Co. v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46. See also ATTACHMENT.

C. ORAL EVIDENCE AND ADMISSIONS.

In Ohio an express trust may be shown by oral evidence: *Harvey v. Gardner*, 41 O. S. 642, IV Longsdorf's Notes, 81.

In a creditor's suit to set aside as fraudulent a deed reciting a consideration of love and affection and one dollar, the one dollar does not make the deed one on valuable consideration, hence parol evidence of an actual valuable consideration is not admissible:

Holmes v. Sullivan, 9 Dec. Rep. 499, 14 Bull. 167. See also DEEDS.

A creditor of an alleged fraudulent vendor can not prove the acts or declarations of such vendor, made after the sale and delivery of the property, against the purchaser for the purpose of impeaching his title: *Coal Co. v. Davenport*, 37 O. S. 194, III Longsdorf's Notes, 905.

In an action to reach a fund in a bank, shown to have been deposited by the debtor in his son's name, the debtor, claiming that he had acted only as agent of his son, may show his own declarations to the banker at the time of the deposit that he acted only as agent for his son. These are as much *res gestae* as the fact of deposit itself: *Martin v. Elden*, 32 O. S. 282, III Longsdorf's Notes, 633. See also EVIDENCE.

Declarations of a person after he had surrendered his property to a creditor that he intended to defraud creditors in so doing, are not admissible to impeach his grantee's title: *Stitt v. Wilson*, W. 505, I Longsdorf's Notes, 40.

A grantor's parol declarations after execution of the deed can not be shown to invalidate it: *Williams v. Mears*, 4 Gaz. 293, 13 Dec. 369, 2 D. 604. See also EVIDENCE.

D. WITNESSES.

In an action by an administrator against the fraudulent vendee to set aside the conveyance or get its value, the vendee is a competent witness under the exception at the end of G. C., § 11495. Such action involves the validity of a deed: *Doney v. Dunnick*, 8 O. C. C. 163, 4 O. C. D. 380. See also WITNESSES.

In a suit against the heirs of a fraudulent alienee, to set aside a fraudulent conveyance, his administrator not being a party, the alienor is a competent witness to prove the fraud. The court can not add to the statute. (The word heirs is now in G. C., § 11495): *Bomberger v. Turner*, 13 O. S. 263, II Longsdorf's Notes, 607.

For the general discussion of the subject of evidence, see EVIDENCE.

XVI. LIMITATIONS.

For the application of the statute of limitations; see LIMITATIONS, STATUTE OF.

XVII. JUDGMENT AND EXECUTION.

The administrator of the vendor can not have a personal judgment for the value of the land against the fraudulent vendee. His only remedy is under G. C., § 10774: *Doney v. Dunnick*, 8 O. C. C. 163, 4 O. C. D. 380.

In an action to subject property bought by the debtor in another's name, the court should not order a sale of all the property, but only of enough to satisfy the plaintiff's claim and costs: *Martin v. Elden*, 32 O. S. 282, III Longsdorf's Notes, 633.

If a *bona fide* buyer has acquired the land, the fraudulent grantee may be sued for its money value as being a trustee who has put it beyond his power to fulfill his duty: *Doney v. Clark*, 55 O. S. 294, IV Longsdorf's Notes, 661.

When the court by its judgment upon the application of one or more creditors declares an assignment in trust to prefer creditors to be a trust for the equal benefit of creditors, the judgment relates back to the delivery of the assignment and binds the assigned property and its proceeds from that time: *Mengert v. Brinkerhoff*, 67 O. S. 472, IV Longsdorf's Notes, 933.

A fraudulently confessed judgment was levied, and then *bona fide* judgments were levied, and then before anything was done under these, a simple contract creditor began proceedings to set aside the fraudulent judgment and for a trustee, and gave notice under G. C., §§ 11106, *et seq.*, but no creditor gave bond or deposit. It was held that the creditor bringing the suit is entitled to be paid in full before the other creditors, for the suit is a creditors' election to treat the property as assigned for general benefit; accordingly, their levies became nullities: *Bloomington v. Stein*, 42 O. S. 168, IV Longsdorf's Notes, 101.

The creditor who first files a bill to reach the effects is entitled to priority in distribution as a reward of diligence, and because, but for the fraud, he might have had the first execution: *Atkinson v. Jordan*, W. 246, I Longsdorf's Notes, 21.

Where property was bought in a wife's name in fraud of the husband's credit, but is protected by the four years statute of limitations, but the improvements being more recent are not so protected, the distribution, if a sale becomes necessary, will be (1) to an unpaid purchase-money mortgage; (2) to the wife the original cost of the land; (3) to the creditor in full; (4) the balance to the wife: *Katzemberger v. Fishel*, 13 Dec. Rep. 954, 2 C. S. C. R. 366.

Judgment against a defendant served with notice of a suit to set aside a fraudulent conveyance will not preclude him from participating as a creditor in the distribution, though other creditors complied with G. C., §§ 11106, *et seq.*, giving them a priority. G. C., §§ 11106, *et seq.*, as to giving notice of the suit, applies to a suit under G. C., §§ 11102, *et seq.*: *Pendery v. Allen*, 53 O. S. 251, IV Longsdorf's Notes, 599 [modifying

Pendery v. Allen, 9 O. C. C. 245, 4 O. C. D. 268, which affirmed *Pendery v. Allen*, 1 O. D. (N.P.) 188].

Where a person sold land to A, and the vendor's creditors levied on it, claiming the sale to be in fraud of creditors, and B bought at execution sale, on bill by A to quiet title, and cross bill by B also to quiet title, the sale to A was found to be fraudulent and B's title was quieted: *Hubbard v. Clark*, 8 O. 382, I Longsdorf's Notes, 443.

Exhausting the debtor's other property is not necessary before attacking a conveyance in fraud of creditors. It is not a creditor's bill: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256 [affirming *Westerman v. Westerman*, 3 Dec. Rep. 501, 9 Am. L. Reg. (N.S.) 690]; *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501.

It is proper to aver that there were no goods and chattels, in order to show a valid levy on land: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256; *Gormley v. Potter*, 29 O. S. 597, III Longsdorf's Notes, 501.

Where a debtor sold his goods in order to defraud creditors, the buyer knowing of the intent and giving a note for the price, the creditor may subject the goods, or can compel the vendee to account for the price, but can not have both remedies, for the former is in avoidance of the sale, and the latter in affirmance of it: *Bradford v. Beyer*, 17 O. S. 388, II Longsdorf's Notes, 840.

If the creditor garnishees the vendee, and then abandons that remedy and takes an assignment of the note, attaches the goods and gets the avails thereof, he can only pursue the vendee on the note. But the vendee can show the fraudulent nature of the note and defeat a recovery on it: *Bradford v. Beyer*, 17 O. S. 388, II Longsdorf's Notes, 840.

For the general discussion of the subject of judgments, decrees and orders, see JUDGMENT.

XVIII. PRIORITIES.

An insolvent husband buying property in his wife's name as a gift to her, he paying two thousand dollars and she paying the balance, four thousand dollars, if a creditor subjects his interest the wife can not claim to be first paid in full, and a decree subjecting two-sixths of it to his debts is not prejudicial to her. For she might well be regarded as sole owner and debtor to the husband, and thus liable for the whole two thousand dollars: *Shaeffer v. Fithian*, 26 O. S. 282, III Longsdorf's Notes, 304.

If an insolvent husband, indebted to his wife for loans, pays off a mortgage on her estate as a gift, she can not be compelled to account for the amount to other creditors

until her own claim is deducted: *Oliver v. Moore*, 26 O. S. 298, III Longsdorf's Notes, 305.

An attachment is in effect an execution before judgment and gives no greater rights than an execution, though garnishment may be otherwise; accordingly, the first in time is the first in distribution, where the fund is in a court of equity: *Shorten v. Drake*, 38 O. S. 76, III Longsdorf's Notes, 958 [reversing *Shorten v. Drake*, 8 Dec. Rep. 184, 6 Bull. 202].

A judgment lien binds land fraudulently conveyed, though the title has passed; accordingly, when A and B each obtained judgment at the same term, and A levied within the year on land transferred for a gambling debt, but B did not, but got a decree to subject the same land, A has the priority: *Bank v. Bank*, 1 Dec. Rep. 219, 4 W. L. J. 538. (supreme court).

B mortgaged his lot to A for a loan. He then sold it to C by absolute deed, but in fact partly to secure a debt he owed C and partly on a secret trust to defraud his creditors. D, a judgment creditor of B, filed a bill against B and C to set aside the deed and subject the lot. Pending this suit A got a decree of sale under his mortgage, and at the sale C bought it in. C then, holding under two titles, viz.: the judicial sale and B's deed, mortgaged the lot to E to secure a *bona fide* loan then made. It is held that E's mortgage is the first mortgage lien, being supported by that title of C which is not under attack, and on sale ordered in his case must receive the first proceeds, and D is remitted to any surplus. D's action to set aside the deed of B to C is not a *lis pendens* as to E: *Porter v. Barclay*, 18 O. S. 546, II Longsdorf's Notes, 916.

An attachment on property fraudulently conveyed gives no priority over other creditors of the grantor, for the fraud antedated it, and the finding thereof relates back to its commission: *Hemann v. Schoenfeld*, 13 Dec. Rep. 756, 2 C. S. C. R. 40.

An attachment on property conveyed in fraud of creditors, obtains no priority when such conveyance is declared to be in trust for all creditors, for the assignment was already burdened with the consequences of violating G. C., § 11106: *Phillips v. Ammon-Stevens Co.*, 2 O. N. P. 187, 3 O. D. (N.P.) 418.

A fraudulent conveyance being by law equivalent to an assignment for creditors, the property is not open to levy; accordingly, subsequent levies or *bona fide* liens are nullities: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337.

A conveyance from husband to wife direct, without consideration, being a nullity, is not

a transfer inuring to the benefit of all creditors equally, and, accordingly, a creditor levying on it gets a priority: *Fowler v. Trebein*, 16 O. S. 493, II Longsdorf's Notes, 795.

If a man having an equitable interest in a lot buys the entire interest and had the deed made to his children, and dies, and the conveyance to the children is found to be in fraud of creditors, the widow has no dower in it, for he never had a legal title, and did not die possessed of an equitable interest, since the void deed was binding on him: *Miller v. Wilson*, 15 O. 108, I Longsdorf's Notes, 699.

Release of dower in a conveyance to defraud creditors will not estop the wife to claim dower from the grantee or subbuyers with notice. Her release is not a fraud, because she released nothing that creditors could take: *Woodworth v. Paige*, 5 O. S. 70, II Longsdorf's Notes, 159. See also DOWER.

A chattel mortgage void as to creditors, because reserving a right of disposition, does not deprive the mortgagor's wife of exemption in lieu against his assignee for creditors. Delaying demand until the mortgages are ascertained to be void, though sale has been had, is not a waiver: *In re White*, Goebel, 153.

A fraudulent conveyance being set aside, the right to a homestead exemption against the creditors obtains: *Sears v. Hanks*, 14 O. S. 298, II Longsdorf's Notes, 657; *Tracy v. Cover*, 28 O. S. 61, III Longsdorf's Notes, 389; *Wildermuth v. Koenig*, 41 O. S. 180, IV Longsdorf's Notes, 57; *Roig v. Schultz*, 42 O. S. 165, IV Longsdorf's Notes, 101.

A conveyance of personal property to put it beyond creditors does not give creditors levying on it a claim to resist exemption in lieu of homestead: *Tracy v. Cover*, 28 O. S. 61, III Longsdorf's Notes, 389.

In a creditor's suit to set aside a conveyance by an insolvent to his wife, the trial court rejected evidence that the property was a homestead and worth only seven hundred dollars more than a paramount mortgage, and ordered a sale. It was held that, notwithstanding this decree, five hundred dollars in lieu of homestead may be allowed out of the proceeds. The excluded evidence, as the case was, was immaterial: *Bills v. Bills*, 41 O. S. 206, IV Longsdorf's Notes, 57.

A fraudulent assignment of a house not occupied as a homestead having been set aside and a trustee appointed under G. C., § 11106, he becomes the legal owner, and no homestead rights in the house can be thereafter acquired. If the debtor secures a possession under the trustee, he can not dispute his landlord's title by claiming homestead,

based on such possession: *Stafford v. Smith*, 11 Dec. Rep. 884, 30 Bull. 288.

In a suit to subject fraudulently conveyed lands to pay a judgment, an answer by the debtor that he is entitled to hold the premises as a homestead is no defense. If the fraud is proved, and there is a mortgage superior to homestead, it is not error to decree sale and the payment of costs and the mortgage from the proceeds. But a further order to apply the proceeds to pay plaintiff's judgment is erroneous. The precedence between the debtor's claim in lieu of homestead and liens against which the original homestead existed must be adjudicated by the court. G. C., § 11737: *Roig v. Schultz*, 42 O. S. 165. IV Longsdorf's Notes, 101. See also EXECUTION, WRIT OF.

Failure to file forthwith only avoids the mortgage as to rights asserted before actual filing, and if withheld from file without the mortgagee's consent, by a mutual friend of both parties until just before a receiver is appointed for the mortgagee's property, it is good against general creditors: *Retzsch v. Printing Co.*, 19 O. C. C. 631, 10 O. C. D. 537 [for opinion below, see *Retzsch v. Printing Co.*, 7 O. N. P. 605, 5 O. D. (N.P.) 574]. See also CHATTEL MORTGAGES.

Under G. C., § 11106, a fraudulent transfer of property inures to the benefit of creditors in the hands of the grantee, just as if it were a transfer expressly for their benefit, and a trustee appointed by the court takes the property in trust for the benefit of all creditors subject to pre-existing liens: *Bank v. Post*, 12 O. D. (N.P.) 232.

An assignment for the benefit of creditors by operation of law, under G. C., § 11106, declaring certain transfers fraudulent, and that same shall inure to the benefit of all creditors, takes effect from the date of the fraudulent transfer, not from the time of finding it fraudulent or from the appointment of a trustee by the probate court: *Bank v. Post*, 12 O. D. (N.P.) 232.

Where a creditor elects to proceed under G. C., § 11106, to set aside a fraudulent conveyance of his debtor's property and have it declared in trust for creditors generally, an attachment thereon subsequent to the fraudulent conveyance of the same acquires no priority over other general creditors: *Bank v. Post*, 12 O. D. (N.P.) 232. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

XIX. COSTS.

Where plaintiff was entitled on the pleadings to a decree declaring a deed to be a general assignment, as containing a trust, but insists upon attacking it for fraud and collusion, which were immaterial issues, and

the courts below deny him any relief, thus negating the fraud, this court, in entering a decree in his favor, will not allow him costs incurred in the lower courts, for he caused them, nor will they allow him attorney's fees out of the fund: *Maas v. Miller*, 58 O. S. 483, IV Longsdorf's Notes, 746.

XX. REVIEW.

A creditor in a suit to set aside a fraudulent conveyance, appealing, brings up the whole case as to all creditors, for such suit is for the benefit of all: *Bowlus v. Shanabarger*, 19 O. C. C. 137, 10 O. C. D. 167.

For the general discussion of the subject of appeal, see APPEALS.

FRAUDULENT INSTRUMENTS.

A pamphlet which is a mere advertisement or commendatory circular, while not an "instrument," in the legal and technical meaning of that word, yet falls within that term as used in G. C., § 13144, making unlawful the sending of any "letter, telegram or other instrument": *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1.

In order to make a good indictment under G. C., § 13144, it is necessary to set forth the fact that the instrument was written partly or wholly by the defendant, and to set forth the instrument, or the parts so written, and allege that it was done with the intent to obtain something of value, and with the intent to defraud: *State v. Hoffman*, 1 O. N. P. 290, 2 O. D. (N.P.) 206.

It is not sufficient that a count contain all that there is in the statute, but it must contain averments going to show that the "instrument" is one calculated to mislead: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1.

An indictment against one for sending a telegram in the name of another with intent to defraud, must, as against a person other than a telegraph operator, show that the person knowingly sent a dispatch not authorized by the one whose name is signed: *Jacoby v. State*, 6 Dec. Rep. 705, 7 Am. L. Rec. 477, 3 Bull. 1145.

FRAUDULENT INTENT.

See FRAUD AND DECEIT; FRAUDULENT CONVEYANCES; INTENT.

FRAUDULENT PREFERENCES.

See FRAUDULENT CONVEYANCES.

FRAUDULENT PRETENSES.

See FRAUD AND DECEIT; FALSE PRETENSES.

FRAUDULENT REMOVAL.

See ARREST; ATTACHMENT.

FRAUDULENT REPRESENTATIONS.

For fraudulent representations, see MISREPRESENTATION.

FRAUDULENT SALES.

See FRAUDULENT CONVEYANCES; SALES.
For fraudulent sales of wool, see also WOOL.

FRAUDULENT TRANSFER.

See FRAUDULENT CONVEYANCES.

FRAUDULENT WAGERS.

See GAMBLING.

FREE BANKING.

See BANKS AND BANKING.

FREEDOM OF CON- SCIENCE.

See CONSTITUTIONAL LAW; SUNDAY LAWS.

FREEDOM OF SPEECH.

See CONSTITUTIONAL LAW; CONTEMPT;
ATTORNEY AND CLIENT.

FREEHOLD ESTATES.

For freehold estates, see ESTATE; FEE SIMPLE; FEE TAIL; LIFE-ESTATES; DOWER; CURTESY; COVERTURE, ESTATE BY.

FREE-LUNCH LAW.

The statute (G. C., §§ 13224-1, *et seq.*), which forbids the giving away of food except crackers, cheese and pretzels in places where intoxicating liquors are sold has been held to be constitutional: *State v. Gallagher*, 8 O. L. R. 305, 55 Bull. 278.

G. C., §§ 13224-1, *et seq.*, prohibiting the furnishing or giving away of food in saloons,

affects but one calling and one particular act, to-wit: the giving away in a place where intoxicating liquors are sold of any food other than crackers, cheese and pretzels, and it is therefore unjustly discriminatory and in contravention of the bill of rights, and not within the police power of the state, which is limited to the enactment of laws which promote the public health, morals or safety: *State v. Foucar*, 8 O. L. R. 317, 55 Bull. 365. See also INTOXICATING LIQUOR.

The title of the act of May 10, 1910 (G. C., §§ 13224-1, *et seq.*), "to prohibit the furnishing or giving away of food without charge in any place in this state where intoxicating liquors are sold," is not sufficiently broad to bring it within the authority of the constitution to provide against the evils resulting from the traffic in intoxicating liquor: *State v. Foucar*, 8 O. L. R. 317, 55 Bull. 365.

FREE SCHOOLS.

See SCHOOLS, PUBLIC.

FREE SPEECH.

For free speech, see CONSTITUTIONAL LAW.

The distribution by pickets in a labor union boycott, of cards warning patrons of a hotel and saloon not to patronize the place as unfair, and threatening to publish the names of any who do so may be enjoined: *McCormick v. Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165.

Coercive measures to enforce a boycott may consist of violence or any form of intimidation such as threats, oral, printed or written. The restraint of such unlawful acts by a court of equity does not violate any right of trial by jury or any constitutional provisions as to the freedom of speech or the press: *McCormick v. Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165. See also BOYCOTTS AND STRIKES.

FREE TEXT-BOOKS.

For free text books, see also SCHOOLS, PUBLIC.

G. C., § 7739, as amended 91 v. 280, providing for free text books, etc., for use in city districts, is not in violation of Art. XIV, § 1 of the United States constitution, or Art. VI, § 2 of the constitution of Ohio: *Mooney v. Bell*, 8 O. N. P. 658, 11 O. D. (N.P.) 786.

There is no difference in principle between the furnishing by the school board of a black-board or a chart and the furnishing of books, these books to remain the property of

the district and to be given out to the pupils on such terms and conditions as the board of education may prescribe: *Mooney v. Bell*, 8 O. N. P. 658, 11 O. D. (N.P.) 786.

The purchase of text books and the distribution, or the "loaning of them to the pupils on such terms and conditions as the board may prescribe" is not a discrimination in favor of some and against others, nor is it a diversion of public funds for the benefit of part of the taxpayers: *Mooney v. Bell*, 8 O. N. P. 658, 11 O. D. (N.P.) 786. See also

FREE TURNPIKE.

For free turnpike, see **ROADS**; **TURNPIKE** AND **PLANK ROAD COMPANIES**.

FREIGHT.

For freight, see **CARRIERS**; **RAILROAD COMMISSION**.

FREIGHT BILL.

See **CARRIERS**.

FREIGHT CHARGES.

See **CARRIERS**; **RAILROADS**.

FREIGHT RATES.

See **CARRIERS**; **RAILROADS**.

FREIGHT TRAINS.

See **RAILROADS**.

FRENCH GRANT.

For French grant, see **SCHOOLS, PUBLIC**.

FRESHETS.

See **WATERS** AND **WATERCOURSES**.

FRIGHT.

No liability exists for acts of negligence causing mere fright or shock, unaccompanied by contemporaneous physical injury, even though subsequent illness results, where the negligent acts complained of are neither wilful nor malicious: *Miller v. Railway Co.*, 78 O. S. 309, IV Longsdorf's Notes, 1041.

It would seem to be a harsh rule, that a person can not recover for a physical injury, as for instance a rupture of the heart or of a blood vessel; or paralysis or some other functional disorder caused by fright in con-

sequence of the negligence of another. Whether such rule would be followed was questioned, but not decided: *Ohliger v. Traction Co.*, 3 O. C. C. (N.S.) 369, 13 O. C. D. 265. See also **DAMAGES**.

FRIVOLOUS APPEAL.

See **APPEALS**; **ERROR**.

FRIVOLOUS PLEADING.

See **PLEADINGS**.

FRIVOLOUS QUESTIONS.

See **EVIDENCE**; **TRIAL**; **WITNESSES**.

FROGS FOR RAILROADS.

For frogs for railroads, see **RAILROADS**.

FRONTAGE.

For assessments on frontage, see **ASSESSMENTS**.

FRONT-FOOT RULE.

See **ASSESSMENTS**.

FRUCTUS INDUSTRIALES.

See **EMBLEMENTS**.

FUGITIVE FROM JUSTICE.

For extradition of fugitives from justice, see **EXTRADITION**.

FUGITIVE SLAVE.

For extradition of fugitives from justice, see **EXTRADITION**.

The rescuer of an escaped slave from the owner violates the federal constitution: *In re Bushnell*, 9 O. S. 77, II Longsdorf's Notes, 377.

Ohio, Kentucky and Virginia have concurrent jurisdiction over the Ohio river below low water mark, and Ohio has exclusive jurisdiction above low water mark. But a slave brought by his master in transit within low water mark is not so within Ohio as to become free, for the river is a common highway from shore to shore: *State v. Hoppess*, 1 Dec. Rep. 105, 2 W. L. J. 279.

The fugitive slave law, passed by Congress February 12, 1793, was in force in the

Northwestern Territory, and was not repugnant to the ordinance of 1787: *Jones v. Van Zant*, 46 U. S. (5 How.) 215.

FULL BLOOD.

See DESCENT AND DISTRIBUTION.

FULL FAITH AND CREDIT.

See JUDGMENT; RECORDS.

FULL INDORSEMENT.

See NEGOTIABLE INSTRUMENTS.

FULL PAID STOCK.

See CORPORATIONS.

FULL PANEL.

See JURY.

FUNDS, PUBLIC.

See PUBLIC FUNDS.

FUNERAL BENEFIT ASSOCIATION.

See INSURANCE.

FUNERAL EXPENSES.

For funeral expenses, see HUSBAND AND WIFE; EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

An expressed desire by a decedent as to the amount which should be expended on his funeral is without force or effect unless such desire has found expression in his will: *In re Kaercher*, 6 O. N. P. (N.S.) 459, 52 Bull. 107.

Where a frugal man, simple in his tastes and habits of living, and accustomed to hard work, takes his own life, leaving an estate of eight hundred dollars, an expenditure of one hundred and fifty dollars for a casket is extravagant and unreasonable, and should be disallowed, notwithstanding the sole legatee may have acquiesced therein at the time: *In re Kaercher*, 6 O. N. P. (N.S.) 459, 52 Bull. 107.

Funeral expenses and expenses of last sickness are made preferred claims against estates of decedents under G. C., § 10714, and as such should be presented to the executor or administrator for his allowance or rejection, as provided by G. C., § 10717: *In re Estate of Miller*, 12 O. D. (N.P.) 562.

The statute of limitations against claims for expenses of last sickness begins to run from the date of account, but against funeral expenses not until after the appointment of an administrator, there being no person to sue or to be sued during the interval between the death of the deceased and the appointment of his personal representative: *In re Estate of Miller*, 12 O. D. (N.P.) 562. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

There was no error in admitting testimony as to the funeral expenses of plaintiff's wife, who was killed in the same accident, inasmuch as they constituted a part of the pecuniary loss sustained by the plaintiff, and could not be recovered in an action begun by the administrator under G. C., § 10770: *Railway v. Taylor*, 17 O. C. D. 757, 3 O. L. R. 30. See also DAMAGES.

An assignment of a contract of insurance issued by a company, corporation or association engaged in the business of providing for the payment of funeral, burial or other expenses of deceased members, or certificate holders therein, or engaged in the business of providing any other kind of insurance, to any designated undertaker, or undertaking concern, or to any particular tradesman, or business man, is in violation of G. C., § 666 and void: *Robbins v. Hennessey*, 86 O. S. 181.

FUNERAL INSURANCE.

See INSURANCE.

FURNISHING INTOXICATING LIQUOR.

See INTOXICATING LIQUOR.

FURTHER ASSURANCE.

See DEEDS.

FURTHERANCE OF COMMON PURPOSE.

See AIDERS, ABETTERS AND ACCOMPLICES; EVIDENCE.

FURTHERANCE OF JUSTICE.

See ERROR.

FUTURE-ACQUIRED PROPERTY.

See HUSBAND AND WIFE; WILLS, LEGACIES AND DEVISES.

FUTURE ADVANCES.

See MORTGAGES.

FUTURE DAMAGES.

See DAMAGES.

FUTURE DELIVERIES.

For future deliveries, see SALES; DAMAGES.

For future deliveries as gambling contracts, see GAMBLING.

The measure of damages for breach of contract for future deliveries of manufactured articles, where the time for the performance of the contract has expired, is the difference between the contract price and the market price, or if there be no market price,

the difference between the contract price and that for which the plaintiff by the exercise of diligence and judgment could have obtained them at the time and in the quantities needed within the limits of the contract: *Furnace Co. v. Heating Co.*, 6 O. C. C. (N.S.) 629, 17 O. C. D. 665 [affirmed, without opinion, *Heating Co. v. Furnace Co.*, 73 O. S. 396; affirmed, without opinion, *Furnace Co. v. Heating Co.*, 76 O. S. 585].

FUTURE EARNINGS.

For assignments of future earnings, see ASSIGNMENTS.

FUTURE ESTATES.

See FUTURE INTERESTS.

FUTURE INTERESTS.

Scope Note.—Includes definition; reversions and remainders; executory interests; construction; the effect of gifts over; performance of conditions; acceleration of remainders; devolution of vested remainders; devolution of title when the remainder is contingent; right of life-tenant to security; right of remainderman to possession and inheritance tax.

Cross References.

For life-estates, see LIFE ESTATES; CURTESY; DOWER; COVERTURE, ESTATE BY.

For trusts and other equitable estates, see TRUSTS.

For the effect and validity of instruments creating future interests, see DEEDS; LANDLORD AND TENANT; WILLS, LEGACIES AND DEVISES.

ANALYTICAL OUTLINE.

- I. Definitions, 8211.
- II. Classifications, 8211.
 - A. Reversions, 8211.
 - B. Remainders, 8212.
 - 1. Vested or contingent remainders, 8212.
 - a. In realty, 8212.
 - b. Effect of direction for conversion, 8213.
 - c. Power to use principal for support, 8214.
 - 2. Remainder in personalty, 8215.
 - C. Executory interests, 8216.
- III. Construction, 8218.
- IV. Gifts Over, 8219.
 - A. In case of death, 8219.
 - B. Death without issue, 8219.
 - 1. Definite and indefinite failure of issue, 8219.
 - 2. Interest of first donee, 8220.
 - 3. Executory gift over, 8222.
 - C. Death without heirs, 8222.
- V. Performance of Conditions, 8223.
- VI. Acceleration of Remainders, 8223.

- VII. Devolution of Vested Remainder, 8224.
- VIII. Devolution of Title When Remainder Contingent, 8225.
 - A. *In heirs*, 8225.
 - B. *In executors*, 8226.
- IX. Right of Life-tenant to Security, 8227.
- X. Right of Remainder-man to Possession, 8228.
- XI. Inheritance Tax, 8230.

1. DEFINITIONS.

A contingent remainder is where the estate in remainder is limited to take effect either to a dubious or uncertain person, or upon a dubious or uncertain event, so that the particular estate may chance to be determined and the remainder never take effect: *Burckhardt v. Decker*, 8 O. N. P. (N.S.) 526, 20 O. D. (N.P.) 106 [affirmed, without opinion, by circuit court: *Burckhardt v. Decker*, 8 O. N. P. (N.S.) 526].

A vested remainder is where the estate is invariably fixed to remain to a determinate person after the particular estate is spent: *Burckhardt v. Decker*, 8 O. N. P. (N.S.) 526, 20 O. D. (N.P.) 106 [affirmed, without opinion, by circuit court, *Burckhardt v. Decker*, 8 O. N. P. (N.S.) 526].

Under G. C., § 8622, the issue of a donee in tail, during the life of such donee, has no estate or interest in the lands entailed which he can alienate: *Dungan v. Kline*, 81 O. S. 371 [followed by *Carter v. Grossnickle*, 11 O. N. P. (N.S.) 465, 22 O. D. (N.P.) 680].

II. CLASSIFICATIONS.

A. REVERSIONS.

The abandonment of a canal does not cause the title to the land belonging thereto to revert to the original owners, their heirs or devisees, but the title remains in the state until granted out by proper conveyance: *Railway v. Nelson*, 14 O. C. C. (N.S.) 129, 22 O. C. D. 431 [affirming *Railway v. Nelson*, 9 O. N. P. (N.S.) 56, 20 O. D. (N.P.) 704].

The right of reversion in property dedicated for street purposes as between the original proprietor and an abutting lot owner is in said owner of abutting lots: *Callen v. Light Co.*, 66 O. S. 166, IV Longsdorf's Notes, 901. See **STREETS**.

The statute (32 Henry VIII, c. 34) enabling the assignee of the reversion to maintain an action in his own name upon express real covenants running with the land, is not a part of the law of this state: *Crawford v. Chapman*, 17 O. 449, I Longsdorf's Notes, 821.

Operative words of conveyance are required either to engraft a reservation of a fee in

reversion upon a grant of a fee simple, or to convey a remainder in fee, in such wise as to reduce a fee simple granted to an estate for life or anything less than a fee simple: *Lee v. Scott*, 5 O. C. C. (N.S.) 369, 16 O. C. D. 799.

For reversions after estates for years, see **LANDLORD AND TENANT**.

B. REMAINDERS.

1. Vested or Contingent Remainders.

(a) In Realty.

The law favors the vesting of estates, and a devise of real estate will be deemed vested at the testator's death unless the contrary is so clearly expressed that the terms of the will would be otherwise opposed. To this end words of seeming condition will, if possible, be deemed to postpone possession only, and not present right: *Linton v. Laycock*, 33 O. S. 128, III Longsdorf's Notes, 660.

A devise to persons when one of them arrives at age vests immediately, and is not defeated by the devisee's death before maturity. The words of futurity merely postpone possession, and do not import contingency. Accordingly, a conveyance by a devisee passes title: *Linton v. Laycock*, 33 O. S. 128, III Longsdorf's Notes, 660.

The rule as to personalty that a direction to pay or divide vests an interest only at the time fixed for paying or dividing does not apply to real estate: *Linton v. Laycock*, 33 O. S. 128, III Longsdorf's Notes, 660.

A devise to a wife for life, and if she die before all the children are of age, then those who have not left home, and have submitted to her control, shall share equally when the youngest is of age. It was held that the children took a remainder in fee contingent on her death before the youngest is of age, and if she survives that date, they took as heirs, and not as devisees, and, hence, that one had left home is of no consequence: *Chambers v. Forsythe*, 1 O. C. C. 282, 1 O. C. D. 155.

A devise to a daughter for life, and at her death the land to be sold and the proceeds to be divided between her and testator's son, "or their heirs," gives the daughter a vested

remainder, hence at her death her half of the proceeds of sale, as between her heirs and her administrator claiming it to pay her creditors, it must be distributed to the latter: *Faulkner v. Clevenger*, 35 Bull. 125 [without opinion in supreme court].

Under a devise to a wife, for and during her natural life, provided she does not again marry, and at her death or marriage the estate to be equally divided between testator's children, the children of deceased children to take their parents' share, the children take a vested interest subject to being divested by the happening of a contingent event: *Burkhardt v. Decker*, 8 O. N. P. (N.S.) 526, 20 O. D. (N.P.) 106 [affirmed, without opinion, by circuit court, *Burkhardt v. Decker*, 8 O. N. P. (N.S.) 526].

A devise to the widow for life without disposing of the remainder, leaves the remainder to descend at once as a vested interest, and it is not an expectancy; accordingly, it is subject to dower of spouses of the remaindermen: *Groppengeiser v. Walter*, 19 O. C. C. 579, 10 O. C. D. 673.

A devise of rents to children, and such children as they might have, share and share alike, the share of grandchildren dying before majority to become common stock and divided as aforesaid, and as each grandchild came of age its share to go to its parents for life, and if the parents died, their share to be used to bring up their minor children, and when all the parents died, the real estate to be divided among the grandchildren, it was held that the remainder after the life estate to the children and grandchildren during the children's lives vested in the grandchildren subject to be opened to let in afterborn, and great grandchildren took by descent from the grandchildren, and not by devise: *Dennis v. Mullane*, 1 O. C. C. 399, 1 O. C. D. 223 [affirmed, without opinion, *Mullane v. Dennis*, 20 Bull. 472].

(b) Effect of Direction for Conversion.

A devise of the entire estate to the wife for life, remainder to two children for life and then after their death the whole estate real and personal to be "sold and the proceeds divided" among two other children and the heirs of two deceased children. It was held that the latter clause containing no dispositive words confers a vested estate on the devisees with a postponement merely of the enjoyment, and they can devise it before expiration of the life estates and their devisees may elect to take the real estate and have it partitioned instead of sold: *Weymouth v. Irwin*, 5 O. N. P. 248, 7 O. D. (N.P.) 91.

Where executors are to lease, mortgage and under certain contingencies sell real estate and after such sale distribute the proceeds among children or their heirs in case of death before sale, the title does not vest in the children but the gift is of personalty and to the heirs living at the time of distribution: *Kline v. Marsh*, 12 O. C. C. 645, 5 O. C. D. 352.

A devise of a farm for twelve years after which the executor shall sell and divide the proceeds among children equally gives the executor but a mere naked power and vests the fee in the children at once, subject to be divested by sale. Accordingly, a child's share is subject to a judgment lien, and in case of sale the lien is transferred to the fund: *Barkman v. Hain*, 5 O. N. P. 508, 5 O. D. (N.P.) 474.

A devise of real estate to executors in trust to sell within fifteen years and divide proceeds when sold among children, but if any die without issue his interest to go to the survivors, does not vest in any child any interest in proceeds of sales made after his death: *Trust Co. v. Darr*, 19 O. C. C. 497, 10 O. C. D. 554.

A further provision that one child's share of the personalty shall be paid over to him when he is twenty-five years old and no longer held in trust does not limit the executor's right to take fifteen years to sell realty nor give such child an interest in realty sold after his death occurring after he becomes twenty-five: *Trust Co. v. Darr*, 19 O. C. C. 497, 10 O. C. D. 554.

(c) Power to Use Principal for Support.

A remainder in personalty is not destroyed by an absolute power of disposition given to the first taker, unless a total repugnancy between the two gifts exists: *Pruden v. Pruden*, 14 O. S. 251, II Longsdorf's Notes, 651.

If the power of disposition is for particular objects or purposes, as the support of a person, there is no total repugnancy, although such purposes may require the whole property, and a gift of the unappropriated part is valid: *Pruden v. Pruden*, 14 O. S. 251, II Longsdorf's Notes, 651.

A devise for life to the widow, with right to control and use principal and interest for support, the unconsumed remainder to go to the children, gives them an interest which is vested, though the amount is contingent: *Min Young v. Min Young*, 47 O. S. 501, IV Longsdorf's Notes, 390.

A bequest was made of all personal estate to the wife, and at her death "said personal estate, or so much thereof as shall be unconsumed, to be equally divided between" his heirs, naming them. The wife elected to take under the will, and the ex-

ecutor, after paying debts, delivered the balance of the personalty to her. It was held that the widow was entitled to the possession thereof, and when the executor delivered it to her, he fully administered the estate, and is not responsible for the unconsumed remainder, nor required to account therefor in the probate court: *Posegate v. South*, 46 O. S. 391, IV Longsdorf's Notes, 333.

A devise was made of all property to a wife for life, remainder to children, after paying debts of her contracting. After settling the estate and paying the balance to the widow she died leaving part of the estate and a debt. It was held not to be the duty of the executor to pay her debt nor divide the remainder. Accordingly, his bond is not liable, although a judgment for the widow's debt was obtained against him and he sold the real estate by order of court to pay it, but did not pay it or divide the residue to the remaindermen: *Flickinger v. Saum*, 40 O. S. 591, IV Longsdorf's Notes, 43.

A devise to the wife of the balance of my estate to sell, rent, or possess, as long as she remains my widow, but in case of her death or remarriage, then to the heirs of my five children as they become of age, after the debts of my wife's contracting are paid, the grandchildren accepted the devise and survived the widow, who left the real estate and part of the personalty and a debt for support, it was held a vested remainder in such personalty as might be left, and a remainder in fee in the realty, vested immediately in the grandchildren in common. By accepting the devise, however, they became personally liable for the widow's debt, which was also a charge on the remainders: *Flickinger v. Saum*, 40 O. S. 591, IV Longsdorf's Notes, 43.

A devise to the widow for life with full power to dispose of and reinvest, and at her death the estate to be divided into ten parts and go to named persons, but if any die without issue his share to go to the others, gives the remaindermen a vested interest which is subject to the lien of a judgment: *Moore v. Herancourt*, 10 O. C. C. 420, 6 O. C. D. 826.

2. Remainder in Personalty.

A remainder over in personalty may be limited by devise, and the remaindermen take as purchasers: *King v. Beck*, 15 O. 559, I Longsdorf's Notes, 730.

If testator's wife is to have the use of all the property for life to bring up the children, and at her decease an equal division, the daughters to have the movable property, this gives her a life estate in the personalty with remainder in the daughters, and

her investment of it in real estate is to be treated as if for herself for life with such remainder: *Williamson v. Hall*, 3 Dec. Rep. 504, 10 Am. L. Reg. (N.S.) 466.

A legacy to B, payable at the death of the testator's widow, vests at once, and accordingly does not lapse by B's death before the widow, but is payable to his administrators: *McGuffey v. Brooke*, 13 Dec. Rep. 873, 2 C. S. C. R. 231.

A devise of all property to a wife for life and at her death to be distributed according to law, gives to the children a contingent remainder vesting at the wife's death. Accordingly where she exchanged stock in an expiring company for stock in the reorganized company giving the company an option to purchase it at par after her death, such contract of purchase does not bind the remaindermen, nor are they estopped by lapse of time and receiving benefits from the stock from her because being contingent remaindermen they could not interfere. Bonus stock issued to her is also subject to the remainder: *Carnes v. McAfee*, 11 O. N. P. (N. S.) 517.

Where, after a testator's death, a corporation in which he held stock sold out at a great profit to another corporation, which issued two shares for every one of the old, and still further large increases in value were had largely from earnings, but the increases were employed in the business and were not separated for distribution, such increases are not income of the estate under the will, but go to devisees of the remainder: *Miller v. Miller*, 13 O. N. P. (N.S.) 1 [for opinion on appeal, see *Miller v. Miller*, 15 O. C. C. (N.S.) 481, 24 O. C. D. 431].

A gift of property, chiefly personalty, to trustees to pay certain annuities out of the income of the estate and after the final cessation of such annuities to distribute the estate among certain children and grandchildren of the testator then living and the heirs of the body of those deceased and in default of such heirs to their brothers and sisters gives a contingent interest only until the time for distribution as fixed by the terms of the will: *Hamilton v. Rodgers*, 38 O. S. 242, III Longsdorf's Notes, 966.

C. EXECUTORY INTERESTS.

An estate to begin at the death of the life tenant is not a remainder, for it is not what remained after carving out a particular estate, but an estate to begin at the happening of a particular event and would not begin until the life tenant's death, even though his life estate terminated before: *Holt v. Lamb*, 17 O. S. 374, II Longsdorf's Notes, 838.

A devise was made to one for life, and at his death the land was to be sold and the proceeds to be divided among his children. Such devise gives an executory interest and not a remainder. Accordingly, the statute of limitations would not begin against them until his death. If it were a remainder the statute would begin when the life estate ended: *Holt v. Lamb*, 17 O. S. 374, II Longsdorf's Notes, 838.

An executory devise is such a limitation of a future estate or interest, as the law admits in the case of a will, but which is contrary to the rules of limitation in conveyances at common law: *Thompson v. Hoop*, 6 O. S. 480, II Longsdorf's Notes, 251.

Failure of the particular estate does not destroy a contingent remainder created by will supporting it, but it may be upheld as an executory devise: *Thompson v. Hoop*, 6 O. S. 480, II Longsdorf's Notes, 251.

Under a devise to the widow and remainder and after her death, to one of the sons, if she refuses to take under the will, the remainder will take effect as an executory devise: *Thompson v. Hoop*, 6 O. S. 480, II Longsdorf's Notes, 251.

Under a devise to the widow in order to raise younger children as long as she is widow, and if she dies the land not to be disposed of until the youngest child is of age, it was held though the widow's estate may be extinct, no partition can be had among the children until majority of the youngest: *Davison v. Wolf*, 9 O. S. 73, I Longsdorf's Notes, 462.

A limitation over of personal property dependent on a future uncertain event (as an absolute money legacy to A, but if she dies without leaving children, then over) takes effect (if at all) as an executory devise and not as a remainder, and no interest vests in them until the contingency: *Lapham v. Martin*, 33 O. S. 99, III Longsdorf's Notes, 659.

If the testator has provided for the sale of his lands by his executors after the death of his widow, and the division of the proceeds between his five children, and that if any of his children should die before distribution, the share of such child or children should go to his or their heirs, the law of succession with respect to the proceeds from the sale of said land when finally made by the executors is not found in the statute of descent but of distribution, and the time of the distribution determines who are the legatees; and a quitclaim deed given by one of the sons to his divorced wife of all his right, title and interest in said land, executed during the lifetime of their mother, is void and without effect: *Knisely v. Young*, 15 O. C. C. (N.S.) 49, 23 O. C. D. 439.

A devise to A in trust for B, A to care for and lease the realty devised and after paying taxes, repairs and expenses to pay from the proceeds to B in monthly installments the sum of three thousand dollars per annum for ten years after testator's death and the sum of five thousand dollars per annum for the second term of ten years after testator's death and at the end of such twenty year period A, to convey such realty to B if living, and if dead, to his children and heirs, share and share alike, creates a passive trust in A with a fee in B and an executory devise over to B's children or heirs on condition that B died within the twenty year period; and without the consent of the beneficiary the trust may be terminated and trustee may be required to convey the property to the beneficiary with condition subsequent in the event of the death of such beneficiary within twenty years from the death of testator: *Kiefer v. Bard*, 8 O. N. P. (N.S.) 377; *sub nomine*, *Kiefer v. Bard*, 20 O. D. (N.P.) 629.

An interest accruing in a survivor by an executory devise is subject to the same contingency as his original interest, and passes to his survivors in like manner if he die without issue: *Taylor v. Foster*, 17 O. S. 166, II Longsdorf's Notes, 824.

III. CONSTRUCTION.

The father of seven children, three of whom were the sons of his second marriage, devised part of his estate to the three latter to vest at a future date, and in another part of his will he provided generally that if any child died without issue his share should go to his brothers and sisters, but all other devises were not to his other children, but to their children, thus showing an intention to exclude his other children, of whom the girls were married, and the boys in debt, it was held that he intended that on the death of one of the three sons of the second marriage his share should go only to his brothers of the whole blood, excluding the brothers and sisters of the first marriage: *Hamilton v. Rodgers*, 38 O. S. 242, III Longsdorf's Notes, 966.

A bequest of dividends of stocks, without limitation of time or other qualification, carries the stock themselves: *Collier v. Collier*, 3 O. S. 369, II Longsdorf's Notes, 35.

A clause, "when all my sisters, nieces, nephews and brother, hereinbefore made beneficiaries of the income," are dead, the trustees shall divide the estate into as many equal parts as there are surviving children of the above, and give one of said parts to each absolutely, requires distribution as soon as all of said beneficiaries are dead: *Barbour*

v. Gallagher, 15 O. C. C. (N.S.) 73, 23 O. C. D. 607 [affirmed, without opinion, *Goodloe v. Barbour*, 87 O. S. 510].

A devise to a child or children, but if they die before twenty-one, or without issue, then over to the widow, is to be construed as if "or was and," and the estate does not go over unless both contingencies happen. Such is the universal construction of this provision, founded on presumed intention of the testator: *Ward v. Barrows*, 2 O. S. 241, I Longsdorf's Notes, 1046.

A devise was made to A and her issue, and if she should die under twenty-one years old, leaving no living issue then over. If A dies over twenty-one but without issue, the remainder never takes effect. The word "or" can not be inserted after twenty-one years old, and if it could, it would be construed "and": *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181.

A devise to a granddaughter of her deceased mother's share, but if she dies before reaching eighteen years or without issue, then to testator's heirs, it was held "or" is to be construed "and," and the grandchild having died over eighteen but without issue, her share belongs to her estate: *Minnix v. Eikenberry*, 36 Bull. 227 [without opinion, in supreme court].

A release of all right in real property "vested or contingent" in articles of separation and division of property reasonably and fairly made, will not affect the wife's inheriting real estate if the husband dies intestate. The chance of inheriting real estate, unlike personalty, is a mere possibility or expectancy and is neither a vested or contingent interest under the contract, for he could have cut it off by will: *Smith v. Smith*, 57 O. S. 27, IV Longsdorf's Notes, 706. See also HUSBAND AND WIFE.

IV. GIFTS OVER.

A. IN CASE OF DEATH.

In a devise, "if my wife should marry or, at her death, I devise my property to be equally divided among my children, except those who are deceased," the words "are deceased" mean at the widow's death and not at the date of the will, for otherwise the exception would be useless: *Burdsall v. Burdsall*, 15 O. C. C. (N.S.) 91, 23 O. C. D. 439.

B. DEATH WITHOUT ISSUE.

1. Definite and Indefinite Failure of Issue.

A devise to A, but if he "die without issue," or without heirs or children, then to B, means without surviving issue, and if A's issue die before he does, B takes: *Parish v.*

Ferris, 6 O. S. 563, II Longsdorf's Notes, 258 [reversing *Parish v. Ferris*, 3 Dec. Rep. 353, 3 Am. L. Reg. 101]; *Niles v. Gray*, 12 O. S. 320, II Longsdorf's Notes, 566; *Piatt v. Sinton*, 37 O. S. 353, III Longsdorf's Notes, 918; *Smith v. Hankins*, 27 O. S. 371, III Longsdorf's Notes, 363.

A devise of a part of a residue to two grandchildren and if both die without issue, the property "coming to" them "shall be given" to the other grandchildren, it was held the contingency referred to the time of the testatrix's death, and if the two grandchildren survive her, their shares become absolute, and on their death without issue passed to their heirs and not to the other grandchildren: *Baker v. McGrew*, 41 O. S. 113, IV Longsdorf's Notes, 53.

The doctrine that, where real estate is devised in terms denoting an intention that the primary devisee shall take a fee simple on the death of the testator, followed by a devise over in case of his death without issue, the latter words refer to a death in the lifetime of the testator, is not the law of Ohio. Such words, or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of the first taker, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purpose: *Walker v. Walker*, 20 O. C. C. 409, 11 O. C. D. 291.

A devise with a proviso thus, "in case my said children shall die without issue, then after the death of my said wife" the property shall go as follows. It was held that where the will points to a period of distribution the words "die without issue," are to be restricted to death without issue prior to such period: *Pendleton v. Bowler*, 11 Dec. Rep. 551, 27 Bull. 313; *Smith v. Hankins*, 27 O. S. 371, III Longsdorf's Notes, 363.

A devise to A, and if she dies, then to her child, or if the child dies, then to brothers and sisters of A, is substitutionary, and means if A dies before the testator. And if the divesting contingency be death without issue, and not mere death alone, it may be similarly restricted even in Ohio if such intent otherwise appear, and then A, surviving the testator, will take an indefeasible fee: *Patterson v. Earhart*, 11 Dec. Rep. 787, 29 Bull. 313.

2. Interest of First Donee.

A devise to A and B, and if either dies without lineal descendants, his share to go to the other, with a gift over in case of the death of each without lineal descendants, gives to A and B each a fee, on condition subsequent subject to be divested by dying

without issue. The estate given is not a life estate with remainder over to the descendants of each: *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043 [affirming *Anderson v. Realty Co.*, 9 O. C. C. (N.S.) 473, 19 O. C. D. 267; and affirmed, on question of jurisdiction, in *Anderson v. Realty Co.*, 222 U. S. 164]; *Trust Co. v. Anderson*, 11 O. C. C. (N.S.) 177, 20 O. C. D. 491 [affirmed, in *Anderson v. Trust Co.*, 86 O. S. 320, on authority of *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043]; *Trust Co. v. Anderson*, 11 O. C. C. (N.S.) 246 [affirmed, without opinion, *Anderson v. Trust Co.*, 86 O. S. 320, on authority of *Anderson v. Realty Co.*, 79 O. S. 23, IV Longsdorf's Notes, 1043]; *Messenger v. Anderson*, 225 U. S. 436 [reversing *Messenger v. Anderson*, 171 Fed. 785, 96 C. C. A. 445; for opinions on former proceedings in error in this action, see *Anderson v. Messenger*, 158 Fed. 250, 85 C. C. A. 468; *Anderson v. Messenger*, 146 Fed. 929, 77 C. C. A. 179].

A devise, thus, at the death of my wife I give to two sons, and if either die without living children, his share to go to the survivor, and if both die leaving no heirs, then over. It was held that each took a vested remainder in fee defeasible on the death of either without children. The word "both" does not mean "either." If one dies leaving children, the other's share becomes absolute, and is no longer subject to be divested by the contingency: *Collins v. Collins*, 40 O. S. 353, IV Longsdorf's Notes, 30.

An equitable estate conveyed to husband and wife is held as tenants in common. The unity of their relation does not make either take by survivorship on the other's death, but his or her heirs take: *Wilson v. Fleming*, 13 O. 68, I Longsdorf's Notes, 624.

A deed to A and his wife jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns, gives the survivor the entire estate in fee and not the half in common with the deceased's heirs: *Lewis v. Baldwin*, 11 O. 352, I Longsdorf's Notes, 565.

A devise to a daughter, but if she dies without issue then her share to a son, gives her a fee simple determinable on the contingency, when it would pass to the son by way of executory devise: *Niles v. Gray*, 12 O. S. 320, II Longsdorf's Notes, 566.

A devise of real estate to children, and if any die without issue their shares to go to the survivors, gives each a fee determinable on dying without issue. In case of such death such share goes to the survivors by way of executory devise: *Taylor v. Foster*, 17 O. S. 166, II Longsdorf's Notes, 824.

A devise was made to a daughter A for life, with remainder to others if she dies

without living issue. Such remainder is on definite failure of issue. A does not take an estate tail but a life estate under the will, and being the only child she also takes the remainder by descent subject to its being divested by leaving no issue. Accordingly, if she leaves issue her husband is entitled to dower: *Woodliff v. Duckwall*, 19 O. C. C. 564, 10 O. C. D. 686.

A devise in absolute terms to A, and in a later clause of the will a limitation over in case of A's death without issue, is not a life estate, and remainder but a fee and an executory devise, and the first devisee may have partition: *Patterson v. Earhart*, 11 Dec. Rep. 787, 29 Bull. 313.

A devise to a son with words of perpetuity, and a later clause that if he should die without issue before the testator's widow, she should have the land for life, but makes no provision for a remainder, does not make the remainder intestate property, but only defeats the son's interest to the extent that the lesser interest is carved out of it, at least if the rest of the will shows that to be the intent: *Hopkins v. Pease*, 8 O. C. C. 246, 4 O. C. D. 435, 1 O. D. (N.P.) 477.

3. Executory Gift Over.

In case the widow had elected not to take under the will, and thereafter the son had died without lawful issue, whether or not the widow, notwithstanding such election, would have taken the estate in fee simple by way of executory devise was queried but not decided: *Weaver v. King*, 12 O. C. C. (N.S.) 129, 21 O. C. D. 199 [affirmed, without opinion, *Weaver v. King*, 80 O. S. 717].

A will provided that the testator's real estate should pass to his wife and child in the same manner as provided by statute, and then provided: "In the event of the death of my said son without lawful issue, leaving my said wife surviving him, then in that case, all my property, real and personal, remaining shall pass and go to my said wife as her sole and separate property." The son having died in infancy subsequent to the death of testator, the widow under the above quoted clause of the will took the estate in fee simple by way of executory devise: *Weaver v. King*, 12 O. C. C. (N.S.) 129, 21 O. C. D. 199 [affirmed, without opinion, *Weaver v. King*, 80 O. S. 717].

C. DEATH WITHOUT HEIRS.

A devise of land to two children and if "either die without heirs capable of inheriting" then to the survivor vests in each a fee determinable on death without children, and then the survivor takes by way of executory devise. The word "heirs" means

children, and a surviving husband does not take: *Durfee v. MacNeil*, 58 O. S. 238, IV Longsdorf's Notes, 738.

The survivor is not estopped by having accounted to the other for the proceeds of sales and given her notes for balances and will be exonerated from paying such notes after such death: *Durfee v. MacNeil*, 58 O. S. 238, IV Longsdorf's Notes, 738.

Where land is devised to a daughter and another clause leaves it to the other children in the event of her death leaving no heirs she takes a fee and they a future contingent interest by way of executory devise: *Darlington v. Compton*, 20 O. C. C. 242, 11 O. C. D. 97.

A provision in a will which gives all the real and personal estate of testator to his daughter, and later provides for a disposition of his property in case of her death without heirs, must be construed to refer to her death occurring after the death of the testator: *Lodge v. Darrow*, 16 O. D. (N.P.) 120 [affirmed, without opinion, *Lodge v. Darrow*, 78 O. S. 397].

V. PERFORMANCE OF CONDITIONS.

Under a devise to two of three children in certain proportions, but that if they should prefer to live together as one family then no division should be made and half the unconsumed remainder at their death should go to the third child's issue, the two children divided the property, but continued to live together. It was held that the subsequent living together was not under the will, and hence did not interfere with the prior division and hence there was no remainder for the third child's issue: *Worthington v. Hottois*, 19 O. C. C. 545, 10 O. C. D. 667.

VI. ACCELERATION OF REMAINDERS.

If the wife refuses to take under the will, or fails to elect, the estate in remainder, limited after her life estate, vests subject to her dower: *Millikin v. Welliver*, 37 O. S. 460, III Longsdorf's Notes, 927.

The will is affected only as to the consort refusing to take under it. Accordingly, under a devise to husband for life and remainder over, the remainderman can not take until the husband's death, though he refuses to take under the will. The same applies in case of a power to sell after his death: *Wilson v. Hall*, 6 O. C. C. 570, 3 O. C. D. 589 [affirmed, without opinion, *Hall v. Wilson*, 53 O. S. 679].

A devise to the widow for life, or so long as she remains a widow, and after her death to a son, may mean to the son not only at death, but at the termination of the life

estate by the widow's remarriage: *Paris v. Winterburn*, 6 O. C. C. 635, 3 O. C. D. 622.

An executory interest or a contingent remainder can not be accelerated by the failure of the particular estate: *Davison v. Wolf*, 9 O. 73, I Longsdorf's Notes, 462.

The doctrine of acceleration of remainders is based on the presumed intention of the testator to devise the property in remainder from and after the determination of the preceding estate, and not from and after the death of the life tenant: *Holdron v. Holdron*, 78 O. S. 276, IV Longsdorf's Notes, 1041.

The doctrine of acceleration of remainders is a rule of interpretation, and is to be applied so as to effect and not to defeat the testator's intention: *Holdron v. Holdron*, 78 O. S. 276, IV Longsdorf's Notes, 1041.

Under the doctrine of acceleration of remainders a devise to A for life, and at his death to B, is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way; but this doctrine rests upon the presumed intention of the testator, and will be applied only when promotive of his intention: *Holdron v. Holdron*, 78 O. S. 276, IV Longsdorf's Notes, 1041.

Remainder dependent on devise of life estate to widow surrendered by her election not to take under the will, is not accelerated: *Holdron v. Holdron*, 78 O. S. 276, IV Longsdorf's Notes, 1041.

A devise was made to A of certain real estate in trust to collect the rents and profits of the same, and pay them to B who was *sui juris* for a period of ten years, at which time the trust was to terminate and the property to vest absolutely in fee simple in B. It was held that such trust was invalid and that B was entitled to the property at once, discharged of said trust: *Wuest v. Wuest*, 8 O. N. P. 298, 11 O. D. (N.P.) 147.

VII. DEVOLUTION OF VESTED REMAINDER.

Where a testatrix devises a life estate to her husband, with remainder to her children, and provides that if any child should die before the husband, the share of such child shall pass in fee to the husband. The husband has a life estate in the property, and on the death of any child, he becomes vested in fee simple with the portion of the estate which otherwise would pass to the child: *Huber v. Carew*, 2 O. N. P. (N.S.) 81, 14 O. D. (N.P.) 656.

Under a devise to a daughter and the issue of her body in tail, upon the termination of a life estate in her mother, with reversion in testator's surviving children, if the daughter survives the testator she

takes a vested remainder in tail expectant on the death of her mother, and in the event of failure of such heirs and death of testator's children, the reversion is undisposed of; in respect thereto the testator dies intestate, consequently it descends to the heirs at law: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

Where a son of a testator is bequeathed a life estate in lands with the remainder to his legal heirs, and the son dies without issue, the remainder fails and the lands go back as undevise: *Miller v. Miller*, 7 O. N. P. (N.S.) 158, 18 O. D. (N.P.) 785.

A bequest of the income of personalty for the benefit of wife and children, and if the wife die before the children are of age the income to go to their guardian, will not be held to prevent the personalty going to them absolutely when of age after the wife's death: *Pendleton v. Bowler*, 11 Dec. Rep. 551, 27 Bull. 313.

A vested remainder can be devised: *Burkhardt v. Decker*, 8 O. N. P. (N.S.) 526, 20 O. D. (N.P.) 106 [affirmed, by the circuit court, without opinion].

Where an estate for life is not terminated prior to the death of a wife who owns the remainder in fee no estate in curtesy rests in her husband, but such estate is extinguished by her death: *Landis v. Marsh*, 14 O. C. C. (N.S.) 157, 22 O. C. D. 399.

VIII. DEVOLUTION OF TITLE WHEN REMAINDER CONTINGENT.

A. IN HEIRS.

Where a remainder of inheritance is limited in contingency by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs or in the heirs of the testator until the contingency happens to take it out of them: *Gilpin v. Williams*, 25 O. S. 283, III Longsdorf's Notes, 230.

Under a devise to a daughter for life, remainder to her then unborn children forever, the reversion in fee is not *in nubibus*, but vests in the testator's heirs, subject to be divested by the life tenant leaving children. The same rule applies, though the legal title be left in trustees to convey as aforesaid: *Gilpin v. Williams*, 25 O. S. 283, III Longsdorf's Notes, 230.

Under a devise of a life estate to the heir and at her death the property to descend to her legal heirs, the fee descends to the heir until the contingency happens and the particular estate is merged only *sub modo*, so as to open for the interposition of the remainder when the contingency happens: *Reif v. Ulmer*, 9 O. N. P. (N.S.) 234, 20

O. D. (N.P.) 342 [case affirmed, see *Reif v. Ulmer*, 9 O. N. P. (N.S.) 234, 20 O. D. (N.P.) 342].

B. IN EXECUTORS.

A devise that executors shall distribute certain land to each heir according to the tenor of the will and the rules of justice, vests the legal title in the executors: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

A devise that another farm shall be sold and the proceeds equally divided among the children, or the children may divide the farm to suit themselves, does not create any trust in the executors. Those authorized to sell or divide hold the legal title: *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667.

A devise giving to my executors complete power as I myself possess to dispose of all my estate in the way they think best calculated to carry into effect my will, but no part is to be sold at public sale, is sufficient to vest the fee in the executors: *Williams v. Burrows*, 1 Dec. Rep. 218, 4 W. L. J. 527.

An executor obtains no title and has no power to convey real estate unless there are words expressly granting him title, and then only for the purpose of realizing money to pay debts, or as a trustee to carry out designated trusts: *Helmig v. Meyer*, 8 O. N. P. 31, 10 O. D. (N.P.) 308.

Under a will directing the sale of real estate and the distribution of proceeds in a prescribed manner, the executors take the fee in the real estate, and with it the right of possession; and the executors may maintain an action for possession, under G. C., § 11903, against one wrongfully in possession, and the heirs are not necessary parties: *Martin v. Spurrier*, 13 O. C. D. 110.

Under a will devising certain realty "to my said grandson A., and my grandson B., share and share alike," and also providing that the executor should hold same in trust for ten years, and at the expiration of such time should "turn over to my said grandsons, or in case of the decease of either or both, then to their lawful children, *per stirpes*, said real estate, and in case of the decease of either of said grandsons before said term of ten years shall have elapsed without lawful issue of said decedent, then the share of such grandson to go to the surviving grandson and to his heirs and assigns forever," the executor takes the legal title as trustee, on the death of testatrix, and no vested interest passes to the devisees until the expiration of the term. Devisee's interest is a mere contingency, and in case of his death his children and not his heirs would take: *Swerer v. Ohio Wesleyan*

University, 2 O. N. P. (N.S.) 333, 14 O. D. (N.P.) 686.

An imperative direction to sell real estate, and an unconditional requirement to distribute the proceeds among the beneficiaries named, are powers coupled with an interest; and, by force of the will, the title to the real estate of the testator vests in fee in his executors, and does not descend to his heirs: *Martin v. Spurrier*, 13 O. C. D. 110 [distinguishing *Elsner v. Fife*, 32 O. S. 358, III Longsdorf's Notes, 638; *Nimmons v. Westfall*, 33 O. S. 213, III Longsdorf's Notes, 667].

The legatees under a will prescribing that certain real estate be sold and the proceeds be equally distributed among them acquire no title to the real estate under the will, although they may by all uniting in a request therefor avoid the sale and keep the premises instead, still no one can do so alone: *Schaupp v. Jones*, 3 O. C. C. (N.S.) 176, 13 O. C. D. 649.

IX. RIGHT OF LIFE-TENANT TO SECURITY.

If a testator devises all his property to his daughters, A and B, absolutely, and in case B dies without heirs of her body her share to go to A, here B is entitled to the possession of her share without security, and the executory devisees, if the limitation over is valid, alone can assert their rights: *Ratliff v. Warner*, 32 O. S. 334, III Longsdorf's Notes, 637.

Under an absolute legacy to A but if she dies leaving no children, then over, the executor has no power to invest the fund and give A the income only, but must give her possession of the principal, though she has moved out of the state, is childless, and has no property. If the limitation over is valid, the executory devisees and not the executor are the proper parties to protect their own interests without requiring security: *Lapham v. Martin*, 33 O. S. 99, III Longsdorf's Notes, 659.

A devise of the residue, real and personal, to the widow to keep for life, and at her death the property remaining to constitute a fund for the support of testator's daughter, A, and her children during her life, and at her death to be divided among her children, and if she has none, then to nieces. It was held that, (1) the fund is charged with A's support as its primary object; and (2) the personalty having been properly consumed, and the income of the realty being insufficient, a decree authorizing sales by A and her husband, and the use of the proceeds for said support, will not be reversed because the court omitted to require security from

or accounting by them: *Bierce v. Bierce*, 41 O. S. 241, IV Longsdorf's Notes, 59.

A legacy of money was given to a married woman, and if she should die without children, it was to be divided among the testator's children. Such children sought to enjoin its payment to her unless she gave security for repayment to them should she die childless. It was held that, (1) she is entitled to it without security in the absence of facts showing an intent to waste or squander it; and (2) such inference will not arise from the fact of her nonresidence and pecuniary irresponsibility: *Martin v. Lapham*, 38 O. S. 538, III Longsdorf's Notes, 992.

The right to immediate possession is essential to the right to partition. A remainderman, therefore, is not entitled to partition although the owner of the intermediate estate consents thereto: *Bryson v. Briggs*, 12 O. N. P. (N.S.) 17, 21 O. D. (N.P.) 532.

X. RIGHT OF REMAINDER-MAN TO POSSESSION.

If there is a life estate and remainder, possession by a third person under the life tenant can not be adverse to the remainderman until a right of entry accrues to him: *Carpenter v. Denoon*, 29 O. S. 379, III Longsdorf's Notes, 479.

Possession of the widow and children for over twenty-one years of premises set apart as a homestead under G. C., §§ 11732 and 11733, being legal, can not be adverse: *Taylor v. Thorn*, 29 O. S. 569, III Longsdorf's Notes, 499.

Since remaindermen and reversioners have no right of possession during the existence of the particular estate, the statute of limitations does not begin to run against an action to compel appropriation until after the determination of the particular estate: *Webster v. Railroad*, 78 O. S. 87, IV Longsdorf's Notes, 1038.

Under the statutes of Ohio with reference to partition there is no provision by which the court may determine the part or portion of the estate which may be set off and divided to the owner of the life estate: *Bryson v. Briggs*, 12 O. N. P. (N.S.) 17, 21 O. D. (N.P.) 532.

Partition may be had where the life tenant consents to a sale free of the life estate and it appears to the court that a sale will not be prejudicial to the interests of the remaindermen: *Helmig v. Meyer*, 8 O. N. P. 31, 10 O. D. (N.P.) 308.

Only the one having the immediate estate of inheritance, and not remote remaindermen, can have an action of waste against the

life tenant to forfeit his estate (G. C., § 8593): *Hatch v. Hatch*, 1 O. D. (N.P.) 270, 31 Bull. 57.

Where property devised by a testator to his widow for life with remainder to his children is mortgaged by one of the remaindermen, the widow joining in the mortgage, the mortgagee, after foreclosure and decree for the sale of the mortgagor's interest therein, has a title in fee as to such interest, with the right of immediate possession and may maintain an action for partition to have that portion set off to him: *Loan Co. v. Larkin*, 1 O. C. C. (N.S.) 473, 15 O. C. D. 209.

Service of notice of a contemplated street improvement upon the owner of the legal title or to the persons in whose names abutting property is listed for taxation as provided by R. S. § 2304 (repealed 96 v. 96 § 231; for present statute see G. C., § 3818), is not sufficient, but notice thereof must be served upon all persons having any interest therein, as for instance mortgagees, reversioners or remaindermen: *Saving Co. v. Cincinnati*, 12 O. D. (N.P.) 218.

XI. INHERITANCE TAX.

The devisee of a contingent remainder is not liable for the collateral inheritance tax: *Kibler v. Glynn*, 12 O. N. P. (N.S.) 657, 23 O. D. (N.P.) 197.

FUTURE PAIN AND SUFFERING.

See DAMAGES.

FUTURES.

For dealing in futures, see GAMBLING.

FUTURE SERVICE.

See SERVICES.

FUTURE SUPPORT.

See CONTRACTS; SERVICES.

G

GAMBLING.

Scope Note.—Includes wagers; betting; playing games; keeping houses for gaming; lotteries; gambling devices; criminal prosecution therefor; gambling contracts; and proceedings to recover losses. Excludes restraining gambling as nuisance; power of municipality to prevent gambling; and rights of landlord against tenant for using premises for gambling.

Cross References.

For responsibility for crime in case of infant, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

That attachment lies for money lost in a bucket-shop, see ATTACHMENT.

For the fact that attachment for nonresidence lies as on an implied contract, see ATTACHMENT.

For the right to counterclaim in actions on option contracts, see CONTRACTS.

For the fact that a note given on a gambling consideration is void, see CONTRACTS.

For facts which make a corporation a lottery, see CORPORATIONS.

For the facts which make the occupant of leased premises the presumed owner of the lease, see FORCEIBLE ENTRY AND DETAINER.

For the parties who can attack a transfer to pay a gambling debt, see FRAUDULENT CONVEYANCES.

For the right of the lessor where the lessee uses premises for gambling, see LANDLORD AND TENANT.

For the running of the statute of limitations, see LIMITATIONS, STATUTE OF.

For gambling instruments as subject of larceny, see BURGLARY; LARCENY.

For the right of a telegraph company to remove tickers from bucket-shops, see TELEGRAMS AND TELEGRAPH COMPANIES.

For indictments that are not bad for duplicity, see INDICTMENT.

ANALYTICAL OUTLINE.

I. Gambling Contracts, 8231.

- A. *Definitions*, 8231.
- B. *What constitutes*, 8233.
 - 1. Contracts held to be wagers, 8233.
 - 2. Contracts held not to be wagers, 8236.
 - 3. Games of chance, 8237.
- C. *Statutory provisions*, 8238.
 - 1. Constitutionality, 8238.
 - 2. Construction, 8238.
 - 3. Effect, 8239.
- D. *Recovery of losses*, 8241.
 - 1. Statutory provisions, 8241.
 - 2. Nature of remedy, 8241.
 - 3. Amount recoverable, 8242.
 - 4. Jurisdiction, 8242.
 - 5. Parties, 8243.
 - a. Plaintiff, 8243.
 - aa. Loser, 8243.
 - bb. Third party, 8243.
 - b. Defendant, 8244.
 - 6. Limitation of action, 8246.
 - 7. Pleading, 8247.
 - 8. Evidence, 8248.
- E. *Equitable relief*, 8249.
- F. *Attachment*, 8249.
- G. *Liability of property*, 8250.
 - 1. Construction of statutes, 8250.
 - 2. Judgment against winner, 8251.
 - a. Necessity, 8251.
 - b. Effect, 8251.

II. Crimes Relating to Gambling, 8252.

- A. *Gambling game*, 8252.
 - 1. What constitutes, 8252.
 - 2. Procedure, 8252.
- B. *Betting*, 8253.
- C. *Bucket-shops*, 8254.
- D. *Lotteries*, 8255.
 - 1. What constitutes, 8255.
 - 2. Procedure, 8256.
- E. *Gambling devices*, 8256.
 - 1. What constitutes, 8256.
 - 2. Procedure, 8257.
- F. *Gambling place*, 8258.
 - 1. Keeping, 8258.
 - 2. Knowingly permitting, 8258.
 - 3. Procedure, 8259.

I. GAMBLING CONTRACTS.

A. DEFINITIONS.

A wager is defined as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest ex-

cept that arising from the possibility of such gain or loss: *Kitchen v. Loudenback*, 48 O. S. 177, IV Longsdorf's Notes, 409 [affirming *Kitchen v. Loudenback*, 3 O. C. O. 228, 2 O. C. D. 129].

A sale "short" of stock means a sale of stock which the vendor does not possess at

the time, but which he expects to acquire subsequently for delivery under his contract: *Lamprecht v. State*, 84 O. S. 32.

B. WHAT CONSTITUTES.

1. *Contracts Held to be Wagers.*

An election bet is within the provisions of G. C., § 5965: *Veach v. Elliott*, 1 O. S. 139, I Longsdorf's Notes, 957.

A contract which purports to be a contract of sale, in which the property is sold at an excessive valuation which is to be paid only upon the success of a specified candidate at an election is a disguised form of a wager: *Harper v. Crain*, 36 O. S. 338, III Longsdorf's Notes, 856.

In August, 1872, C sold and delivered to A a horse, upon his written contract to pay therefor \$140 one day after B should be re-elected president of the United States; but if B was not re-elected, then the obligation was to be void. Before the election, A returned and tendered back the horse, in as good condition as when received, and demanded his contract, but C refused to receive the horse or surrender the contract. Thereafter, A kept the horse as bailee of C. After the election, at which B was elected president, C demanded the contract price of the horse, and, on refusal by A to pay, but while he was ready and willing to return the same, brought an action under the act of 1831 (1 S. & C. 664) to recover the value of the property. It was held, (1) That the transaction was a wager, within the meaning of said act, and the contract was void; (2) that A might, before the election took place which was to determine the wager, rescind the contract by surrendering back the horse; (3) after such refusal to take back the property, A might elect to hold the property as bailee of C, and he is not liable under the statute for its value, unless it appears that, at the time the action was commenced, he had refused to deliver him back, or done some act amounting to a conversion of the property to his own use: *Harper v. Crain*, 36 O. S. 338, III Longsdorf's Notes, 856.

During the pendency of an election for president of the United States, for which office A and B were opposing candidates, the defendant in error agreed to sell, and the plaintiff in error agreed to buy, a lot of hogs at the price of nine cents per pound, to be paid for when H. G. should be elected. The market price for hogs at the date of the contract was less than four and a half cents per pound. In pursuance of the contract, the hogs were delivered by the defendant in error to the plaintiff in error, who converted them to his own use. The election having resulted in the defeat of A,

the defendant in error brought suit against the plaintiff in error and recovered the market value of the hogs. It was held, (1) That the transaction was a wager; (2) that the hogs were delivered by the person losing the wager to the person winning, within the meaning of the second section of the act of March 12, 1831 (S. & C. 664; for present statute, see G. C., § 5965): *Lucas v. Harper*, 24 O. S. 328, III Longsdorf's Notes, 175.

A contract, which on its face appears to be one for the sale and purchase of stock in corporations or of grain or other commodities, by the terms of which the parties do not expect such articles to be delivered or to be paid for, but expect to settle such contract by paying the difference between the contract price and the market price, is a disguised wager: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318; see also *Bank v. Somers*, 9 O. N. P. (N.S.) 481, 21 O. D. (N.P.) 772; *Pickering v. Chase*, 7 Dec. Rep. 156, 1 Bull. 186; *Bradley v. Telegraph Co.*, 8 Dec. Rep. 707, 9 Bull. 223; *Johnson v. Brown*, 13 Dec. Rep. 782, 2 C. S. C. R. 83.

Contracts for the sale of personal property to be delivered at a future day, if the parties intended the property shall be delivered and paid for, are valid, though the seller has not the goods, nor other means of getting them than to go into the market and buy them; but, when the real intention of the parties is merely to speculate on the rise and fall of prices, and the property is not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the time specified for executing the contract, the transaction is against public policy, and void: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318.

A contract whereby one of the parties is to have the option to buy or sell at a future time a certain commodity, on the understanding of both that there is to be no delivery of the commodity, the party losing to pay to the other the difference in the market price simply, is by common law, as well as by statute, in this state (G. C., § 5965, as adopted April 25, 1882), a "gambling contract," or wager upon the future price of the commodity, and therefore void: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

A contract for the sale of corporate stock, grain or other commodity in which the parties do not intend an actual delivery of the thing sold, but only a settlement of the difference between the contract price and the market price, is a scheme of gambling: *Rogers v. Edmund*, 21 O. C. C. 675, 12 O. C. D. 291.

An assignment of life insurance policies by a loser in a bucket shop transaction to the winner is a nullity: *Wachtel v. Campbell, Seinsheimer v. Wachtel*, 7 O. N. P. 507, 9 O. D. (N.P.) 572.

A contract that a cause shall be tried contrary to established rules is void: *Gittings v. Baker*, 2 O. S. 21, I Longsdorf's Notes, 1017.

Where parties have agreed, that a suit pending between them shall be decided for the plaintiff or defendant, according to the result of another suit pending between them, and where no consideration is alleged to have existed for making the agreement, and no connection is shown by the plea between the two cases, after the termination of such other suit, such agreement shall not furnish a basis for a plea in bar to the pending suit; but it will be held void, being a mere wager: *Gittings v. Baker*, 2 O. S. 21, I Longsdorf's Notes, 1017.

Contracts of investment security, debentures or certificates, which can not reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy and unlawful: *State, ex rel., v. Investment Co.*, 64 O. S. 283, IV Longsdorf's Notes, 871.

Contracts of investment security, debentures or certificates, which by the device of a "numeral-apart," may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize constituting a lottery, and are unlawful: *State, ex rel., v. Investment Co.*, 64 O. S. 283, IV Longsdorf's Notes, 871.

An agreement whereby a number of persons pay for the privilege of entering a guessing contest upon the vote at an election, the amount thus contributed to be paid to the person whose guess is the most nearly correct, is a wager: *Stevens v. Times-Star Co.*, 72 O. S. 112, IV Longsdorf's Notes, 988 [reversing on this point only, *Stevens v. Enquirer Co.*, 13 O. D. (N.P.) 235]; see to the same effect, *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704.

A petition alleging that the plaintiff paid fifty cents to a newspaper under a contract whereby a prize of \$10,000 was to be paid to the subscriber whose estimate of the vote cast at a certain election is correct, and that he made the correct estimate and is therefore entitled to the prize of \$10,000, is demurrable, because the transaction was a

bet: *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704.

2. Contracts Held Not to be Wagers.

A sold a lot to a village for \$700 cash and \$2,000 in fourteen years, with annual interest, but if A died before the \$2,000 came due it was not to be paid at all. He died shortly before it came due. It was held that, (1) The condition is an inseparable part of the contract and can not be held void and the rest valid; (2) it is not a wager, but is as valid as a contract for support or a gift would be: *Clyde v. Mohn*, 4 O. C. C. 537, 2 O. C. D. 694 [affirmed, by the supreme court, without opinion, *Mohn v. Clyde*, 32 Bull. 407].

An agreement that the loser of a game of billiards shall pay for such game has been held not to be gambling in *Steuer v. Cigar Co.*, 17 O. C. C. 82, 9 O. C. D. 456.

Whether purchases or sales of stock, on part payment and without delivery, are gambling or not, depends on the intent. If a *bona fide* sale was intended, it is legal, although for speculation: *Goodhart v. Rastert*, 7 O. N. P. 534, 10 O. D. (N.P.) 40.

If delivery and payment are intended, the contract is valid, though the sellers have not the goods nor means of getting them, other than to buy them on the market: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318; *Bradley v. Telegraph Co.*, 8 Dec. Rep. 707, 9 Bull. 223.

Where A, a citizen of Ohio, in settling claims for money lost in grain speculation in Chicago, reorganized a railroad company and attempted to issue stocks and bonds therefor in an amount greatly in excess of its value, no money payments being made, it is not a gambling transaction between the parties: *Lloyd v. Preston*, 146 U. S. 630, 7 O. F. D. 379.

A contract whereby one buys grain for seed at an excessive price, and the vendor agrees to repurchase from him a greater quantity of grain at the same price in the following year, is not a wager whatever other vices it may have; and a note given for such grain is valid in the hands of a *bona fide* holder: *Kitchen v. Loudenback*, 48 O. S. 177, IV Longsdorf's Notes, 409 [affirming *Kitchen v. Loudenback*, 3 O. C. C. 228, 2 O. C. D. 129]; *Stewart v. Simpson*, 2 O. C. C. 415, 1 O. C. D. 562; see also *Jacobs v. Mitchell*, 46 O. S. 601, IV Longsdorf's Notes, 348.

It was said in *Williams v. Keel*, 9 Dec. Rep. 746, 17 Bull. 118, that such a note was on a gambling consideration; and that if the maker had to pay a *bona fide* purchaser he could recover from the payee; but such result would have been reached on the ground

of fraud, even if such contract had been held not to be a wager.

Such contract is said to be illegal as tending to work a fraud upon third persons, but not to be gambling; and accordingly a person who has paid under such contract can not recover the money thus paid: *Shirey v. Ulsch*, 2 O. C. C. 401, 1 O. C. D. 554; *Cowell v. Harris*, 2 O. C. C. 404, 1 O. C. D. 556; *Carter v. Lilli*, 3 O. C. C. 364, 2 O. C. D. 204.

A promise to purchase a certain amount of shares deliverable within a certain time is not *per se* a wager: *Ashley v. Walker*, 15 O. C. C. 660, 8 O. C. D. 285.

A sale of property, bonds, at a given price, to be reduced to the lowest sum accepted by the seller in any future sales, is not void as a wager: *McGregor v. Railroad*, 12 Dec. Rep. 763, 1 D. 509.

An offer of a clock for \$10 cash or \$15 when Polk was elected president, the last offer being accepted and a note given, the note is valid, the event having happened: *Rapp v. Wilkerson*, 1 Dec. Rep. 177, 3 W. L. J. 220 [affirmed, in Clinton supreme court, *Wilkerson v. Rapp*, 1 Dec. Rep. 178, 3 W. L. J. 471].

3. Games of Chance.

Money lost in a slot machine is within G. C., § 5966, if by the operation of such machine articles of substantially unequal value were to be returned to the party depositing money therein according to chance or lot: *Wise v. Martin*, 7 O. N. P. 660, 5 O. D. (N.P.) 550.

A nickel in a slot machine is a game of chance, if the property obtained by playing such game is not always substantially equal in value: *Enderes v. State*, 11 O. C. C. (N. S.) 473, 21 O. C. D. 517; *State v. Smith*, 53 Bull. 380 [affirmed, without opinion, *Smith v. State*, 71 O. S. 473, 2 O. L. R. 271].

Money lost at a bucket shop is lost at a scheme of chance: *Baker v. Morehead Co.*, 7 O. N. P. (N.S.) 384, 19 O. D. (N.P.) 230.

Chips being used to represent money and bought from the keeper of the room, who redeems what a player has when he ceases playing, the player must be deemed to have expended and the seller to have received the money paid for them on account of a scheme of gambling under G. C., § 5967: *Vincent v. Taylor*, 60 O. S. 309, IV Longsdorf's Notes, 786.

A lottery is illegal: *Williams v. State*, 25 O. S. 628, III Longsdorf's Notes, 273.

A guessing contest, instituted by a newspaper company, by which persons are invited to deliver to the company fifty cents each, twenty-four cents of which being payment for a subscription to the newspaper

and twenty-six cents for the privilege of making a guess upon the total vote for a state officer who is to be chosen at an approaching election, the guesser coming nearest to the actual total vote cast to receive a money prize from the fund equal to one-tenth thereof, and others next nearest to receive from the fund lesser money prizes, is within the condemnation of the statutes of Ohio against lotteries and schemes of chance, and is an unlawful enterprise. And a similar scheme, involving the same amount of payment by each person, but differing from the former in that there is to be no subscription to a paper, and the prizes promised are definite amounts from five thousand dollars, down to two dollars, is equally within the condemnation of the statute and unlawful: *Stevens v. Times-Star Co.*, 72 O. S. 112, IV Longsdorf's Notes, 988.

A subscription scheme by which a concern agrees to erect a factory in a town in consideration of having four hundred lots subscribed for at two hundred dollars each, lots to be assigned to subscribers by a drawing, is a scheme of chance under G. C., §§ 13063, 13064, and not binding on a subscriber: *Nail Co. v. Marks*, 4 O. C. C. 343, 2 O. C. D. 584.

C. STATUTORY PROVISIONS.

1. Constitutionality.

G. C., § 5966, providing for the recovery of money lost at gambling, is not rendered unconstitutional by any provision of the constitution of the United States: *Marvin v. Trout*, 199 U. S. 212.

In an action by a wife for recovery of money lost by her husband in betting on horse races in a pool room operated by the defendants, the requirement that the defendants shall answer pertinent interrogatories attached to the petition is not in violation of their rights as guaranteed by the bill of rights: *Kleimeyer v. Payne*, 16 O. D. (N.P.) 289, 3 O. L. R. 386.

G. C., § 5971, giving a lien on the property in which money is lost at gambling is constitutional: *Marvin v. Trout*, 199 U. S. 212, 15 O. F. D. 141, 3 O. L. R. 550 [affirming *Marvin v. Trout*, 70 O. S. 437, which affirmed, without opinion, *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333]. For decision on first writ of error, see *Trout v. Marvin*, 62 O. S. 132, IV Longsdorf's Notes, 827.

2. Construction.

G. C., § 5965, was supplemented by an act to prevent buildings from being used for gambling. (See G. C., § 13081): *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941.

From considerations of public policy, G. C., § 5965, is construed to make notes and other contracts and securities therein referred to absolutely void; and not merely voidable if given under the circumstances specified in the statutes: *Bank v. Portner*, 46 O. S. 381, IV Longsdorf's Notes, 331 [quoted and approved in *Railway v. Trust Co.*, 95 Fed. 497, 36 C. C. A. 155, 13 O. F. D. 86].

Loss of money in a bucket shop is a loss by a bet or wager within the meaning of G. C., § 5966: *Sanders v. Penney*, 79 O. S. 221, IV Longsdorf's Notes, 1045.

Where the purchase or sale of a commodity is accepted as a mode of disguising a wager upon the market price of the commodity at a future time, the fact that one of the parties assumes to make the purchase, or sale, as a commission merchant only, will not alter the real relation in which they stand as parties to a wager. Each is in law *particeps criminis* to the wager, and either may, as loser, recover from the other as "winner," under the provisions of G. C., § 5966: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

One who loses money in a bucket shop has no lien upon the premises where the business is carried on until he brings a suit and subjects the premises to the lien of his judgment. G. C., § 5971, giving a lien upon the premises applies only to money lost at gambling: *Sanders v. Penney*, 79 O. S. 221, IV Longsdorf's Notes, 1045.

The broker is not liable to refund money expended by him for another on margins. G. C., § 5966, allows recovery against the winner, and not against the broker: *Roulstone v. Moore*, 10 Dec. Rep. 275, 19 Bull. 387.

The negotiable instruments act does not by implication repeal G. C., § 13070, providing that all contracts made with intent to "corner" the market shall be void, and a note given in settlement of such a contract is not enforceable even in the hands of an innocent holder: *Bank v. Somers*, 9 O. N. P. (N.S.) 481, 21 O. D. (N.P.) 772.

To say "he played a game for money" can not be construed to mean "he was hired to play": *Carper v. State*, 27 O. S. 572, III Longsdorf's Notes, 377.

3. Effect.

Under the statute (1 Chase, 104, similar to G. C., § 5965) enacted by the territorial government, conveyances upon a gambling consideration inured to the use of the heir of the grantor, subject to the right of the creditors of the grantor to enforce payment

of their claims out of such realty: *Bond v. Swearingen*, 1 O. 395, I Longsdorf's Notes, 91.

A conveyance in payment of a gambling debt is said to be a nullity, and notwithstanding such conveyance a creditor of the grantor could levy an execution upon such property: *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572.

In the absence of a statute specifically providing that a deed given on a gambling consideration should be void, such deed, if delivered is valid and passes title, and equity will not grant rescission in a suit for that purpose brought by the grantor: *Thomas v. Cronise*, 16 O. 54, I Longsdorf's Notes, 748; see also *Hooker v. DePalos*, 28 O. S. 251, III Longsdorf's Notes, 403.

The indorsee of a check given for money lost at a game of cards can not recover upon it against the drawer, though a *bona fide* holder for value without notice of the vice in the consideration. A check so drawn is within the provisions of G. C., § 5965, and "absolutely void and of no effect": *Bank v. Portner*, 46 O. S. 381, IV Longsdorf's Notes, 331.

A *bona fide* holder of a check given for a gambling debt can recover from any prior indorser after demand and notice: *Bank v. Portner*, 46 O. S. 381, IV Longsdorf's Notes, 331.

If the party to whom such articles are delivered offers to return the same, and the party who has delivered such articles refuses to receive them, the person having possession of them may hold them as bailee for the original owner; and in such case the original owner can not recover the value thereof: *Harper v. Crain*, 36 O. S. 338, III Longsdorf's Notes, 856.

A broker who has made gambling contracts on behalf of his principal, knowing them to be gambling contracts, can not recover compensation for his services: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318.

If an agent has received money from the adversary party to a gambling contract which is paid to him under an agreement that he will pay the same over to his principal, such agent is liable to his principal therefor, and he can not interpose the defense that the principal acquired such money in a gambling transaction: *Norton v. Blinn*, 39 O. S. 145, III Longsdorf's Notes, 1014.

The parties to a gambling contract are *particeps criminis* to the wager and either may recover from the other under G. C., § 5966: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

D. RECOVERY OF LOSSES.

1. Statutory Provisions.

In the absence of a statute authorizing recovery by the loser, a loser who has paid his loss under a gambling contract can not recover from the winner: *Pratt v. McIntosh*, W. 356, I Longsdorf's Notes, 28.

The parties to a gambling contract are *particeps criminis* to the wager and either may recover from the other under G. C., § 5966, providing that money lost at gambling may be recovered: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

G. C., § 5970, providing an action of discovery is an additional and independent remedy for the recovery of money lost at gambling: *McCabe v. Jaberg*, 12 O. D. (N.P.) 58, 3 O. L. R. 627 [affirmed, without opinion, *McCabe v. Jaberg*, 74 O. S. 446].

Formerly an act merely making a bet void made the party *particeps criminis*, and the court would not aid either to a recovery back, though he could rescind before delivery. Accordingly, if the loser replevied a horse lost on a bet, the verdict gave the defendant its value: *Pratt v. McIntosh*, W. 356, I Longsdorf's Notes, 28.

Election bets can be recovered under the gaming act. The act to punish betting on elections did not supersede this part of the gaming act: *Veach v. Elliott*, 1 O. S. 139, I Longsdorf's Notes, 957.

G. C., §§ 5966 and 5969, relating to recovery of money lost in gaming, wagers, etc., the first providing that within six months the loser may sue, and the second that if the loser do not sue within the time specified any person may sue, are not mutually exclusive: *Nelken v. Foster*, 1 Hosea, 26.

2. Nature of Remedy.

G. C., § 5966, provides for a statutory action to recover a penalty or forfeiture: *Cooper v. Rowley*, 29 O. S. 547, III Longsdorf's Notes, 496.

An action by a wife to recover money lost by her husband in betting upon horse races, is said not to be a penal action, but an action *ex contractu*: *Kleimeyer v. Payne*, 16 O. D. (N.P.) 289, 3 O. L. R. 386.

The right of the loser at gambling to recover from the winner is said to originate in a constructive contract: *Harlan v. Investment Co.*, 11 O. N. P. (N.S.) 492, 22 O. D. (N.P.) 12.

An action under G. C., § 5965, to recover money lost in gaming is an action on a constructive contract on which an attachment will lie: *Baker v. Morehead*, 7 O. N. P.

(N.S.) 384, 19 O. D. (N.P.) 230. See also ATTACHMENT.

Actions brought under G. C., § 5967, are actions at law, and not in equity: *McCabe v. Jaberg*, 12 O. D. (N.P.) 58, 3 O. L. R. 627 [affirmed, without opinion, *McCabe v. Jaberg*, 74 O. S. 446].

3. Amount Recoverable.

Interest on the money lost at gaming or betting is not recoverable, and will be struck out of the judgment by a reviewing court: *Hooper v. Kissel*, 61 O. S. 645, (memorandum opinion).

Uncertainty as to the amount expended is not material under G. C., § 5967. If any was expended, the person dependent upon the one who expended the money is entitled to recover its amount and exemplary damages: *Vincent v. Taylor*, 60 O. S. 309, IV Longsdorf's Notes, 786.

If a contract expressly authorizes a broker to buy on a margin and to sell if the margin is not kept good, and accordingly he sells on due notice, he is not liable to return the margins: *Patterson v. Keys*, 13 Dec. Rep. 436, 1 C. S. C. R. 94.

That the broker bought in his own name and kept the commodity, viz.: gold, in bank with, and undistinguishable from others, does not entitle the customer to get back his margins: *Patterson v. Keys*, 13 Dec. Rep. 436, 1 C. S. C. R. 94.

Profits arising under a contract for the operation of a book on horse races are not recoverable, either by the party in interest or his administrator: *Schneider v. Kamp*, 6 O. N. P. (N.S.) 365, 18 O. D. (N.P.) 360 [affirmed in circuit court, December 22, 1907].

4. Jurisdiction.

Since an action to recover money lost at betting is held to be remedial in its nature, and to give an action upon an implied contract, such action may be brought in this state, although the loss took place in Kentucky, the Kentucky statute being similar to ours: *Kleimeyer v. Payne*, 15 O. D. (N.P.) 671, 3 O. L. R. 19.

The fact that G. C., § 5967, provides for the recovery of as much as five hundred dollars exemplary damages on account of losses in lotteries, does not oust a justice of the peace from jurisdiction where the plaintiff asks for exemplary damages in an amount which added to the sum he would otherwise recover is equal to three hundred dollars or less: *McCabe v. Jaberg*, 12 O. D. (N.P.) 58, 3 O. L. R. 627 [affirmed, without opinion, *McCabe v. Jaberg*, 74 O. S. 446].

The plaintiff in a guessing contest is not even entitled to recover his fifty cents in this suit, because the common pleas court has no jurisdiction in suits for that amount, although under G. C., §5966, the loser may recover money lost on account of a wager: *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704.

5. Parties.

(a) Plaintiff.

(aa) Loser.

A party who has furnished money to be played, and who loses may recover, although he has employed others to make such bets on his behalf: *Mead v. McGraw*, 19 O. S. 55, II Longsdorf's Notes, 925.

In a contract for the sale or purchase of corporate stocks or grain, which is in legal effect a disguised gambling contract, the broker who has made such contract at his own risk is as between himself and his principal to be regarded as the winner or loser as the case may be: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

The broker who negotiates knowingly the illegal agreement between parties is a *particeps criminis*, and can not recover commissions nor losses incurred on behalf of either party. And checks given him for such services or losses are tainted with the vice of their origin: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318; *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

No recovery can be had by one partner to a gambling transaction against another partner for money advanced by him for the purpose of carrying on such gambling; nor can the administrator of the deceased partner so recover: *Schneider v. Kamp*, 6 O. N. P. (N.S.) 365, 18 O. D. (N.P.) 360.

The loser of a bet may recover under G. C., §5969, though the action be not begun within six months, under G. C., §5966. He has the exclusive right to sue for six months, and after then any one who sues first has the right under G. C., §5969: *Hoss v. Layton*, 3 O. S. 354, II Longsdorf's Notes, 34; *Cooper v. Rowley*, 29 O. S. 547, III Longsdorf's Notes, 496.

The loser not having sued for six months, any third person may sue for his benefit within a year after the six months: *Fenzel v. Wagner*, 1 Dayton Term Rep. (Iddings) 15.

(bb) Third Party.

G. C., §5969, gives to the loser a right of action, which by virtue of G. C., §5966, is an exclusive right for the first six months; and after that time any person may sue to

recover such loss until such right of action is barred by the period of limitations: *Hoss v. Layton*, 3 O. S. 352, II Longsdorf's Notes, 34.

A judgment recovered by a third person may be a lien upon the building in which gambling was conducted, with the knowledge of the owner: *Trout v. Marvin*, 62 O. S. 132, IV Longsdorf's Notes, 827.

Where the loser fails for six months to bring suit to recover the money lost, third persons may as joint plaintiffs recover it without interest (plaintiffs were employers of the loser and he had embezzled their money): *Robertson v. Deming*, 33 Bull 190 [without opinion, by the supreme court].

If a wife brings an action, she may recover whatever her husband expended on account of a gambling scheme; even if it is not alleged that he lost such money thereat. She may accordingly recover from the banker at a gambling game money paid by her husband for chips, even though such chips were lost to others; it being shown that the banker redeemed the chips at the end of the game: *Vincent v. Taylor*, 60 O. S. 309, IV Longsdorf's Notes, 786.

If a member of a partnership has bet goods belonging to such partnership upon an election and lost, the other members of such partnership may join with him in an action to recover the value thereof: *Cannon v. Cheney*, 8 O. C. C. 143, 4 O. C. D. 335 [affirmed, without opinion, *Cheney v. Cannon*, 54 O. S. 683].

The general assignee for the benefit of creditors is the proper person to proceed to recover property transferred by his assignor in consideration of a gambling debt: *Wachtel v. Campbell*, 21 O. C. C. 731, 12 O. C. D. 148 [affirming *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572].

If certificates in a corporation are acquired under a gambling transaction, the corporation may set up such fact: *Heafield v. Chain Co.*, 84 O. S. 470.

A third person who, on the failure of the loser to sue within six months, has obtained judgment for the winnings under G. C., §5969, may subject the premises. The statute refers rather to discouraging gambling than to natural justice: *Trout v. Marvin*, 62 O. S. 132, IV Longsdorf's Notes, 827.

(b) Defendant.

Persons who own and operate a faro bank are liable jointly for money which is won and received by the dealers, who are employed by them to conduct such bank: *Lear v. McMillen*, 17 O. S. 464, II Longsdorf's Notes, 844.

Persons to whom money is lost at gambling are liable whether or not they can be

shown to be partners in the technical meaning of the term: *Rogers v. Edmund*, 21 O. C. C. 675, 12 O. C. D. 291.

A broker who furnished a ticker and received commission from one who buys on margins is liable for money lost if the transaction is a gambling one: *Rogers v. Edmund*, 21 O. C. C. 675, 12 O. C. D. 291.

A broker who has paid out money in a gambling transaction under the direction of his principal, can not be required by his principal to repay such money: *Roulstone v. Moore*, 10 Dec. Rep. 275, 19 Bull. 387.

The theory that the broker is to be regarded as an adversary party to the gambling contract is expressed in *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

A banker who sells chips which are to be redeemed at the end of the game is liable for money spent in the purchase of such chips, even though such banker does not take any part in the game; and accordingly does not win from the players who lose: *Vincent v. Taylor*, 60 O. S. 309, IV Longsdorf's Notes, 786.

A claim for money lost at gaming under favor of G. C., § 5969, may be maintained against the assignors for the benefit of creditors, but is not a claim against the assets in the hands of an assignee: *Burrows v. Hussong*, 12 O. C. C. (N.S.) 93, 21 O. C. D. 211 [distinguishing *Pentz v. Burrows*, 8 O. C. C. (N.S.) 349, 18 O. C. D. 490].

In an action to recover money which is lost at gambling, the winner, the assignee of the winner, and the owner of the property in which such gambling was conducted may be joined: *Pentz v. Burrows*, 8 O. C. C. (N.S.) 349, 18 O. C. D. 490.

As to the respective liabilities of the winner and the owner of property used for gambling purposes, see *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

Owners of separate buildings in which separate sums were lost by the same players can not be joined. The cause of action is against each separately for the loss in his building: *Bobb v. Hetsch*, 8 Dec. Rep. 245, 6 Bull. 636.

If demand is made upon the stakeholder before he has paid the stake over to the winner, he is personally liable for the amount deposited with him to the party who has so deposited it: *Ward v. Ritt*, 6 Dec. Rep. 1129, 7 Bull. 76.

A stakeholder must return the property placed in his hands to the parties who have respectively deposited it, if the bet is abandoned: *Barrett v. Neill*, W. 472, I Longsdorf's Notes, 38.

Demand on the stakeholder by the loser, the winner having refused to take the money, was not held necessary by the common pleas

before suing him. The district court reversed this, holding demand was necessary before suit (see *Ward v. Ritt*, 6 Dec. Rep. 1129, 10 Am. L. Rec. 567, 7 Bull. 76), but the supreme court commission reversed the district court and affirmed the common pleas without stating the ground, on February 3, 1885: *Ritt v. Ward*, 13 Bull. 138.

For the general discussion of the subject of parties, see PARTIES.

6. Limitation of Action.

Under G. C., § 5969, the loser has an exclusive right to maintain an action to recover his loss, within six months: *Hoss v. Layton*, 3 O. S. 352, II Longsdorf's Notes, 34.

G. C., § 5966, providing that a loser may within six months thereof sue for the recovery of money lost at gaming, is a statute of limitations; and where an interval of more than six months occurs between the loss of money and the bringing of suit for recovery thereof, the plaintiff is barred from prosecuting the action, notwithstanding the defendant had made an assignment for the benefit of creditors and the plaintiff had presented a claim for the money so lost to the assignee within six months of the loss: *Burrows v. Hussong*, 12 O. C. C. (N.S.) 93, 21 O. C. D. 211.

After the six months have elapsed, the loser may still recover his money, but he has not an exclusive right of action: *Hoss v. Layton*, 3 O. S. 352, II Longsdorf's Notes, 34.

It has been held that the six months period mentioned in G. C., § 5966, is not a period of limitations on the theory that the term "any person" used in G. C., § 5969, does not mean any person other than the loser, but includes the loser; and accordingly that section does not bar the loser from suing after the six months period has elapsed, but merely gives him an exclusive right to sue within such time: *Nelken v. Foster*, 1 Hosea, 26.

An action to recover money which has been lost by playing a game, or by a bet or wager, is a statutory action to recover a penalty or forfeiture within the meaning of G. C., § 11225; and must be brought within one year after the cause thereof has accrued: *Cooper v. Rowley*, 29 O. S. 547, III Longsdorf's Notes, 496.

An action for the recovery of money lost is barred by the statute of limitations, if not brought within one year from the time the cause accrued: *Harrington v. Halliday*, 4 O. N. P. (N.S.) 281, 17 O. D. (N.P.) 40.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

7. Pleading.

The policy and purpose of G. C., §§ 5966, *et seq.*, are to discourage gambling rather than to determine the natural justice of the case. Therefore, G. C., § 5968, prescribing what are sufficient allegations in such cases, does not require the pleader to set out with legal exactness and particularity a state of facts which would bring him within either G. C., §§ 5966 or 5967, prohibiting gaming. A plain statement of the situation is sufficient. Averments that the defendant has the money, that it is due the plaintiff and that it was obtained in a gambling transaction are sufficient: *Rodgers v. Edmund*, 21 O. C. C. 675, 12 O. C. D. 291.

It is not necessary that the petition state the nature of the gambling nor the exact dates at which the money was lost, if it contains the dates between which such amount was lost: *Robertson v. Demming*, 33 Bull. 190.

The total amount of losses may be alleged within certain periods, without setting forth the dates of the different losses and payments thereof: *Nelken v. Foster*, 1 Hosea, 26.

The same principle was laid down in *Lear v. McMillen*, 17 O. S. 464, II Longsdorf's Notes, 844; the question being raised in that case by exceptions to the charge and the refusal to charge as requested.

A wife's petition under G. C., § 5967, need not show that the husband lost at the game. It is sufficient to aver expenditure by him and its reception by defendant, as by the purchase of chips to play with: *Vincent v. Taylor*, 60 O. S. 309, IV Longsdorf's Notes, 786.

Allegations were made by a wife as to the place where her husband had lost money at gambling, and the amount he had lost within a specified period of three months, and that the place was run by the defendants. It was held that these allegations are sufficient to support a recovery of the amount lost, with penalty: *Bare v. Kraft*, 1 O. N. P. (N.S.) 16.

In an action by a wife to recover money lost in the defendant's gambling house, defendant may by cross-petition set off winnings by the husband in the same house: *Follett v. Saviers*, 8 O. D. (N.P.) 669, 35 Bull. 222.

If one of the parties to a series of option deals sues the other to recover the balance claimed by the account, the other may by counterclaim set up his losses and recover any balance over, under G. C., § 5966: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

In an action by a wife for recovery of money lost by her husband in betting on

horse races in a pool room operated by the defendants, the requirement that the defendants shall answer pertinent interrogatories attached to the petition is not in violation of their rights as guaranteed by the bill of rights: *Kleimeyer v. Payne*, 16 O. D. (N.P.) 289, 3 O. L. R. 386.

In an action for recovery of money lost in a gambling scheme, a petition which alleges generally that the plaintiff expended money thereon, which was paid to the defendant, is good against demurrer, without pleading the character of the game or the particular manner in which the plaintiff expended his money; but a failure to allege that the defendant is indebted to plaintiff in the sum claimed, or that the money was received by defendant for the plaintiff's use, and was converted by the defendant to his own use, renders the petition subject to demurrer: *McGurrer v. Halliday*, 15 O. D. (N.P.) 753, 3 O. L. R. 324.

In an action to enforce the lien of a judgment as specified in G. C., § 5971, allegations in the petition that at the time that the game was played and the money was lost the defendant in such action was the owner of the building in which gambling was conducted, and that he knowingly permitted such building to be used for the purpose of gambling for money, and for such game, were sufficient as averments of the unlawful use and occupation of such building as against a general demurrer: *Binder v. Finkbone*, 25 O. S. 103, III Longsdorf's Notes, 213.

An allegation that a plaintiff, suing for the recovery of money lost in the purchase of debentures, has shared in the distribution of the assets of the company by its receivers, constitutes, if proven, a *pro tanto* defense, and also states the further defensive fact that the plaintiff was a part owner of the business: *Harrington v. Halliday*, 4 O. N. P. (N.S.) 281, 17 O. D. (N.P.) 40.

For the general discussion of the subject of pleading, see PLEADINGS.

8. Evidence.

It is sufficient for plaintiff to prove his aggregate losses over winnings between specified dates, without proving dates or amounts of the items: *Lear v. McMillen*, 17 O. S. 464, II Longsdorf's Notes, 844.

A preponderance of evidence is sufficient: *Robertson v. Demming*, 33 Bull. 190.

Knowledge on the part of the defendant landlord that the premises were used for the purposes of gaming may be proved by evidence that the fact of their being so used was a matter generally known and talked about and of common reputation in the community where he resided: *Trout v. Marvin*,

2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

The game of policy may be proved by showing that the tickets were written and sold without proving the drawings: *Young v. State*, 16 O. D. (N.P.) 54, 3 O. L. R. 133.

The nature of the account may show that it was gambling as against the evidence of a party: *Lester v. Buel*, 49 O. S. 240, IV Longsdorf's Notes, 453.

For the general discussion of the subject of evidence, see EVIDENCE.

E. EQUITABLE RELIEF.

G. C., § 5966, does not authorize the granting of an injunction to prevent the collection of a check which has been given for a gambling debt: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318.

Equity will not appoint a receiver for a fund which is raised by a gambling contract, whereby a number of persons pay for the privilege of entering a guessing contest, the proceeds of which are to be paid to the winner: *Stevens v. Times-Star Co.*, 72 O. S. 112, IV Longsdorf's Notes, 988 [affirming *Stevens v. Enquirer Co.*, 13 O. D. (N.P.) 235].

A transfer of life insurance in payment of a debt arising out of transactions in stock on margins is void at common law and under the statutes of Ohio, and can be set aside at the suit of the assignee for the benefit of creditors; a proceeding under G. C., §§ 11106 and 11107, by a creditor is not necessary: *Wachtel v. Campbell*, 21 O. C. C. 731, 12 O. C. D. 148 [affirming *Wachtel v. Campbell*, 7 O. N. P. 507, 9 O. D. (N.P.) 572].

An injunction against the stationing of police about a place of business in such a manner as to interfere with the business carried on therein will be refused, where the court has reasonable ground for the belief that things of a forbidden character, such as gambling, are being carried on in connection with such business, and the plaintiff in his testimony exhibits a lack of candor and a willingness to suppress the facts, and otherwise by his conduct forfeits his claim on a court of equity: *Hirsch v. Hunt*, 13 O. N. P. (N.S.) 137, 23 O. D. (N.P.) 143.

F. ATTACHMENT.

Attachment will lie to recover money which is lost at betting or gambling: *Wise v. Martin*, 7 O. N. P. 660, 5 O. D. (N.P.) 550; *Jenks v. Richardson*, 35 Bull. 120.

An attachment will lie against a foreign corporation in an action for recovery of money lost in gambling: *Harlan v. Invest-*

ment Co., 11 O. N. P. (N.S.) 492, 22 O. D. (N.P.) 12.

G. LIABILITY OF PROPERTY.

1. Construction of Statutes.

G. C., §§ 5969 and 5971, amount to a valid exercise of the police power; and do not constitute a taking of property without due process of law: *Marvin v. Trout*, 199 U. S. 212, 15 O. F. D. 141, 3 O. L. R. 550 [affirming *Marvin v. Trout*, 70 O. S. 437, which affirmed, without opinion, *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333].

G. C., § 5971, relating to gaming, does not undertake to create a lien on the interest of the "owner" of the property, but authorizes such interest to be subjected to payment of the judgment by proper proceedings: *Iroquois Co. v. Meyer*, 80 O. S. 676, IV Longsdorf's Notes, 1053.

The word "owner" in G. C., § 5971, relating to gaming, includes one who is a lessee as well as the owner of the fee. Accordingly the interest of a lessee of premises who sublets the same to one who, with the knowledge and permission of such lessee, uses the same for gaming purposes, may be subjected to the satisfaction of a judgment recovered against such sublessee for money lost therein at gaming: *Iroquois Co. v. Meyer*, 80 O. S. 676, IV Longsdorf's Notes, 1053.

The provisions of G. C., § 5971, relate only to money lost at gambling, and it is nowhere provided that one who loses money in a bucket shop may have a lien for the amount of his loss on the premises where the business is carried on, which he may assert against a purchaser of the premises for value, the purchase being made before a suit to subject the premises is instituted and without notice of the claim: *Sanders v. Penney*, 79 O. S. 221, IV Longsdorf's Notes, 1045.

Under G. C., § 5971, the owner who knowingly permits a building to be used for gambling purposes holds such building subject to the lien of the judgment specified in that section; and under G. C., § 5972, a person who leases premises for gambling or knowingly permits them so to be used and occupied, and fails forthwith to prosecute an action to recover possession thereof, is personally liable for such losses: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 465.

The fact that a judgment against the owner of the property as a winner has been reversed is not an adjudication in his favor, if an action is brought under G. C., § 5971, to subject such property to the lien of such judgment: *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

A third person who, on the failure of the loser to sue within six months, has obtained judgment for the winnings, under G. C., § 5969, may subject the premises. The statute refers rather to discouraging gambling than to natural justice: *Trout v. Marvin*, 62 O. S. 132, IV Longsdorf's Notes, 827.

The word "permit" in G. C., § 5972, does not mean "expressly consent." The owner's knowledge and inaction is enough: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 465 [reversing *Ackerman v. Thompson*, 7 O. N. P. 598, 10 O. D. (N.P.) 361].

2. Judgment Against Winner.

(a) Necessity.

The right to enforce a lien under G. C., § 5971, does not accrue until the judgment for the recovery of the money lost at gambling has been rendered: *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

Where the owners are not charged as principals in the gambling, under G. C., § 5972, by permitting the property to be used and occupied for gambling, but only their property is sought to be reached to pay a debt lost to others, it can only be after judgment first obtained against the others under G. C., § 5971: *Bobb v. Hetsch*, 8 Dec. Rep. 245, 6 Bull. 636.

One who loses money in a bucket shop has no lien upon the premises where the business is carried on until he brings a suit and subjects the premises to the lien of his judgment. G. C., § 5971, giving a lien upon the premises applies only to money lost at gambling: *Sanders v. Penney*, 79 O. S. 221, IV Longsdorf's Notes, 1045 [affirming *Penny v. Sanders*, 17 O. D. (N.P.) 34, 4 O. L. R. 500].

(b) Effect.

In the absence of collusion, a judgment recovered against the winner in an action under G. C., § 5966, is conclusive in an action to enforce the lien of such judgment against the property in which such gambling was knowingly permitted by the owner under G. C., § 5971: *Binder v. Finkbone*, 25 O. S. 103, III Longsdorf's Notes, 213.

If a judgment has been rendered against the owner of property as a winner, the reversal of such judgment is not an adjudication which will prevent a judgment against another person as a winner from being enforced as a lien upon the property in which gambling was conducted with the knowledge of such owner: *Trout v. Marvin*, 62 O. S. 132, IV Longsdorf's Notes, 827.

The fact that in a former suit the question was tried whether the landlord was the winner of the money lost at gaming, did not necessarily involve the question whether the gaming was carried on in his property and with his knowledge, and therefore does not act as a bar under the rule that the particular controversy sought to be precluded was necessarily tried and determined: *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

A judgment under G. C., § 5969, against the winners is conclusive in an action under G. C., § 5971, against the owner of the premises as to following facts: That the money lost and winnings secured, which caused the plaintiff's injury, was won by the defendant; that it was lost and won in violation of law; that the plaintiff, in consequence thereof sustained damage to the amount of the judgment: *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

A judgment under G. C., § 5969, against the winners is not conclusive that he was the owner of the premises described; that said premises were used and occupied for the purpose of gaming, or that said premises were leased by him to the lessees, for the purpose of gaming therein, or that he knowingly permitted the same to be so used. As to these facts the burden of proof is on the plaintiff: *Trout v. Marvin*, 2 O. C. C. (N.S.) 523, 14 O. C. D. 333 [affirmed, without opinion, *Marvin v. Trout*, 70 O. S. 437].

II. CRIMES RELATING TO GAMBLING.

A. GAMBLING GAME.

1. What Constitutes.

The word "gambling" does not include lottery or policy, and prosecution for these offenses must be brought under G. C., § 13064: *State v. Lark*, 3 O. N. P. 155, 4 O. D. (N.P.) 241.

Games of cards in which the loser pay for the beer, cigars or lunches, as an understood forfeit on his part, though without agreement to that effect, are for gain and consequently gambling: *Ulsamer v. State*, 11 Dec. Rep. 889, 30 Bull. 293.

It is not gambling where the players of a slot machine received value for their money in the kind of commodities sold in the place in which the machine is kept: *Heelman v. State*, 6 O. N. P. 258, 9 O. D. (N.P.) 274.

2. Procedure.

An indictment charging "that A did unlawfully play at a certain game called 'draw

poker' for a large sum of money, towit, for the sum of six dollars, by means of a certain gaming device, towit, a pack of cards," is sufficient in law, after a plea of guilty, to warrant sentence thereon: *Carper v. State*, 27 O. S. 572, III Longsdorf's Notes, 377.

An indictment that A "did unlawfully play at a certain game called 'poker,' for a large sum of money, towit, for the sum of two dollars, by means of a certain gaming device, towit, a pack of cards," is sufficient although it does not state the name or names of the persons with whom he played: *Davis v. State*, 7 O. (pt. 1) 204, I Longsdorf's Notes, 371, and *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941 [distinguished, *Roberts v. State*, 32 O. S. 171, III Longsdorf's Notes, 625].

Contra, the indictment must recite the parties, or allege that they are unknown. It must also specify whether the game was for money or other valuable things: *Davis v. State*, 7 O. (pt. 1) 204, I Longsdorf's Notes, 371; *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941.

Each player may be separately or all jointly indicted, and on a joint indictment there may be several verdicts: *Carper v. State*, 27 O. S. 572, III Longsdorf's Notes, 377.

A prosecution for a first offense for gambling may be had before a mayor on affidavit without filing an information: *Kubach v. State*, 1 O. N. P. (N.S.) 405, 14 O. D. (N.P.) 726 [affirmed, *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488].

On a prosecution for gambling, expert testimony as to the game commonly known as "craps" is admissible: *Fields v. State*, 4 O. N. P. (N.S.) 401, 17 O. D. (N.P.) 16.

Under an act similar to G. C., § 13660, it was held that a witness called to testify for the state shall not be punished for any of the offenses he discloses, applies so that if the prisoner is called on by the state to testify in his own case before sentence, although he has been convicted by the jury, and does testify, he must be discharged: *Evans v. State*, 1 Dec. Rep. 436, 10 W. L. J. 49.

B. BETTING.

A bet is an agreement between two or more that a sum of money, or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain: *Stevens v. Times-Star*, 72 O. S. 112, IV Longsdorf's Notes, 988.

A telegraph association formed to receive money in this state and after telegraphing to a pool room in another state, a return

telegraph would either claim the money or remit a like amount, according to the result, is a device to evade the statute against pool selling, and the agent is liable: *State v. Thompson*, 8 O. D. (N.P.) 682, 35 Bull. 94.

Betting upon elections is embraced in G. C., §§ 5965, *et seq.*, which prohibit gambling. [Overruling the dictum in the case of *Thomas v. Cronise*, 16 O. S. 54, I Longsdorf's Notes, 748]; *Veach v. Elliott*, 1 O. S. 139, I Longsdorf's Notes, 957.

A contract for the sale of certain hogs by which the vendee agrees to pay to the vendor twice the market value of said hogs if a certain presidential candidate is elected is a gambling contract: *Lucas v. Harper*, 24 O. S. 328, III Longsdorf's Notes, 175.

A sold and delivered a horse to B upon his written contract to pay therefor one hundred and forty dollars one day after Grant should be re-elected president of the United States, but if Grant was not re-elected the obligation was to be void. It was held that the transaction was a wager: *Harper v. Crain*, 36 O. S. 338, III Longsdorf's Notes, 856.

Recovery was allowed on a note payable when Polk should be elected president: *Rapp v. Wilkerson*, 1 Dec. Rep. 177, 3 W. L. J. 220.

C. BUCKET-SHOPS.

The gravamen of the offense of keeping a bucket shop, is in keeping a place wherein is conducted or permitted the pretended buying and selling of stock, etc., on margin or otherwise, without intention on the part of the customers to receive or deliver the stocks: *Gill v. State*, 10 O. C. C. (N.S.) 345, 20 O. C. D. 278.

Where the indictment charges the accused, as owner and occupier of a certain building, with permitting a bucket shop to be kept therein, and the proof shows that the accused himself kept the place and personally conducted the unlawful business, there is no such variance as to warrant the court in directing a verdict for the defendant: *State v. Murray*, 82 O. S. 305.

An indictment which follows the general language of the statute is not sufficient, where it avers specifically the purpose for which the place was kept, and does not define the nature of the contracts alleged to have been made there: *Gill v. State*, 10 O. C. C. (N.S.) 345, 20 O. C. D. 278.

As to the admissibility and weight as evidence of "buy slips" and "confirmation slips" reciting that it is the intention of the customers to receive and pay for stocks, see *Gill v. State*, 10 O. C. C. (N.S.) 345, 20 O. C. D. 278.

In a prosecution for keeping a bucket shop, it is not error to charge that the keeper must show that the transactions admitted to have occurred were not prohibited by the statute: *Gill v. State*, 10 O. C. C. (N.S.) 345, 20 O. C. D. 278.

It is not prejudicial error in a bucket shop case to neglect to explain to the jury the meaning of the word "margin," where there is no request that its meaning be defined: *Gill v. State*, 10 O. C. C. (N.S.) 345, 20 O. C. D. 278.

The conducting of a bucket shop with intent to defraud may be punished under § 5480, U. S. Rev. Stat., if intentional efforts to despoil through the medium of the post-office establishment are shown notwithstanding the carrying on of a bucket shop business may not be illegal under the federal statute: *Foster v. U. S.*, 9 O. L. R. 66 (C. C. A.)

D. LOTTERIES.

1. What Constitutes.

A lottery is a sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks: *Stevens v. Times-Star*, 72 O. S. 112, IV Longsdorf's Notes, 988.

Policy or lottery is governed by the provision of G. C., § 13064, and not by G. C., §§ 13054 and 13055: *State v. Lark*, 3 O. N. P. 155, 4 O. D. (N.P.) 241.

A contract for the sale of lands which are to constitute prizes in a lottery scheme or "gift enterprise," to be set on foot by the vendee, and which are to be paid for in part by tickets in such lottery, is against public policy, and contrary to the provisions of a penal statute, and, therefore, wholly illegal: *Hooker v. DePalos*, 28 O. S. 251, III Longsdorf's Notes, 403.

A guessing contest, instituted by a newspaper, by which persons are invited to deliver to the company fifty cents each, part of which sum goes for the privilege of making a guess upon the total vote cast for a state officer at an approaching election, the guesser coming nearest to the actual total vote cast to receive a money prize from the fund collected to one-tenth thereof, and others next nearest to receive from the fund lesser money prizes, is a lottery and scheme of chance and an unlawful enterprise. A similar scheme in which the entire sum paid by each person is to be placed in the fund and in which the prizes promised are definite amounts from five thousand dollars down to two dollars is clearly within the condemnation of the statute and unlawful: *Stevens v. Times-Star*, 72 O. S. 112, IV Longsdorf's Notes, 988.

A scheme by which lots were to be sold to purchasers at a certain price and when the lots were all sold the particular one to which the purchaser was entitled to be determined by chance, is a scheme of chance forbidden by G. C., § 13064: *Nail Co. v. Marks*, 4 O. C. C. 343, 2 O. C. D. 584.

A savings and loan association containing a lottery feature by which certain lucky shares are to be first paid is within the statute, and will be restrained from proceeding with the business, and, a receiver appointed to distribute the assets equally among all the shareholders: *Shaw v. Trust Co.*, 5 O. N. P. 411, 8 O. D. (N.P.) 510.

2. Procedure.

The term "agent" used in the former statute, R. S., § 6931, referred to agency in promoting, or acting as agent for, the game, and not as an agent of a personal principal. The ordinary rules of principal and agent do not apply to G. C., § 13064: *Adams v. State*, 14 O. D. (N.P.) 257.

Under a former statute, R. S., § 6931, which reads "Whoever, publicly or privately, as owner or agent," etc. It was necessary for the information to charge that the defendant was concerned in a scheme of chance as owner or agent; see G. C., § 13064: *Ginandt v. State*, 1 O. N. P. 327, 3 O. D. (N.P.) 400.

In charging the accused with being "concerned in" a game of policy, the affidavit must state in plain and concise language the way in which the accused was connected with such game: *Adams v. State*, 14 O. D. (N.P.) 257.

Courts will take judicial notice of the meaning of the word "policy," and an affidavit need not set forth in what the game consists: *Adams v. State*, 14 O. D. (N.P.) 257.

Where, in an affidavit charging the defendant with being concerned in a game of policy, there is a specific statement of the act or acts of which it is claimed he is guilty in addition to the language of the statute, it is sufficient: *Young v. State*, 16 O. D. (N.P.) 54, 3 O. L. R. 133.

Expert testimony as to what constitutes a game of policy is admissible: *Adams v. State*, 14 O. D. (N.P.) 257.

E. GAMBLING DEVICES.

1. What Constitutes.

A slot machine is included within the prohibition of G. C., § 13056: *Kubach v. State*, 1 O. N. P. (N.S.) 405, 14 O. D. (N.P.) 726 [affirmed, *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488].

Slot machines are gambling devices under G. C., § 13056. (N. B.—The report in 37 Bull. 258, shows it is a slot machine; the other two reports which are mere copies do not show this): *Anonymous*, 37 Bull. 258; same case as *Fletcher v. State*, 18 O. C. C. 674, 7 O. C. D. 316.

A slot machine, operated by inserting in a slot at the top a coin which finds its way into one of several compartments at the bottom according as it is deflected to one side or the other by pegs or other obstructions, against which it may chance to strike, is clearly within the definition of a gambling machine, the keeping of which for the purpose of gambling is a crime: *Wise v. Martin*, 7 O. N. P. 660, 5 O. D. (N.P.) 550.

Where a party keeps a billiard table, and permits persons to play upon it for twenty cents a game, to be paid by the loser of the game, he is guilty of keeping such table for gain within the meaning of G. C., § 13066: *Ward v. State*, 17 O. S. 32, II Longsdorf's Notes, 812.

Playing billiards, the loser to pay for the game, is not gambling, and keeping a table for this purpose is not within the provisions of G. C., § 13066: *Steuer v. Cigar Co.*, 17 O. C. C. 82, 9 O. C. D. 456.

The law does not recognize any property rights as existing in gambling devices: *Engelhardt v. Kumming*, 10 O. N. P. (N.S.) 609, 23 O. D. (N.P.) 103.

2. Procedure.

Police court has jurisdiction to try cases under G. C., § 13056, without the intervention of a jury: *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488.

Following the words of the statute in describing the offense of gambling is sufficiently certain without specifying that the device was for gain of money or other valuable thing: *Davis v. State*, 32 O. S. 24, III Longsdorf's Notes, 618.

An indictment for keeping or exhibiting gaming devices can not be sustained unless it avers that such devices were kept or exhibited "for gain," or unless it is averred that the defendant kept or exhibited such devices "to win or gain money or other property of value," or that he aided, assisted or permitted others to keep or exhibit them to win money or "property of value": *Davis v. State*, 19 O. S. 270, II Longsdorf's Notes, 945.

Under an indictment charging a defendant with keeping a nickel slot machine for gambling, it is necessary to satisfy the jury beyond a reasonable doubt that the defendant did, in the county and at about the time named, exhibit such machine for gain, or to

gain or win money or other property, either for himself or another who may have been the owner of the machine: *State v. Smith*, 6 O. L. R. 264 [affirmed, without opinion, *Smith v. State*, 71 O. S. 473].

Evidence of the placing of a nickel in an aperture of a slot machine and receiving a cigar in return, is not sufficient to maintain a charge of permitting a game to be played for gain by means of a gambling machine. So far as this evidence goes the machine may be merely a convenient method of receiving the five cent piece offered for cigars and drinks: *Heelman v. State*, 6 O. N. P. 258, 9 O. D. (N.P.) 274.

When a mayor finds from the evidence that certain slot machines are gambling devices, he may properly order their destruction and apply the money therein toward the payment of costs: *Engelhardt v. Kumming*, 10 O. N. P. (N.S.) 609, 23 O. D. (N.P.) 103.

When the record shows the action of a magistrate in destroying gambling devices to be under a search warrant, his action is in the nature of a proceeding "in rem": *Engelhardt v. Kumming*, 10 O. N. P. (N.S.) 609, 23 O. D. (N.P.) 103.

F. GAMBLING PLACE.

1. Keeping.

G. C., § 13054, is in aid of G. C., §§ 5965 to 5972, relating to gambling contracts: *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941.

Keeping a house for gambling purposes constitutes the offense described in G. C., § 13054, and it is not necessary to allege that any gambling was actually done therein: *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941.

A single act of gambling in a house not kept for that purpose should be prosecuted under G. C., § 13059, and not under G. C., § 13054: *Buck v. State*, 1 O. S. 61, I Longsdorf's Notes, 941; *Ulsamer v. State*, 11 Dec. Rep. 889, 30 Bull. 293.

The fact that other business is carried on in the room as the main purpose of its occupation is no defense if gambling is permitted: *Ulsamer v. State*, 11 Dec. Rep. 889, 30 Bull. 293.

2. Knowingly Permitting.

An owner of premises who knows that the lessee is using the same for gambling purposes and who does nothing whatever to hinder or prevent it, "knowingly permits" such use within the meaning of G. C., § 5971: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

A tavern keeper who leased a room in his tavern to a family for three months is liable for knowingly permitting card games to be played therein by the lessee: *State v. Erwin*, T. 245.

It is no defense that the owner of the place did not know that the acts permitted, namely, playing cards and requiring the loser to pay for lunches and drinks, constituted gambling: *Ulsamer v. State*, 11 Dec. Rep. 889, 30 Bull. 293.

3. Procedure.

The offense defined in G. C., § 13054, and offenses of the same description, may be laid in an indictment with a continuando: *Buck v. State*, 1 O. S. 61, 1 Longsdorf's Notes, 941.

An indictment for actually permitting a room to be used for gambling purposes must allege that gambling actually took place: *Buck v. State*, 1 O. S. 61, 1 Longsdorf's Notes, 941.

But an indictment for gaming under G. C., § 13059, is sufficient without stating the name or names of the persons with whom the accused played: *Davis v. State*, 7 O. (pt. 1) 204, 1 Longsdorf's Notes, 371; *Buck v. State*, 1 O. S. 61, 1 Longsdorf's Notes, 941; distinguished, *Roberts v. State*, 32 O. S. 171, 111 Longsdorf's Notes, 625.

An indictment for keeping a room for gambling purposes is defective unless it sets forth the name of the person or persons permitted by the accused to play, or an averment that their names are unknown: *Buck v. State*, 1 O. S. 61, 1 Longsdorf's Notes, 941.

An indictment for permitting gambling must recite the parties, or allege that they are unknown, and must also specify whether the game was for money or other valuable thing: *Davis v. State*, 7 O. (pt. 1) 204, 1 Longsdorf's Notes, 371.

A conviction for suffering a game of chance on the premises must be reversed, where the affidavit merely charges that the offense was committed within four miles of the city of Cincinnati and county of Hamilton, but there is no averment and no proof that the offense occurred "within" the county of Hamilton and state of Ohio: *Enderes v. State*, 11 O. C. C. (N.S.) 473, 21 O. C. D. 517.

Where on the trial of an indictment charging the accused as owner and occupier of a certain building, with having unlawfully and knowingly permitted to be kept therein a bucket shop, office and place wherein he permitted the pretended buying and selling of stocks, grain, etc., on margins, the proof shows that the accused himself kept the place and personally conducted and carried on therein said unlawful business, there is no such variance between the allegations of

the indictment and the facts proved as to warrant the court in directing a verdict for the defendant: *State v. Murray*, 82 O. S. 305.

An indictment charging that on a certain day and during the interval between the date and the date of the finding of the indictment the defendant kept a room for the purpose of gambling, is not bad for duplicity: *State v. Henry*, 9 O. N. P. (N.S.) 254, 21 O. D. (N.P.) 701.

GAMBLING APPARATUS.

See GAMBLING.

GAMBLING CONTRACTS.

For gambling contracts, see GAMBLING.

GAMBLING DEVICE.

For gambling device, see GAMBLING.

GAMBLING GAME.

For gambling game, see GAMBLING.

GAMBLING LOAN.

See GAMBLING.

GAMBLING PLACE.

For gambling place, see GAMBLING.

GAME.

See FISH AND GAME.

GAME LAWS.

For game laws, see FISH AND GAME.

GAMES OF CHANCE.

For games of chance, see GAMBLING.

GAME WARDEN.

For game warden, see FISH AND GAME.

GAMING.

For gaming, see GAMBLING.

GAOL.

See JAIL.

GARBAGE.

A municipal ordinance defining garbage as in this case, forbidding its removal through the streets by other than the city contractor, or the placing of it upon private property, contravenes the fourteenth amendment of the constitution of the United States, and is void: *Bauer v. Casey*, 6 O. C. C. (N.S.) 69, 16 O. C. D. 598.

The authority which is vested in municipalities to control the collection and reduction of garbage and offal does not include the right to take, without compensation to the owners, slaughter-house offal and other articles of a sanitary character, unless such articles are mixed with garbage and other matter which is noxious and dangerous to health and life: *Stadler v. Cleveland*, 12 O. N. P. (N.S.) 321.

One who has existing contracts for the removal of slaughter-house and other offal of a sanitary character and possessing value, may enjoin the enforcement of an ordinance for the collection of garbage and offal including slaughter-house offal, in so far as it is in impairment of his contract obligations: *Stadler v. Cleveland*, 12 O. N. P. (N.S.) 321.

GARBAGE REDUCTION.

The power of a city to collect and reduce garbage and offal does not include the right

to take, without compensation, discarded parts of freshly killed animals and slaughter-house offal which are not noxious and dangerous to health and have a value, though if mixed with noxious garbage, they would be otherwise: *Stadler v. Cleveland*, 12 O. N. P. (N.S.) 321. See also MUNICIPAL CORPORATIONS.

The crematory law of 1893 (90 v. 375) applies to all cities of the second grade, second class, and classification being constitutional, is valid: *Seifert v. Weidner*, 12 O. C. C. 1, 5 O. C. D. 506 [affirmed, without opinion, *Seifert v. Weidner*, 55 O. S. 646]. See also CONSTITUTIONAL LAW.

GARFIELD LAW.

For Garfield law, see ELECTIONS, POLITICAL.

GARNISHEE.

See ATTACHMENT.

GARNISHMENT.

For garnishment, see ATTACHMENT.

GAS AND OIL.

See OIL AND GAS.

GAS COMPANIES.

Scope Note.—Includes rights and duties of gas companies, control of them by the state and by municipalities; rates chargeable; and actions. Excludes corporations in general; the creation of gas companies; and taxation.

Cross References.

For oil and gas leases, see OIL AND GAS.

For powers of municipal corporations, see also MUNICIPAL CORPORATIONS.

For the subject of corporations, see CORPORATIONS.

For the taxation of gas companies, see TAXATION.

ANALYTICAL OUTLINE.

- I. Constitutionality and Construction of Legislation, 8263.
- II. Control by State, 8263.
- III. Control by Municipal Corporation, 8267.
- IV. Contracts with Municipal Corporations, 8267.
- V. General Powers of Gas Company, 8271.
- VI. Amendment of Charter, 8272.
- VII. Pipes and Use of Streets, 8272.

VIII. Rates, 8275.

- A. *Constitutionality of legislation*, 8275.
- B. *Power of municipalities*, 8276.
- C. *Nature of ordinance*, 8277.
- D. *Construction of contract*, 8277.
- E. *Lower rate to competing company*, 8278.
- F. *Where no rate fixed*, 8279.
- G. *Effect of contract*, 8279.
- H. *Contracts with private consumers*, 8280.

IX. Duration of Franchise, 8281.**X. Exclusive Character of Franchise, 8282.****XI. Use of Gas, 8283.****XII. Abandonment of Franchise, 8283.****XIII. Estoppel, 8284.****XIV. Liabilities of Gas Companies, 8285.****XV. Injunction, 8287.****XVI. Actions by City Solicitor or Taxpayer, 8287.****XVII. Pleading, 8288.****I. CONSTITUTIONALITY AND CONSTRUCTION OF LEGISLATION.**

G. C., §§ 9327, 9329, 9330 and 9332, are valid and constitutional: *Coke Co. v. State*, 18 O. S. 237, II Longsdorf's Notes, 885.

The word "gas" as used in the statutes, does not embrace every species of gas discovered or manufactured in modern times. The word is not generic in this sense: *Light Co. v. Gas Co.*, 69 O. S. 259, IV Longsdorf's Notes, 957 [affirming *Circleville v. Gas Co.*, 1 O. C. C. (N.S.) 526, 14 O. C. D. 684].

The general term "gas," employed in G. C., §§ 3982 and 3983, would by its own force, extend the application of the statute to all species of the genus which might afterwards be discovered or applied to the use of lighting or heating in the absence of the amendment: *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [reversed, on other grounds, *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883].

II. CONTROL BY STATE.

Public service corporations, such as gas or water companies, are virtually subject to two contracts, one with the state to render the public service, which the purposes of its organization have defined as set forth in its articles of incorporation, and the other with the municipality to perform its agreement as set forth in the ordinance by which the consent of the municipal authorities was obtained: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218 [re-

versed, on other grounds, *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055].

A public service corporation, like a gas or water company, authorized to supply a considerable territory, and having secured consents to supply one or more municipalities within that territory, can not refuse to supply service to the inhabitants of such municipality without the consent of the state: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218 [reversed, on other grounds, *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055].

So long as a gas company continues to exercise any of its franchises within a contracting municipality, it may be compelled to exercise its franchise therein fairly and without discrimination: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [approving and distinguishing *Gas Light Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356].

Where a gas corporation, acting under a special charter, is invested with franchises to be exercised to subserve the public interest, the terms upon which the corporation may be required to discharge its duties to the public are subject to legislative supervision and control, unless it clearly appears from the terms of its charter that it was the intention to exempt it from such interference: *State, ex rel., v. Gas Co.*, 34 O. S. 572, III Longsdorf's Notes, 739.

Under a special charter, granted prior to the adoption of the present constitution, the defendant was empowered to "manufac-

ture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters. It was held that the defendant was subject to the provisions of a subsequent statute, restricting the price to be charged for the use of meters: *State, ex rel., v. Gas Co.*, 34 O. S. 572, III Longsdorf's Notes, 739.

The right of a gas company to lay its pipes in the public streets is a franchise: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218 [see reversal in *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055]; *Defiance v. Electric Co.*, 12 O. D. (N.P.) 424.

A statute which authorizes a municipal corporation to fix the rate at which gas may be sold followed by an ordinance which fixes the rate below the cost of manufacturing the same are, when taken together, unconstitutional as depriving the gas company of its property without due process of law: *Gas Light & Coke Co. v. Cleveland*, 71 Fed. 610, 9 O. F. D. 258.

The legislature has power to pass inspection laws and require the inspector's compensation to be paid by the inspected occupations. This does not violate the requirements to tax all property uniformly; accordingly, the act for the inspection of gas meters at the expense of the gas companies, in proportion to their valuation, is valid: *Gas Co. v. State*, 18 O. S. 237, II Longsdorf's Notes, 885. See also INSPECTION LAWS.

For regulation of rate, see VIII, A, herein.

III. CONTROL BY MUNICIPAL CORPORATION.

The right to lay gas pipes in a public street and to maintain them there depends ultimately upon the grant from the state as distinguished from the municipal corporation: *Defiance v. Electric Co.*, 12 O. D. (N.P.) 424.

A city council has no power to compel a gas company, without its assent to the franchise ordinance, to furnish gas in a manner and at a rate entirely at the option of the consumer (see G. C., §§ 3982, *et seq.*): *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

In making a contract with a gas company for supplying gas to a municipal corporation and to its inhabitants, G. C., §§ 3982, *et seq.*, do not authorize a contract which, for an indefinite period, leaves to other parties the regulation of the price that shall be

paid, or the quantity or quality of gas that shall be furnished: *Gas Light & Coke Co. v. Avondale*, 43 O. S. 257, IV Longsdorf's Notes, 43.

When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitute a contract and the rights of the parties thereunder are to be determined by the contract itself: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

A municipality has the right to impose terms and conditions under which a natural gas company may come within the limits of the city and use its streets, alleys and public places in laying pipes for distribution of gas to consumers: *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179. [For subsequent opinion, see *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250].

The requirement that a natural gas company pay to the municipality ten per cent. of its receipts from gas sold at or above a specified figure, is not a revenue measure and therefore not void because a means for levying a tax upon the company in addition to its regular taxes, notwithstanding the provision that the money so received by the municipality shall be for the benefit of the general expense fund of the city: *Columbus v. Fuel Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179 [for subsequent opinion, see *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250].

The right to operate gas works is a franchise granted by the legislature and does not depend on the permit of the local authorities. It is a legitimate and necessary business and the municipal authorities can not arbitrarily declare it a nuisance, or, unless it in fact becomes a nuisance, prohibit it within a certain district, or make its operation outside of such a district depend upon the consent of private property owners: *Defiance v. Gas & Electric Co.*, 12 O. D. (N.P.) 424.

An ordinance which confers a right upon a gas company upon certain terms may upon acceptance by such company amount to a valid contract even though as an ordinance it may be invalid: *Columbus v. Fuel Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

The council of a municipal corporation may fix the rate which a gas company may charge for the rent of gas meters: *State, ex rel., v. Gas Co.*, 34 O. S. 572, III Longsdorf's Notes, 739.

The power to regulate the price of gas carries as an incident the power to enact that gas companies shall report to the city annually the cost and amount of gas made during the year, and the total receipts and expenditures. Any gas company in such ordinance will include a natural gas company, though unknown at the date of the ordinance. That no other city requires such reports does not affect the right: *Cline v. Springfield*, 7 O. N. P. 626, 10 O. D. (N.P.) 389.

An ordinance requiring an annual report of the cost and amount of gas, can be enforced only by civil proceedings. A clause fixing a penalty for noncompliance is so far void: *Cline v. Springfield*, 7 O. N. P. 626, 10 O. D. (N.P.) 389.

For power of municipalities to fix rates, see VIII, B.

IV. CONTRACTS WITH MUNICIPAL CORPORATION.

Power in a city to cause it to be lighted with gas carries by implication power to contract with a gas company: *State, ex rel., v. Gas Co.*, 18 O. S. 262, II Longsdorf's Notes, 886.

A gas company in operation does not require a vote of the people to make a valid contract with a city to furnish gas. G. C., § 9324, only applies to the first organization of the company: *Gas Co. v. Lima*, 4 O. C. C. 22, 2 O. C. D. 396.

A contract by a city with a gas company to furnish gas is valid though it does not reserve to the city the right to purchase the gas plant. The city has such power under G. C., § 3990, hence G. C., § 3989, must mean that if it contracts away such power the contract is void: *Gas Co. v. Lima*, 4 O. C. C. 22, 2 O. C. D. 396.

A city has power to contract with a gas company for lighting with gas for any period not exceeding ten years. G. C., § 3994, is to be construed with G. C., § 3983: *Gas Co. v. Lima*, 4 O. C. C. 22, 2 O. C. D. 396.

If the contract with the gas company is shown by an ordinance, under R. S., § 1693 (repealed 96 v. 96), with the written acceptance of the gas company, it is binding on both parties, and, hence, not void for want of mutuality. The contract creates a vested right, and an ordinance repealing the contract ordinance is void: *Gas Co. v. Lima*, 4 O. C. C. 22, 2 O. C. D. 396. See also MUNICIPAL CORPORATIONS.

Before any gas company can occupy public highways and places for the transaction of its business, the consent of the municipal authorities must be obtained. The municipal authorities are not limited simply to the regulation of the mode and use of the streets and the price to be charged for the gas: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645].

A gas company may discontinue service at the expiration of its contract, even if it furnishes other municipal corporations: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing, on other grounds, *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218]; approving and distinguishing *Gas Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356].

So long as a gas company continues to exercise any of its franchises within the contracting municipality, it may be compelled to exercise its franchise therein fairly and without discrimination: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218].

A gas company may be compelled by mandatory injunction to furnish gas at rates prescribed in the franchise ordinance, as long as it continues to exercise and enjoy its franchise as a gas company: *Gas Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356 [affirming *Gas Co. v. Zanesville*, 1 O. C. C. 123, 1 O. C. D. 73]; see, however, explanation of this case in *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218].

A municipal corporation which has purchased gas works may operate the same: *State, ex rel., v. Hamilton*, 47 O. S. 52, IV Longsdorf's Notes, 357.

A company which has a franchise for furnishing artificial gas can not substitute natural gas, without the consent of its consumers and the municipal corporation: *Gas Light Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463.

An artificial gas company, whose contract with the municipal authorities of a city or village, for the furnishing of gas for illuminating purposes to the corporation and its inhabitants, has expired by the lapse of time, is not entitled to an injunction against a natural gas company, furnishing natural gas to said corporation and its inhabitants for the same purpose: *Light & Power Co. v. Gas Co.*, 69 O. S. 259, IV Longsdorf's Notes, 957.

A natural gas company having a right by franchise to furnish natural gas for fuel,

might go into operation in a city or village, under contract with the municipal authorities thereof, for the furnishing of natural gas for illuminating purposes, to the municipality and its inhabitants, although there was already formed within such municipality, a company which manufactures and furnishes artificial gas for the same purpose, and the right to so go into operation did not require a vote of the qualified voters of the municipality, as provided for in G. C., § 9324, as it then stood: *Light & Power Co. v. Gas Co.*, 69 O. S. 259, IV Longsdorf's Notes, 957.

A municipal corporation can not fix a rate for gas which is below the cost of manufacturing the same: *Gaslight & Coke Co. v. Cleveland*, 71 Fed. 610, 9 O. F. D. 258.

Assuming that by authority of an invalid ordinance, a natural gas company has entered a municipality, and thereby comes into competition with the gaslight and power company previously serving the municipality and its citizens, a suit by the latter company to enjoin the former from further operation will not lie, for the reason that no legal injury to said company can result from such competition; and this is true, notwithstanding if the contention as to the invalidity of the ordinance is well founded, the new company may be ousted from the city by a proper action brought in that behalf: *Light & Power Co. v. Gas Co.*, 1 O. C. C. (N.S.) 526, 14 O. C. D. 684.

When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

The approval of the municipal board of public works was necessary under R. S., § 1546-195 (repealed 96 v. 96), to give validity to an ordinance granting franchises in streets to a gas and fuel company, although the municipality at the time was under a *de facto* form of government: *Columbus v. Gas & Fuel Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

G. C., § 3989, relative to right to purchase gas plant, etc., does not apply to natural gas companies: *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas & Fuel Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

A city ordinance passed May 3, 1875, granted to the defendant's predecessor the right to use the streets for its gas pipes, and provided that the grant should vest in the grantees power and license to make all necessary excavations and that the right in the pipes laid should be and remain in the grantees without limitation. The ordinance contained a contract with the grantees for a period of twenty years. A second ordinance was passed in 1891 granting a predecessor of the defendant the right to purchase and maintain the pipes laid under the original ordinance and to use the streets to lay and maintain others. It was held that under these ordinances no special permit of the municipal authorities for the laying down of gas pipes and conduits could be required: *Defiance v. Gas & Electric Co.*, 12 O. D. (N.P.) 424.

A provision in an ordinance embodying a grant to a natural gas company, that gas shall not be furnished for illuminating purposes, but only for heating and power, is void, and the company may be compelled to either furnish gas for illuminating purposes or abandon its rights in the streets: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537]. See also MUNICIPAL CORPORATIONS.

An ordinance to issue bonds to construct or purchase gas-works sufficiently states the purpose of the bonds: *Hensly v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114.

But a provision for submitting to popular vote the question of for the purchase or construction or against the purchase or construction is illegal, for it gives the voter no chance to choose between purchase and construction: *Hensly v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114.

Bonds for the purchase or construction of gas-works are within the power of a city to issue under G. C., § 3295, as being an improvement of a local nature: *Hensly v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114.

In view of G. C., § 4241, providing that a city council "shall not enter into any contract which is not to go into full operation during the term for which all members of such council are elected," a condition contained in an accepted bid for the purchase of a natural gas plant, providing that the bidder shall have the right to operate the plant and to fix a satisfactory price for gas, can not be waived by the bidder, so as to validate a sale, after the expiration of the terms of office of some of the members of council which accepted the bid: *Kerlin Co. v. Toledo*, 20 O. C. C. 605, 11 O. C. D. 57 [for opinion below, see *Kerlin v. Toledo*, 8 O. N. P. 62, 10 O. D. (N.P.) 509].

The provision of G. C., § 3989, providing that every ordinance or contract by a municipality for the construction or extension of gas works, etc., must secure to the council the right to purchase such works applies only to natural gas works: *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

The provision of section three of the "Con-over contract" which puts upon the city the expense of service pipes connecting with street lamp posts, has not been made a part of the natural gas ordinance under which natural gas is now being furnished to the city of Cincinnati: *Cincinnati v. Gas and Electric Co.*, 14 O. N. P. (N.S.) 513, 24 O. D. (N.P.) 23.

V. GENERAL POWERS OF GAS COMPANY.

When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [for opinion below, see *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218].

A gas company may borrow money for its corporate purposes, and may secure such loan by a mortgage: *Hays v. Coal Co.*, 29 O. S. 330, III Longsdorf's Notes, 470.

G. C., § 10128, which applies to companies organized for the transportation of natural gas, petroleum, water or electricity through pipes, applies to a company formed to furnish natural gas to cities although such companies were not known when such statute was passed originally, and the statute was enacted solely for pipe line companies organized for transportation purposes only: *Columbus v. Fuel Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

Where a corporation is formed "for the purpose of producing, purchasing and acquiring natural gas" and "of piping and transporting natural gas from the place or places where it is produced, purchased or acquired" to certain named towns and cities situated in the counties along the lines of said company and between the termini thereof, "and to other cities, villages and places in the counties aforesaid," it is not one of

the charter obligations of such corporation to furnish natural gas to consumers in all of such cities, towns and villages: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

Under a municipal ordinance authorizing a gas company to use the streets and public grounds of a city for the purpose of laying down pipes for the conveyance of gas in and through the city for the use of said city and its inhabitants, the gas company has the right to purchase the gas supplied by it from another company, there being no prohibition thereof in the ordinance: *Hamilton v. Gas Light & Coke Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Co.*, 46 Bull. 213].

If a consumer is an occasional or exceptional user only by reason of having introduced an electric light system, the gas company has a right to take out the connection and meters: *Express Co. v. Gaslight Co.*, 10 Dec. Rep. 389, 21 Bull. 18.

VI. AMENDMENT OF CHARTER.

G. C., § 8719, does not authorize a gas company to amend its charter so as to include the power of operating a railway or a traction company: *State v. Taylor*, 55 O. S. 61, IV Longsdorf's Notes, 653.

A corporation which is organized for the purpose of furnishing gas for lighting may amend its charter so as to authorize it to furnish gas or electricity for lighting: *Picard v. Hughey*, 58 O. S. 577, IV Longsdorf's Notes, 749.

A company which is organized for the purpose of furnishing illuminating gas is not authorized, in the absence of specific statutory provision, to substitute natural gas therefor, and to furnish it for heating as well as for illumination: *Gaslight Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463.

VII. PIPES AND USE OF STREETS.

Where a municipal corporation by an ordinance passed by its council grants to a gas company the right to lay its pipes and other appliances in the streets and other public places within the corporation, for the purpose of selling and distributing its gas for public and private use, such council may require the gas company to pay annually to such municipal corporation a reasonable sum to compensate for the city's necessary supervision of the work as well after as during its installation; and when the gas company accepts the terms of said ordinance according to law, and takes possession of and occupies the streets, etc., under said grant, such ac-

cepted ordinance becomes a valid contract between the parties for the annual payment of said sum. The clause in the ordinance here involved that said payments are "for the benefit of the gas and light fund of said city" does not render the ordinance invalid as a means to raise general revenue, said clause being subordinate to the principal obligation: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645, and *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416].

That the municipal authorities, subsequent to the grant to the defendant company, gave permission to one or more other gas companies to lay pipes in the streets and other public places within the corporation for the purpose of selling and distributing gas for public and private use, constitutes no defense to an action to recover payments due under the provisions of the former ordinance, because, the said former ordinance under which the defendant holds does not purport to give to defendant an exclusive right to the streets for the purpose of its business; and, because, the latter part of § 6 of that ordinance provides "that nothing herein contained shall be construed as granting exclusive rights or privileges, or preventing any other company from furnishing gas to the citizens of said city of Columbus": *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025 [reversing *Columbus v. Gas Co.*, 3 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 645, and *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 37, 14 O. D. (N.P.) 416].

Since the city might have excluded a gas company from any use of its streets, but saw fit to permit such use under conditions which were embodied in a contract which was accepted in writing by the gas company, the provisions thus agreed upon must be fulfilled on the principles of contract, and the company after having enjoyed the benefits of the contract will not be heard to say that its provisions were *ultra vires* on the part of the city: *Columbus v. Gas & Fuel Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179 [for subsequent opinion, see *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250].

The grant of a franchise to a gas company authorizes it to lay pipes in the public streets; and it needs no further special permit therefor: *Defiance v. Electric Co.*, 12 O. D. (N.P.) 424.

A gas company laying its pipes in the streets of a city, under a grant from the city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the

necessities of the public require it, and, in the absence of wantonness or negligence on the part of the city, the company can not maintain an action for damage occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade: *Gaslight & Coke Co. v. Columbus*, 50 O. S. 65, IV Longsdorf's Notes, 485.

A municipal corporation can not by ordinance grant to a gas company the exclusive privilege of laying gas pipes in the public streets: *Hamilton v. Gaslight & Coke Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Co.*, 46 Bull. 213].

Even if the municipal corporation consents to the laying of gas pipes in the public streets, the gas company must nevertheless make compensation to the owners of abutting property: *Webb v. Gas & Fuel Co.*, 9 Dec. Rep. 662, 16 Bull. 121.

If a gas company, under the provisions of G. C., § 9325, extends into a village its gas pipes, and if it is given a right of way along which such pipes are laid, and if it uses such pipes to convey into the village gas which it manufactures outside of the village, and if it uses such manufacturing plant and such pipes together as one entire plant, it may be regarded as established in such village within G. C., § 3982; and the extension of such pipes may be regarded as an extension of the gas works for supplying the village with gas within the meaning of G. C., § 3989: *Gas Co. v. Avondale*, 43 O. S. 257, IV Longsdorf's Notes, 164.

A private corporation, in placing pipes under a sidewalk upon a public street for the purpose of conveying gas for private consumption only, imposes an additional burden, and one not contemplated in the original grant for street purposes nor incidentally connected with the use of the street for public travel, upon the easement of abutting owners, inasmuch as the laying and repair thereof necessitate tearing up the sidewalk, thereby obstructing ingress and egress to such property, interferes with the abutter's right to construct and use the area under the sidewalk for cellars, and is otherwise an additional burden on the easement therein, and, hence, such a company is not entitled to so use the street without first obtaining the consent of or making compensation to, the abutters therefor: *Gas & Fuel Co. v. Townsend*, 1 O. N. P. (N.S.) 289, 14 O. D. (N.P.) 5 [following *Callen v. Electric Light Co.*, 66 O. S. 166, IV Longsdorf's Notes, 901].

A franchise, granting to a gas company the right to lay its pipes in the streets and alleys of a municipality, is a contract be-

tween the gas company and the municipality, which can not be abrogated as to one of the streets included therein by vacation of said street by the municipality and the reversion of title therein to the abutting owners, but the right to maintain said pipe continues so long as the right remains in the company to supply gas to the municipality and its inhabitants: *Gas Co. v. Railway*, 14 O. N. P. (N.S.) 171.

Where the abutting owner is a railway company, who after vacation of the former street changed its grade for the purpose of laying a track thereon, and in so doing exposed the gas pipe and made it necessary that it should be relaid, the railway company is liable to the gas company for the cost of so relaying said pipe: *Gas Co. v. Railway*, 14 O. N. P. (N.S.) 171.

A municipality may, in its proprietary character, make a contract with a gas company, granting to such company, the right to use the city streets for the purpose of laying pipes for the purpose of distribution of gas to consumers, and providing a consideration for such use: *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

A gas company which has accepted several ordinances granting it the right to lay its pipes in the streets, and has so laid its pipes and used them for a long period, is estopped from questioning the validity of the ordinances under which it has been operating; nor can it successfully resist, as unreasonable, or as an unconstitutional taking of its property without due process of law, the collection by the municipality of a consideration of ten per cent. of its sales of gas as provided in its contract for the use of the streets: *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

Under the ordinance granting to the Cincinnati Gas & Electric Company the right to furnish natural gas for heat, light and power and all other necessary uses to both public and private consumers, the gas company is required to construct at its own expense service pipes from its mains to the inside curb lines at least, and the city as well as private consumers is entitled to the benefit of this provision: *Cincinnati v. Gas and Electric Co.*, 14 O. N. P. (N.S.) 513, 24 O. D. (N.P.) 23.

VIII. RATES.

A. CONSTITUTIONALITY OF LEGISLATION.

A statute which authorizes a municipal corporation to fix the rate at which gas may

be sold followed by an ordinance which fixes a rate below the cost of manufacturing the same are, when taken together, unconstitutional as depriving the gas company of its property without due process of law: *Gaslight & Coke Co. v. Cleveland*, 71 Fed. 610, 9 O. F. D. 258.

A business which controls and supplies a public want in such a position as to have a virtual monopoly, is so far devoted to the public that the price may be regulated by the public: *Zanesville v. Light Co.*, 47 O. S. 1, IV Longsdorf's Notes, 355. See also CONSTITUTIONAL LAW.

B. POWER OF MUNICIPALITIES.

The power conferred on the council of any city or village by G. C., §§ 3982 and 3983, is the power to fix the maximum (statute reads "minimum"), price at which the company may sell gas: *Gas Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

A municipal corporation can not make a contract with a gas company for an indefinite period which leaves to other parties the regulation of the price that shall be paid, or the quantity or quality of gas which shall be furnished: *Coke Co. v. Avondale*, 43 O. S. 257, IV Longsdorf's Notes, 164.

A gas company in a city or village, chartered by an act of the legislature passed before the adoption of the present constitution of the state, is subject to the provisions of an ordinance regulating the price of gas, adopted by the council of the city or village, under the authority conferred by G. C., § 3982, where the right to fix its own prices is not expressly conferred on the company by the terms of its charter: *Zanesville v. Gaslight Co.*, 47 O. S. 1, IV Longsdorf's Notes, 355.

A municipal corporation having authority to regulate the price of gas, has, as incidental thereto, power to require gas companies to furnish annually such information and data, exclusively in their possession, as will enable the council to act intelligently in fixing a price for gas which will be reasonable and just to the public and to the gas company: *Cline v. Springfield*, 7 O. N. P. 626, 10 O. D. (N.P.) 389.

The city of Toledo, not having legislative authority to regulate the price of natural gas, prior to the act of March 1, 1889, an ordinance passed prior thereto, containing a provision for the further regulation of the price upon such terms as council and the company might determine, constitutes a binding contract between the parties, when ac-

cepted: *Toledo v. Gas Co.*, 6 O. N. P. 531, 8 O. D. (N.P.) 277.

The franchise for the use of a street in a municipality for the furnishing of gas being silent as to the duration of the franchise and the ten-year agreement as to price having expired, the municipality may, under its power of regulation, impose new conditions as to price, and the gas company may accept or reject them. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city, but not of its property: *Ohio Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

C. NATURE OF ORDINANCE.

While a provision in an ordinance relating to the price of gas to be charged to the city for its own purposes, is in the nature of a contract, the city can not contract for its citizens, and a provision in the ordinance fixing the price of gas to be charged private consumers, is not a contract, but a legislative enactment: *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [reversed, on other grounds, *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883].

D. CONSTRUCTION OF CONTRACT.

The practical construction placed upon a contract, in the performance thereof, by the parties who made it, should, in case of doubt, have great weight in its construction by courts; but the construction placed upon such contract by the successors of those who made it, or by public officers, is entitled to much less weight: *Cincinnati v. Gaslight & Coke Co.*, 53 O. S. 278, IV Longsdorf's Notes, 599.

A contract binds a gas company to furnish to a city "such quantity of gas as may be required by the city council for public lamps at two-thirds of the lowest averaged price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburgh." It was held that this means the lowest cash price in each city, averaged by adding together such lowest cash prices, and dividing the amount by five; two-thirds of the quotient will be the price to be paid by the city to the gas company, under the contract: *Cincinnati v. Gaslight & Coke Co.*, 53 O. S. 278, IV Longsdorf's Notes, 599.

A mistake made by reason of a wrong construction of the terms of a contract, is not made under a mistake of fact, but under a mistake of law, and if voluntary can not be recovered back: *Cincinnati v. Gaslight &*

Coke Co., 53 O. S. 278, IV Longsdorf's Notes, 599.

Where a municipality by ordinance authorizes a gas company to supply natural gas, and under certain conditions artificial gas and to charge a higher rate therefor, and by said ordinance the board of public service is constituted the arbitrator or judge as to the existence of such conditions, and the said board determines that conditions exist which warrant the supplying of artificial gas at artificial gas rates, the gas company has authority to supply artificial gas at artificial gas rates, until such time as the said board makes a different finding, or its original finding is set aside as not in good faith, or for other valid reasons: *Feckter v. Gas & Electric Co.*, 19 O. D. (N.P.) 658, 6 O. L. R. 658.

When an ordinance regulating the price of gas under G. C. §§ 3982 and 3983, provides that it shall be in force and take effect from and after its passage and legal promulgation, and also provides that the gas company shall be entitled to charge at a certain rate for ten years from a date later than the date of the passage and legal promulgation of the ordinance, such provision, when accepted in writing by the gas company, is valid and binding for the period of ten years from the date so named. Such ordinance is not restricted by G. C., § 4241: *Gas Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

E. LOWER RATE TO COMPETING COMPANY.

If a municipal corporation has fixed the maximum price of natural gas under favor of G. C., §§ 3982 and 3983, and a company has accepted the provisions of the ordinance and engaged in supplying gas thereunder, injunction will not lie to restrain such municipality from fixing a lower maximum price for a competing company: *Gas Co. v. Columbus*, 16 O. D. (N.P.) 359.

An ordinance fixing the price which may be charged for natural gas by a competing company does not, as a matter of law, operate as a requirement that the company engaged in selling gas under a prior ordinance fixing a higher maximum rate shall furnish gas at the reduced price, and does not impair the obligation of the contract of the old company: *Gas Co. v. Columbus*, 16 O. D. (N.P.) 359.

A gas company will not be heard to attack an ordinance fixing the price at which gas may be sold by a new competing company on the ground that, being general in its nature, it lacks uniform operation, where it appears that the complaining company is allowed under the terms of a prior ordinance

to sell gas at a higher price than its competitor will be, under the new ordinance: *Gas Co. v. Columbus*, 16 O. D. (N.P.) 359.

F. WHERE NO RATE FIXED.

Where no rate has been agreed upon for gas within a city and council attempts to fix rates, but the gas company refuses to accept the terms imposed, the ordinance is not enforceable: *Granville v. Gas Co.*, 14 O. C. C. (N.S.) 421 [reversing *Granville v. Gas Co.*, 11 O. N. P. (N.S.) 641].

G. EFFECT OF CONTRACT.

Where an ordinance attempting to fix the price of gas is void because of its extension beyond the period of ten years, the conditions which limit the council to an exercise of its power, under G. C., § 3983, are not present, and it may again legislate upon the same subject: *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [reversed, on other grounds, *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883].

When a city council proceeding under G. C., §§ 3982 and 3983, has fixed the price of gas according to one standard, and the same has been duly accepted by the company, it can not be altered without the consent of the company within ten years by fixing another standard which may affect the limit or price previously fixed: *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Fuel Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

A city council has no power under G. C., §§ 3982 and 3983, to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at a rate entirely at the option of the consumer: *Gas & Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883 [reversing *Chillicothe v. Gas & Fuel Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24].

An agreement between a city and a gas company for the supply of gas for a period beyond that authorized by law, will not affect the authority of the city to regulate the price of gas, although the agreement has been performed by both parties for the period for which it was legally authorized: *State, ex rel., v. Gas Co.*, 37 O. S. 45, III Longsdorf's Notes, 890.

If a gas company has accepted an ordinance fixing the maximum rate for gas, it can not increase such rate within the time limited, although the time has expired within which a certain minimum charge can be made: *Trust Co. v. Gas Co.*, 55 Fed. 181, 7 O. F. D. 578.

The fact that the maximum rate for gas fixed by the franchise ordinance which has been accepted by the gas company has become inadequate, by reason of a change of circumstances, is not ground for equitable relief: *Trust Co. v. Gas Co.*, 55 Fed. 181, 7 O. F. D. 578.

While power to regulate the price at which gas shall be furnished by a gas company is vested in council, such power must be exercised in good faith for the purpose for which it was given, and bad faith on the part of council in fixing an inadequate price or in making unreasonable and arbitrary regulations is a proper subject of inquiry, when put in issue: *Akron v. Ohio Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218 [reversed, *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055].

It will be presumed, in the absence of allegations of fraud or want of good faith, that a municipal ordinance fixing the price to be charged for natural gas is reasonable, and it will not therefore be the subject of judicial inquiry: *Gas Co. v. Columbus*, 16 O. D. (N.P.) 359.

H. CONTRACTS WITH PRIVATE CONSUMERS.

On petition by a gas company against A, averring that A had agreed to light his store only with gas for ten years, and not introduce electric lights, the company agreeing to furnish it at a reduced price, and A agreeing to use not less than three-quarters of his present consumption, and averring that A had put in electric lights and refuses to light with gas, and asking injunction, it was held that it did not appear but that the remedy at law was full and adequate, for here was a final breach, and full damages could be assessed at once; hence injunction could not be granted: *Steinau v. Gas Co.*, 48 O. S. 324, IV Longsdorf's Notes, 417 [reversing *Gas Light & Coke Co. v. Steinau*, 2 O. C. C. 286, 1 O. C. D. 490]. See also INJUNCTION.

Where a gas company entered into contracts with private consumers for the price of the gas to be furnished, but the city council afterward passed an ordinance fixing the price at a lower rate, the gas company can only collect the price as fixed by such ordinance: *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [reversed, *Chillicothe v. Gas Co.*, 65 O. S. 186, IV Longsdorf's Notes, 883].

Mere discrimination by a public service corporation without substantial injury is not necessarily unlawful, and it follows that allegations will not lie as to discrimination in rates charged for electric current, where made without regard to circumstances and conditions or any averment that consumers

are unfavorably affected thereby: *State, ex rel., v. Gas & Electric Co.*, 13 O. C. C. (N. S.) 12.

IX. DURATION OF FRANCHISE.

Where a corporation is formed "for the purpose of producing, purchasing and acquiring natural gas" and "of piping and transporting natural gas from the place or places where it is produced, purchased or acquired" to certain named towns and cities situated in the counties along the line of said company and between the termini thereof, "and to other cities, villages and places in the counties aforesaid," it is not one of the charter obligations of such corporation to furnish natural gas to consumers in all of such cities, towns and villages: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; but in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [for opinion below, see *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

As long as a gas company continues to exercise any of its franchises within the contracting municipality, it may be compelled to exercise its franchise therein fairly and without discrimination: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [for opinion below, see *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218; *Gas Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356, approved and distinguished].

Since G. C., § 9320, fixes no limit on the use of the streets with the consent of the authorities, such consent once given is irrevocable, and the grant becomes a vested right and includes the right to repair and extend as may be necessary: *Defiance v. Gas & Electric Co.*, 12 O. D. (N.P.) 424.

The general right of a gas company granted under a municipal ordinance authorizing the

use of the streets, lanes, alleys and public grounds of a city for the purpose of laying down pipes, etc., is not terminated at the end of twenty years by a section of such ordinance providing that the gas company shall have the exclusive right for laying gas pipes for a period of twenty years from the passage of the ordinance: *Hamilton v. Gas Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Co.*, 46 Bull. 213].

An ordinance granting to a gas company the exclusive privilege of laying pipes in its streets and public places is void and a provision in an ordinance intended to convey such a right for a period of twenty years, being absolutely void, is not available to the municipality as a termination at the end of twenty years of such right. The proper construction of such an ordinance is that the gas company has the right without limit as to time, to use the streets: *Hamilton v. Gas Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Light Co.*, 46 Bull. 213].

X. EXCLUSIVE CHARACTER OF FRANCHISE.

G. C., § 9320, does not authorize a gas company to acquire an exclusive right to lay its pipes in the public streets; nor does it authorize a municipal corporation to grant the exclusive right: *Columbus v. Gas Co.*, 76 O. S. 309, IV Longsdorf's Notes, 1025; *State v. Gas Light & Coke Co.*, 18 O. S. 262, II Longsdorf's Notes, 886; *State, ex rel., v. Hamilton*, 47 O. S. 52, IV Longsdorf's Notes, 357.

A gas company incorporated for the purpose of supplying gas for lighting the streets, and public and private buildings of a city, under authority from the city council erected gas works, and laid pipes for long distances, for conducting gas through the streets for public and private consumption. The council regulated, from time to time, the price which such company might charge for gas, and from time to time, made contracts with the company for lighting the streets. At the expiration of the last contract, no new agreement was entered into, and the city declined to take gas any longer from the company. The company complied with all the provisions of the law of the state relating to gas companies, and with all the requirements of the city council in that behalf. It was held that although there was no refusal or neglect by the company, to comply with the requirement of G. C., § 3984, as to laying pipes and lighting streets, and no neglect by the company to furnish gas to citizens and other consumers, in accordance with the

prices fixed by the council, as provided in G. C., § 3986, the city council, under G. C., § 3990, was empowered to erect its own gas works at the expense of the corporation, or to purchase gas works already erected therein, whenever it might be deemed expedient and for the public good; and that the company acquired no vested rights of which it would be deprived, without due process of law, by the city's erecting its own gas works: *State, ex rel., v. Hamilton*, 47 O. S. 52, IV Longsdorf's Notes, 357.

That a municipal corporation may erect its own gas works, see also *Gas Light & Coke Co. v. Hamilton*, 146 U. S. 258, 7 O. F. D. 358.

A condition in a franchise providing that the grantees shall furnish gas free to the municipality, "so long as they shall have the exclusive right to the use of the streets of said city for their pipes," means so long as they shall have the only right granted. The passage of another ordinance, therefore, granting the right to another renders such condition inoperative, and the first company acquires the right to charge for gas so furnished: *Gas Co. v. Newark*, 7 O. N. P. 76, 8 O. D. (N.P.) 418 [reversed, *Akron v. Gas Co.*, 81 O. S. 33, IV Longsdorf's Notes, 1055].

XI. USE OF GAS.

A municipality is without authority to prescribe by ordinance that a commodity acquired by its inhabitants shall not be used for any purpose that is not dangerous or injurious; and a provision in the ordinance embodying a grant to a natural gas company, that gas shall not be furnished for illuminating purposes, but only for heating and power, is void, and the company may be compelled to either furnish gas for illuminating purposes or abandon its rights in the streets: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

XII. ABANDONMENT OF FRANCHISE.

If a company formed for the purpose of manufacturing and distributing gas abandons the manufacture thereof, a municipal corporation may proceed to furnish natural gas to its inhabitants: *Gas Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463.

The entire abandonment of its franchise in one municipality by a gas company authorized under its charter to furnish gas to other municipalities, does not constitute unlawful discrimination as generally understood: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 19 O. D. (N.P.) 218].

Under the decree of court permitting the East Ohio Gas Company to collect from consumers in the city of Akron the full amount claimed to be due from them, provided that one-third of the amount so collected should be deposited in bank pending a determination of the amount which could be legally charged and a settlement with the consumers on that basis, injunction will not lie to prevent the withdrawal by the gas company of the amount thus impounded, where it appears that the supreme court (*Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055) has held that the company can not be compelled to furnish gas at the rate demanded and is at liberty to discontinue its service and withdraw from the city: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218.

XIII. ESTOPPEL.

After a gas company, in reliance upon a franchise from a municipal corporation, has spent about one million, five hundred thousand dollars in constructing its pipes, a taxpayer can not enjoin further construction, on the ground that the original ordinance was invalid: *Darby v. Norwood*, 17 O. D. (N.P.) 253, 4 O. L. R. 536.

A municipal corporation is estopped from declaring a forfeiture of franchises granted in its streets to a gas and fuel company for the purpose of laying pipes to transport gas to its consumers, where the city has stood silently by and permitted the company to complete and mature all its plans, expend over a half million of dollars thereunder and is in the very act of supplying about thirteen hundred houses with gas, and has also given bond and taken every step necessary to perfect its rights under the statutes: *Columbus v. Gas & Fuel Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261 [affirmed, without opinion, *Columbus v. Gas Co.*, 72 O. S. 632].

A natural gas company after having enjoyed the benefits of a contract with a municipality prescribing terms for its use of the streets, accepted by it in writing, will not be heard to say that its provisions were *ultra vires* on the part of the city: *Columbus v. Fuel Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179 [for subsequent opinion, see *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250].

An ordinance which confers a right upon a gas company upon certain terms may upon acceptance by such company amount to a valid contract even though as an ordinance it may be invalid: *Columbus v. Fuel Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas*

Co., 10 O. N. P. (N.S.) 305, 21 O. D. (N. P.) 179].

A gas company which has invoked the action of a municipal corporation to pass an ordinance granting the right to lay pipes in streets and which has laid pipes in the streets by virtue of such ordinance is estopped from questioning either the legality of the passage of the ordinance or the power of the municipal corporation to pass such an ordinance: *Columbus v. Fuel Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 11 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

The incorporating of conditions which may be unlawful in an ordinance granting a franchise does not render the ordinance invalid, where it does not appear that the ordinance would not have been passed had the conditions been omitted: *Columbus v. Gas & Fuel Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261 [affirmed, without opinion, *Columbus v. Gas & Fuel Co.*, 72 O. S. 632, IV Longsdorf's Notes, 994].

If a gas company has accepted the ordinances of a municipal corporation which gave to it the right to lay its pipes in the streets on consideration of its paying the expense of replacing the streets which were torn up to lay such pipes, and paying ten per cent. of the sales of the gas under such ordinances to such municipal corporation, it can not after laying its pipes under such ordinances resist the payment of such ten per cent. of the sales: *Columbus v. Fuel Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250 [for former opinion, see *Columbus v. Gas Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179].

The fact that a city has heretofore paid for the service connections, from the service pipes to the lamp posts, made since the passage of the natural gas ordinance, does not estop it from raising the question of its obligation to continue so doing, and under the rule that it is against public policy to permit public officials to bind the municipality as to the manner in which its ordinances shall be enforced, the question may be litigated without reference to previous custom: *Cincinnati v. Gas & Electric Co.*, 14 O. N. P. (N.S.) 513, 24 O. D. (N.P.) 23.

XIV. LIABILITIES OF GAS COMPANIES.

A natural gas company is required by G. C., § 14776, to keep its gas in control, and it is liable for an explosion while being conducted through its pipes in a street, although there was no negligence: *Gas Fuel Co. v. Andrews*, 50 O. S. 695, IV Longsdorf's Notes, 522.

A natural gas company was employed to put gas in a brick kiln. Its workman finished

his part and told the brick company that they could turn on the gas. They did so, but by reason of a leak it exploded. It was held that the mere fact that a workman was in charge of the construction does not show that he had authority to bind the gas company by directions as to turning on the gas. The jury must determine from all the evidence whether the brick company was authorized to turn on the gas. If the brick company did so without authority, or continued to use it after being warned that it was unsafe, the gas company will not be liable and may recover on cross-petition for the loss of its tools: *Brick Co. v. Gas Co.*, 11 O. C. C. 319, 5 O. C. D. 379.

In an action for damages from a natural gas company on account of the wrecking of a drug store by an explosion of gas, which had percolated through the ground after escaping from a leaking pipe, proof that the company had failed to use ordinary care in the laying of its pipes or in keeping them free from leakage, in consequence whereof an explosion occurred and damage resulted, is sufficient to establish negligence on the part of the company: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733].

A gas company knowing its gas was escaping from its pipes is bound to use all due care and caution to stop the escape thereof, and failure so to do, or carelessness and neglect in making connections or repairing leaks resulting in an explosion, renders the company liable: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733].

The fact that a neighbor upon being told that gas was escaping, went into his cellar and lighted a match with the intention of searching for the leak and thereby caused the explosion, resulting in the wrecking of a drug store, does not constitute the proximate cause thereof, nor is it material how the gas was ignited, if otherwise than by the plaintiffs or their agent: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733].

Proof of the mere fact of an explosion and that the accident happened to plaintiff, without more evidence, will not amount to *prima facie* proof of negligence on the part of a defendant gas company: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733].

The measure of damages on account of the wrecking of a drug store by an explosion of gas, due to the negligence of the gas company, is the loss in value of the goods, fixtures, and appliances by reason of the explosion, to which may be added loss of good

will, and expenses incurred in caring for the goods after the explosion: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forry*, 80 O. S. 733].

XV. INJUNCTION.

A municipal corporation can not restrain a gas company from laying pipes in its streets for the conveyance of gas to the patrons of the company on the ground that the city owns a gas plant which will be injured by the competition of the gas company: *Hamilton v. Gas Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Co.*, 46 Bull. 213].

Where a gas company has a right to lay pipes in the streets of a city a court of equity will not enjoin it from so doing, because it has not obtained a permit from the proper city officials as required by an ordinance or police regulation of the city: *Hamilton v. Gas Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513 [affirmed, without opinion, *Hamilton v. Gas Co.*, 46 Bull. 213].

The duty of a gas company to furnish gas to a city at rates fixed by ordinance, adopted under G. C., § 3982, may be compelled by mandatory injunction so long as it exercises its franchises as a gas company: *Light Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356 [affirming *Zanesville v. Light Co.*, 1 O. C. C. 123, 1 O. C. D. 73]. See also INJUNCTION.

An incorporated company may voluntarily forfeit its rights to exercise its privileges within the municipality and wholly withdraw therefrom, and can not be prevented from doing so by injunction: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055 [reversing *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218].

XVI. ACTIONS BY CITY SOLICITOR OR TAXPAYER.

A city solicitor is clearly authorized under G. C., §§ 4311, *et seq.*, to bring suit in the name of the municipality to enjoin a public utility company from violating its obligations to the city and its inhabitants: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

An action by the city solicitor under G. C., §§ 4311, *et seq.*, will lie notwithstanding the corporation is acting under color of an ordinance, if the provision of the ordinance complained of is in excess of the power of council to grant: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

The city solicitor under G. C., § 4311, empowering him to restrain "the abuse of its corporate powers, or the execution or performance of any contract" in contravention of law or ordinance, has power to maintain an action in behalf of the municipality to declare a forfeiture of franchises granted to a gas and fuel company in the streets and territory under municipal control: *Columbus v. Gas & Fuel Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261.

The grant of a franchise to a gas company devolves upon it an obligation to furnish gas to the public generally at such prices as the council may, by a lawful exercise of its legislative authority, fix; and for a violation of this obligation an action may be maintained by the city solicitor, in the name of the city, under G. C., § 4311, without showing a contractual relation between the city and the gas company: *Chillicothe v. Natural Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [reversed, *Gas Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883].

A citizen and resident of a city may have a writ of mandamus issued, upon its own relation, to a public service corporation commanding it to furnish him gas in accordance with the terms and conditions of a city ordinance, when such corporation has accepted the benefits of such ordinance, and is bound by its provisions to furnish gas to the citizens and residents of such city: *State, ex rel., v. Gas Co.*, 14 O. N. P. (N.S.) 97.

XVII. PLEADING.

The question whether the percentage exacted by a municipality from a natural gas company is unreasonable and void on that account, can not be considered on demurrer to the petition in an action by the municipality for an accounting: *Columbus v. Fuel Co.*, 10 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 179 [for subsequent opinion, see *Columbus v. Gas Co.*, 13 O. N. P. (N.S.) 394, 22 O. D. (N.P.) 250].

Mere discrimination by a public service corporation without substantial injury is not necessarily unlawful, and it follows that allegations will not lie as to discrimination in rates charged for electric current, where made without regard to circumstances and conditions or any averment that consumers are unfavorably affected thereby: *State, ex rel., v. Gas Co.*, 13 O. C. C. (N.S.) 12.

GAS PIPES.

See GAS COMPANIES; STREETS; LICENSES, [IN REALTY].

GAS WELLS.

See OIL AND GAS.

GAS WORKS.

For municipal gas works, see MUNICIPAL CORPORATIONS.

GENERAL AGENT.

See AGENCY.

GENERAL AND LOCAL LAWS.

See CONSTITUTIONAL LAW.

GENERAL AND SPECIFIC LEGACIES.

See WILLS, LEGACIES AND DEVISES.

GENERAL AND SPECIFIC WORDS.

See CONTRACTS; DEEDS; STATUTES; WILLS, LEGACIES AND DEVISES.

GENERAL APPEARANCE.

See APPEARANCE.

GENERAL ASSEMBLY.

For general assembly, see LEGISLATURE.

GENERAL ASSIGNMENT.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

GENERAL AVERAGE.

For general average, see CARRIERS; INSURANCE.

GENERAL BENEFITS.

For deductions from property taken by eminent domain for general benefits, see CONSTITUTIONAL LAW; EMINENT DOMAIN.

GENERAL BEQUESTS.

See WILLS, LEGACIES AND DEVISES.

GENERAL CHALLENGE.

See JURY.

GENERAL CHARACTER.

See EVIDENCE.

GENERAL CHARGE.

See CHARGE OF COURT.

GENERAL CODE.

See STATUTES.

GENERAL CREDITORS.

For general creditors, see DEBTOR AND CREDITOR.

GENERAL CUSTOMS.

See CUSTOM AND USAGES.

GENERAL DAMAGES.

See DAMAGES.

GENERAL DEMURRER.

See PLEADINGS.

GENERAL DENIAL.

See PLEADINGS.

GENERAL DEPOSITS.

See BANKS AND BANKING.

GENERAL DESCRIPTION.

See CONTRACTS; DEEDS; STATUTES; WILLS, LEGACIES AND DEVISES.

GENERAL DEVISES.

See WILLS, LEGACIES AND DEVISES.

GENERAL ELECTION.

See ELECTIONS, POLITICAL.

GENERAL EXECUTOR OR ADMINISTRATOR.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

GENERAL GUARANTY.

See GUARANTY.

GENERAL GUARDIAN.

See GUARDIAN AND WARD.

GENERAL ISSUE.

See PLEADINGS; TRIAL.

GENERAL JURISDICTION.

See JURISDICTION.

GENERAL LAWS.

For general laws, see CONSTITUTIONAL LAW.

GENERAL LEGACIES.

See WILLS, LEGACIES AND DEVISES.

GENERAL PARTNERS.

See PARTNERSHIP.

GENERAL PRAYER.

See PLEADINGS.

GENERAL REPUTATION.

See EVIDENCE.

**GENERAL RESTRAINT
OF TRADE.**

See CONTRACTS; MONOPOLIES AND UNLAWFUL COMBINATIONS.

GENERAL STATUTES.

See STATUTES.

GENERAL TRAVERSE.

See PLEADINGS.

GENERAL USAGE.

See CUSTOM AND USAGES.

GENERAL VERDICT.

See VERDICT.

GENERAL WARRANTY.

See DEEDS.

GENERAL WORDS.

See CONTRACTS; DEEDS; STATUTES; WILLS, LEGACIES AND DEVISES.

**GENUINENESS OF
WRITING.**

See FORGERY; EVIDENCE.

GEOGRAPHICAL FACTS.

See EVIDENCE.

GERMAN ADVERTISING.

See ADVERTISEMENT AND ADVERTISING.

GERMAN NEWSPAPER.

For German newspaper, see ADVERTISEMENT AND ADVERTISING; NEWSPAPER.

GIFT ENTERPRISE.

See GAMBLING.

GIFTS.

Scope Note.—Includes definitions and nature of gifts; voluntary transfers of property without consideration, to take effect at once or upon the death of the giver; parties who may make gifts; evidence and review. Excludes advances, conveyances to defraud creditors; deeds of gift; the rights of subsequent purchasers; gifts by will or testament.

Cross References.

For gifts, see also ADVANCEMENTS; WILLS, LEGACIES AND DEVISES.

For deed of gift, see DESCENT AND DISTRIBUTION.

For gifts by deed, see DEED; DESCENT AND DISTRIBUTION.

For gifts in fraud of creditors, see FRAUDULENT CONVEYANCES.

For gifts by insolvent debtors, see FRAUDULENT CONVEYANCES.

For gifts to pious uses, see PIOUS USES.

For the validity of gifts if in fraud of creditors, see FRAUDULENT CONVEYANCES.

ANALYTICAL OUTLINE.

- I. Definitions and Nature, 8293.
- II. Gifts Inter Vivos, 8295.
 - A. Presumptions, 8295.
 - B. Delivery, 8297.
 - 1. Necessity, 8297.
 - 2. What constitutes, 8297.
 - C. Acceptance, 8298.
 - D. Effect, 8298.
- III. Gifts Causa Mortis, 8300.
 - A. Expectation of death, 8300.
 - B. Delivery, 8300.
 - 1. Necessity, 8300.
 - 2. What constitutes, 8301.
 - C. Presumptions, 8303.
 - D. Rights of creditors, 8303.
- IV. Who May Make Gift, 8304.
- V. Evidence, 8305.
- VI. Review, 8306.

I. DEFINITIONS AND NATURE.

A gift *inter vivos* is an immediate, voluntary and gratuitous transfer of personal property, by one to another. It is essential to its validity that the transfer be executed, for the reason that there being no consideration therefor, no action will be to enforce it: *Flanders v. Blandy*, 45 O. S. 108, IV Longsdorf's Notes, 259.

A gift *causa mortis* is a gift in prospect of death, and it may be revoked before death, and it is not complete during the donor's life but takes effect only upon his death: *Gano v. Fisk*, 43 O. S. 462, IV Longsdorf's Notes, 176.

Donatio mortis causa is a gift of some particular thing to take effect when the donor dies, or at his death: *Prior v. Reynolds*, 1 W. L. J. 366.

A testator's notes to his grandson, if as compensation for services, however trifling and disproportionate, are not mere gifts and are valid: *White v. White*, 8 W. L. J. 45.

Delivering money to a daughter to build a home, she to pay interest during the parent's life and to own the principal at his death, is not an advancement, for as interest was to be paid it is not a gift *inter vivos*, and the intention to give at death was not executed: *Medill v. Fitzgerald*, 15 O. C. C. 415, 8 O. C. D. 129. See also ADVANCEMENTS.

Furnishing liquor without compensation or any promise of paying or intention of receiving compensation is a gift, and not a sale: *State v. Maloney*, 4 O. N. P. 197, 6 O. D. (N.P.) 209. See also HOUSE OF ILL FAME.

It is essential to the validity of a gift that there is a distinct and absolute delivery of the property so as to show that the donor has relinquished all dominion over it: *Worthington v. Redkey*, 86 O. S. 128.

Promissory notes made by an employer to his housekeeper due in one day, but understood to be paid at his death, to pay her for a reduction of her wages, made upon his financial ability becoming reduced, are not gifts, but are supported by valuable consideration and may be ordered paid out of his estate: *In re Jennings's Estate*, 13 O. N. P. (N.S.) 186, 22 O. D. (N.P.) 348. See also NEGOTIABLE INSTRUMENTS.

A statement by a business man at the time of making a conveyance of property to his daughter, to the effect that the business in which he was engaged was subject to fluctuations and he desired to put the title to his property in such shape that it would afford a home for himself and his children in case anything unfavorable happened to him, in his business, is not inconsistent with the theory that the conveyance was to the daughter absolutely, and not to her in trust for himself: *Walston v. McCabe*, 11 O. N. P. (N.S.) 26.

A resolution to maintain a free public library and to provide a suitable site is not necessarily rendered invalid by incorporating therein an acceptance of a proposition tendered by a private person, that if the village will agree to maintain a free public library, and provide a suitable site, he will donate \$10,000 to erect such building: *Smith v. Evans*, 74 O. S. 17, IV Longsdorf's Notes, 1005 [reversing *Evans v. Smith*, 5 O. C. C.

(N.S.) 1, 16 O. C. D. 549]. See also PUBLIC LIBRARIES.

Courts of equity will not enforce imperfect gifts which are made in consideration of love and affection only: *Hout v. Hout*, 20 O. S. 119, II Longsdorf's Notes, 983. See also SPECIFIC PERFORMANCE.

II. GIFTS INTER VIVOS.

A. PRESUMPTIONS.

A father's purchase of land in his son's name is presumptively a gift or advancement, but this is rebuttable: *Fleming v. Donahoe*, 5 O. 255, I Longsdorf's Notes, 277; *Tremper v. Barton*, 18 O. 418, I Longsdorf's Notes, 853; *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216.

The father's intent thereby to defraud his creditors does not rebut the presumption, for no trust results to him but only to them: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216.

A wife's purchase in her husband's name made through a friend is presumptively a gift or advancement, but this is rebuttable: *Gilman v. Speaker*, 1 Dec. Rep. 56, 1 W. L. J. 395.

A purchase by a son in his mother's name is presumably on a resulting trust, and no presumption of advancement can be founded on such relationship to rebut this: *Mullen v. Mullen*, 5 Dec. Rep. 111, 2 Am. L. Rec. 611 [modified and affirmed, without opinion, *Mullen v. Mullen*, 3 Bull. 310].

Declarations made by a father subsequent to the purchase and conveyance of land by his direction to a son are not sufficient to rebut the presumption of a gift or advancement: *Tremper v. Barton*, 18 O. 418, I Longsdorf's Notes, 853.

Taking stock in a company in the name of children is *prima facie* a gift but rebuttable: *Creed v. Lancaster Bank*, 1 O. S. 1, I Longsdorf's Notes, 929.

That U. S. bonds, found in a testator's safe deposit box after his death, on which he had always received the interest, stand registered in his son's name and undorsed, is not presumptive evidence of a gift to or ownership in the son: *McCammon v. Dillaby*, 11 Dec. Rep. 824, 30 Bull. 89.

Where a child buys property in the parent's name, no gift, but a trust for the child is presumed. Hence where property was devised to the widow for life, remainder to the children, and all unite to sell it and invest the proceeds in other property in the widow's name absolutely, and she devises it to one child alone, the presumption is that the widow held in trust for all the children, as she held the original property, and the burden is on the devisee to rebut this, and the

children may have partition: *Roberts v. Remy*, 56 O. S. 249, IV Longsdorf's Notes, 689.

The "family relation" spoken of in the case of *Hinkle v. Sage*, 67 O. S. 256, IV Longsdorf's Notes, 930, does not rest wholly on the blood relationship existing between the parties, but rather on the relation that is borne to the family as a whole; and where the circumstances do not show some reason for the making of a gift or performing of a service to a relative without charge, such an intention will not be inferred simply from the relationship, and payment therefore may be enforced: *Thompson v. Jones*, 13 O. C. C. (N.S.) 493, 33 O. C. D. 182. See also SERVICES.

The presumption that where the debt of a wife is paid by her husband with his own money, a gift is intended, does not apply where the debt was to a firm of which the husband was a member, and was a balance due for the construction of a building on a lot owned by the wife, which was soon afterward sold and the proceeds retained by the husband until his death: *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628]. See also HUSBAND AND WIFE.

A husband conveyed land to his wife at her earnest solicitation through a trustee. She afterwards left him and the children, and confessed a judgment on which the land was sold, and he seeks to set aside the conveyance before the sheriff has made a deed or distributed the purchase-money. It was held that the presumption of an absolute gift was not conclusive, and if the circumstances rebut it, the claimant had the burden to show absence of undue influence, or an abuse of the relation of trust between husband and wife: *Rankin v. Rankin*, 10 Dec. Rep. 430, 21 Bull. 126.

A voluntary conveyance, by ordinary deed to a brother does not create a presumption that the grantee holds in trust for the grantor, but a gift or advancement is presumed: *Goodrich v. French*, 7 O. N. P. 225, 8 O. D. (N.P.) 351. See also TRUSTS.

Advancements from a father to his daughter are gifts *inter vivos*, and when actually made and delivered can not be recovered by the donor or his representatives; and a note given therefor to the donor by the husband of the donee is without consideration, can not be enforced, and will be treated merely as a receipt or memorandum of the amount received by the donee if the parties so intended it: *Martin v. Scudder*, 14 O. D. (N.P.) 283.

A gift of a tract of land to a son-in-law, and payment by the donor of part of the pur-

chase price of another tract, the son-in-law and the daughter uniting in a receipt for the property by way of advancement, constitutes neither an implied nor a resulting trust, but is an advancement to the son-in-law of the daughter's interest with her acquiescence: *Fisher v. Fisher*, 11 O. C. C. (N.S.) 375, 20 O. C. D. 606 [affirmed, without opinion, *Fisher v. Fisher*, 80 O. S. 748].

If money furnished by a mother to her son was intended by her and accepted by him as an irrevocable gift, to be treated as a part of mother's estate which would come to him on distribution at her death, it is an advancement: *Hicks v. Hicks*, 9 O. C. C. (N.S.) 413, 19 O. C. D. 628 [affirmed, without opinion, *Hicks v. Hicks*, 76 O. S. 575]. See also ADVANCEMENTS.

B. DELIVERY.

1. Necessity.

To constitute a valid gift the donor must intend to part with his property, and he must carry this intention into effect by relinquishing dominion over his property and delivering it to the donee either actually or constructively: *McKelvey v. McKelvey*, 14 O. C. C. (N.S.) 331, 23 O. C. D. 117.

Where one intending to make a gift to another purchased United States money orders in the name of the prospective donee, but died before delivering them and with the orders in her possession, the gift was incomplete and the administrator is entitled to the money: *McKelvey v. McKelvey*, 14 O. C. C. (N.S.) 331, 23 O. C. D. 117.

Purchasing United States money orders in the name of the intended donee thereof, the donor dying in possession of them before delivery is not a completed gift nor a trust. she could have had the money orders canceled (U. S. R. S., §§ 4035-4039): *McKelvey v. McKelvey*, 14 O. C. C. (N.S.) 331, 33 O. C. D. 117.

It is essential to the validity of a gift that there is a distinct and absolute delivery of the property so as to show that the donor has relinquished all dominion over it: *Worthington v. Redkey*, 86 O. S. 128.

2. What Constitutes.

A set aside United States bonds as a gift for his daughter but never delivered them, and at her request he kept control of them. He collected and sent her the interest up to a certain date, but then without her knowledge invested them in a business. He wrote her a letter stamped as a contract, that if she did not accept the investment in lieu of the bonds he would retain it and pay her \$2,000, with interest. She accepted the

promise, and on his death sued the administrator for the \$2,000. It was held, delivery of the interest was not delivery of the bonds. There was no valid consideration to support the promise. The transaction did not amount to a gift, and there was no valid declaration of trust. An imperfect gift will not be effectuated as a trust: *Flowers v. Blandy*, 45 O. S. 108, IV Longsdorf's Notes, 259.

The owner of two railroad bonds endorsed on each in pencil a statement that he gave them to his daughter M, with the date. M was then three years old, too young to receive or have custody of them, and the bonds were in the custody of M's mother, the donor's wife, until his death five years later. It was held to be a sufficient delivery to establish a completed gift: *Rote v. Warner*, 17 O. C. C. 350, 9 O. C. D. 540 [affirmed, without opinion, *Rote v. Warner*, 57 O. S. 633].

Where husband and wife in possession of a homestead belonging to the wife, make a deed of gift of it, to be delivered after the death of both, a delivery by the wife without the husband's consent will not affect his homestead rights: *Meeks v. Stillwell*, 54 O. S. 541, IV Longsdorf's Notes, 648.

A conveyed a life estate to his wife and delivered a deed drawn to his daughter for the remainder to the notary, to be delivered to the daughter thirty days after A's death, and gave the notary's receipt for the deed to the daughter, who accepted it. A afterwards obtained the deed from the notary and destroyed it. It was held that an irrevocable title vested in the grantee on delivery to the notary, though the deed was a gift: *Chambers v. Stewart*, 2 O. N. P. 287, 3 O. D. (N.P.) 522. See also DEEDS.

C. ACCEPTANCE.

Acceptance is presumed, whether in trust or not, unless the contrary is proved, because it is supposed, in the absence of proof, to be beneficial to the donee: *Harvey v. Gardner*, 41 O. S. 642, IV Longsdorf's Notes, 81.

It is not necessary that a son under age, being the grantee, should accept or even know of the grant: *Lore v. Truman*, 1 Dec. Rep. 510, 10 W. L. J. 250. See also DEEDS.

D. EFFECT.

If the testator fearing that certain gifts may be invalid as being for charitable purposes and within a year of his death gives a check to "A, trustee in trust for" the

testator, and such check is deposited by A as such trustee, A holds as trustee for the testator and not for the beneficiaries to whom testator has instructed trustee to pay over such money upon the death of the testator; and accordingly a subsequent inconsistent gift of such property by will prevents the original beneficiaries from taking any interest therein: *Worthington v. Redkey*, 86 O. S. 128.

A conveyance by a man, who has entered into a contract of marriage which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 O. S. 125, IV Longsdorf's Notes, 850. See also HUSBAND AND WIFE.

If the officer's signature is omitted, though he filled up the certificate and wrote his name in it, the deed is void. If the deed is only on a meritorious and not valuable consideration, as by father to son for love and affection, and the father dies without providing for another son, equity will not enforce the imperfect gift: *Hout v. Hout*, 20 O. S. 119, II Longsdorf's Notes, 983. See also ACKNOWLEDGMENT.

Where a publication is given by its founder in trust to a society, and in reliance on the trust thus created large sums were contributed by members of the society which were used in extending the circulation and value of the publication, equity will not require the trustees of the society to account to the estate of the donor of the publication for profits derived therefrom: *Story v. Knapp*, 12 O. C. C. (N.S.) 241, 20 O. C. D. 684 [affirming *Story v. Knapp*, 17 O. D. (N.P.) 461, 5 O. L. R. 55]. See also TRUSTS.

A donee of mortgaged land does not by accepting assume the mortgage, nor though the warranty clause excepts the mortgage. Accordingly, the donee on becoming executor of the donor may properly pay the mortgage out of the assets: *In re Estate of Gould*, 3 O. N. P. 314, 3 O. D. (N.P.) 701. See also VENDOR AND PURCHASER.

Where a person gains an important advantage over another by receiving a voluntary conveyance, or where the transaction indicates palpable improvidence on the part of the grantor, the person securing the benefit will be required to prove it was consistent with fair dealing, and in the absence of such evidence it will be set aside: *Goodhue v. Goodhue*, 3 O. N. P. (N.S.) 225, 15 O. D. (N.P.) 635. See also RESCISSION.

III. GIFTS CAUSA MORTIS.

A. EXPECTATION OF DEATH.

To establish a gift *causa mortis* the court must find that the donor was a competent person, that the gift was made in expectation of death, that death resulted from the physical ailment which the party had at the time of making the gift; that the gift was delivered and accepted by the donee; that the donee had rightful possession of the property at the death of the donor; that no revocation of the gift had been made, and that there was sufficient other property to pay all debts and the costs of administration: *Sutton v. Galbraith*, 7 O. N. P. (N.S.) 293, 18 O. D. (N.P.) 864 [reversing *In re Galbraith*, 4 O. L. R. 186, 51 Bull. 326; affirmed, *Galbraith v. Sutton*, 11 O. C. C. (N.S.) 262, 20 O. C. D. 653; affirmed, without opinion, *Galbraith v. Sutton*, 82 O. S. 421].

Bonds delivered by an invalid to her sister in expectation of death, but on condition that the interest be paid to her and the bonds be returned to her in the event that she needed them, constitutes a gift *causa mortis*, where the donor did not cancel the gift and died from the malady from which she was then suffering, although her death did not occur until six months thereafter: *Sutton v. Galbraith*, 7 O. N. P. (N.S.) 293, 18 O. D. (N.P.) 864 [reversing *In re Galbraith*, 4 O. L. R. 186, 51 Bull. 326; affirmed, *Galbraith v. Sutton*, 11 O. C. C. (N.S.) 262, 20 O. C. D. 653; affirmed, without opinion, *Galbraith v. Sutton*, 82 O. S. 421].

Bonds given by an invalid to her sister in expectation of death but with the condition that they be returned to her in case she should need them, are a valid gift *causa mortis*: *Galbraith v. Sutton*, 11 O. C. C. (N.S.) 262, 20 O. C. D. 653 [affirming *Sutton v. Galbraith*, 7 O. N. P. (N.S.) 293, 18 O. D. (N.P.) 864; affirmed, without opinion, *Galbraith v. Sutton*, 82 O. S. 421].

Though a gift was made during the last sickness yet if absolute and not revocable on recovery or conditioned on dying it is not a gift *causa mortis* or testamentary and excludes the wife: *Brodt v. Rannells*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

B. DELIVERY.

1. Necessity.

Delivery is necessary to a gift either *inter vivos* or *causa mortis*. Leaving securities at death in an envelope marked "to be given to P in payment of wages," is not a delivery: *Phipps v. Hope*, 16 O. S. 586, II Longsdorf's Notes, 804.

A gift of a check for the drawer's entire deposit is revoked by his death before it is paid or accepted, and the bank may therefore pay his administrator: *Simmons v. Sav. Society*, 31 O. S. 457, III Longsdorf's Notes, 597 [affirming *Simmons v. Sav. Society*, 7 Dec. Rep. 388, 2 Bull. 283]; *Simmons v. Sav. Society*, 5 Dec. Rep. 527, 6 Am. L. Rec. 441.

After a devise of \$6,000 to the wife a codicil revoked this, assigning as a reason that he had deposited \$3,000 for her, and adding "this not to interfere with the gifts to my said wife." Among the testator's private papers was found a note and mortgage for \$3,760, each endorsed by him thus, "this is transferred to my wife in case of my death." It was held that the codicil did not pass the note and mortgage and oral declarations of the testator that he had given them to her in place of the reduction in the legacy were not admissible: *Hadlow v. Beavis*, 42 Bull. 256 [supreme court].

2. What Constitutes.

A gift of the maker's own note is delivering a promise only, and if not fulfilled before his death, is not collectible as a gift, nor as a contract for it has no consideration: *Starr v. Starr*, 9 O. S. 74, II Longsdorf's Notes, 376.

A note by decedent, thus, "For value received, I promise to pay Mrs. H \$600, as a recompense for her kindness, and my executors are directed to pay it to her," delivered to a person to be given her after death, which was done, is not good as a gift *causa mortis* or *inter vivos*, or as a will. And the kindness mentioned, being gratuitous, is not consideration to support it as a contract: *Hamor v. Moore*, 8 O. S. 239, II Longsdorf's Notes, 337.

A gift of the donor's own note to take effect at his death is not enforceable against his estate: *Prior v. Reynolds*, 1 Dec. Rep. 366, 8 W. L. J. 325.

The execution and delivery of a paper writing promising payment of a specified sum of money at death must fail as a gift, inasmuch as it is a delivery of a promise only, and not of the thing promised; nor is it good as a testamentary disposition, because not executed as a will or codicil thereto: *In re Schierberg*, 4 O. L. R. 53, 51 Bull. 232.

Delivery changing present ownership as distinguished from an intention in the future is necessary in both kinds of gifts. It is not sufficient that a sick wife should say to her husband that she did not expect to live long, and wanted him to collect a note as she wanted him to have the money. Such

language looks to the future: *Carter v. Buckingham*, 12 Dec. Rep. 202, 1 H. 395 [affirmed, *Buckingham v. Carter*, 12 Dec. Rep. 26, 3 Dec. Rep. 323, 2 D. 41, Gaz. 35].

Where the owner of land conveys the same to his son, and to secure payment of the purchase-money, takes a mortgage upon the land so sold, payable in annual installments to himself during life, after his death to his wife during her life, and, at her death, the residue still unpaid, to his daughter, and the same is duly recorded by him, a valid gift of the residue thereof is executed to the daughter, the record taking the place of manual delivery and acceptance by the daughter being presumed under the circumstances. Hence, the daughter dying before her father, and the wife shortly after his decease, the residue unpaid belongs to the estate of the daughter: *Prindle v. Wood*, 3 O. C. C. (N.S.) 641, 14 O. C. D. 74.

G having before his last sickness expressed a desire that his children should have notes belonging to him, and his son a farm, on the day of his death said to his daughter, in presence of her husband and a sister, "My notes are in the box; take them and divide them equally among you children." He told her to get the key, which she did, and tried it in the box, and gave it to her husband for safe keeping. After G's death she took the box, but returned the notes to the administrator. It was held that no such delivery was shown as made a gift *causa mortis*. The notes were assets, and the widow was entitled to her share: *Gano v. Fisk*, 43 O. S. 462, IV Longsdorf's Notes, 176.

A delivery by way of gift, of an instrument evidencing a debt, without written indorsement by the donor as effectually transfers the beneficial interest in the property to the donee, as would such delivery by way of assignment for value: *Polley v. Hicks*, 58 O. S. 218, IV Longsdorf's Notes, 737.

Delivery of a savings bank deposit book with proper words of gift during the donor's last illness, where the deposit can be drawn on presentation of the book without check or order from the depositor, is sufficient to constitute a valid gift *causa mortis* and of course *inter vivos*: *Polley v. Hicks*, 58 O. S. 218, IV Longsdorf's Notes, 737.

A invested money in stock of a building and loan company, took the certificates in the name of her granddaughter B, thirteen years old, with a parenthetic clause after the name ("A or other legal guardian may draw") and A retained possession of them. It was held that this was an inchoate gift in trust for the granddaughter, to be followed, as later events disclosed, by a testamentary designation of the purpose and limi-

tation of the trust: *Mook v. Loan Co.*, 87 O. S. 273.

Soon after A had invested money in stock of a building and loan company, taking the certificates in the name of her granddaughter B, thirteen years old, with a parenthetic clause after the name ("A or other legal guardian may draw") and A retaining possession of them, A died leaving a will wherein she named her lawyer C as executor (without bond) and trustee of the property she should die possessed of, for the use and benefit of the granddaughter B. She gave to her executor all moneys held by her in trust for B declaring in the will her intention to make her executor her successor in said trust, to hold for B, and pay to her or for her benefit the income, till she be thirty years old. The executor qualified as such, having in his possession the certificates which the testatrix placed in his hands, and he sent the company a copy of the will with notice that he held the certificates under the will, and requested that dividends be paid to him as trustee. Thereafter he borrowed money from the company for his personal use pledging the certificates as collateral security, and canceled and turned in some for cash, signing the transfers and the written pledges as trustee. He squandered the money and died insolvent. It was held that the company was a party to this breach of trust and conversion, and it must surrender to the plaintiff as successor in the trust, the pledged securities, and pay to him the value of those canceled with accumulated dividends and interest: *Mook v. Savings & Loan Co.*, 87 O. S. 273.

C. PRESUMPTIONS.

Gifts *causa mortis* are not favored by the policy of the law, for they are in the nature of legacies, and the statutes of wills and descents provide for transmission of property: *Gano v. Fisk*, 43 O. S. 462, IV Longsdorf's Notes, 176.

D. RIGHTS OF CREDITORS.

The remedy on a note given *causa mortis* by a wife to her husband is at law as her administrator so that prior claims of creditors may be saved and not in chancery: *Meyer v. Shaney*, 1 Dec. Rep. 183, 2 W. L. J. 183.

Equity never opposes gifts merely because they are immoderate. But in such case there must be an intention to be liberal, and liberality imports the absence of influence: *Goodhue v. Goodhue*, 3 O. N. P. (N.S.) 225, 15 O. D. (N.P.) 635.

IV. WHO MAY MAKE GIFT.

A conveyance by a parent, who had formerly been under guardianship for imbecility, to a son in consideration of support for the rest of his life, and also as an advancement to equalize him with the other children, is in effect a final disposition of the property, and does not require the capacity necessary to uphold a transaction with a stranger, but will be sustained if the father had testamentary capacity, that is, ability to comprehend the extent and value of his estate, and the names and rights of his children: *Pepple v. Pepple*, 13 O. C. C. 43, 7 O. C. D. 102. See also *INSANE, IMBECILES AND IDIOTS*.

A wife has absolute power of disposition over separate property, except as restricted in the instrument creating it, and not merely no power except as conferred: *Hardy v. Van Harlingen*, 7 O. S. 208, II Longsdorf's Notes, 291.

W and M, about to intermarry, agreed that a legacy coming to M should be her separate property, to draw as she saw fit from time to time, and invest as she pleased, and at her death to go to her heirs on her father's side unless she bequeathed it otherwise. She drew most of the money, put it into W's hands, and he invested it in lands in his own name with her approbation. It was held she was a *feme sole* as to this legacy, that her interest was not a life estate, but unqualified, and she could dispose of it in other ways than by will; that the husband had no right in it, but could become a donee of the power of disposition; that undue influence is not presumed, but must be proved; and that the undrawn part of the legacy not being disposed of goes to the heirs mentioned in the agreement: *Hardy v. Van Harlingen*, 7 O. S. 208, II Longsdorf's Notes, 291.

A husband may by gift *inter vivos* of all his property deprive his wife of any share therein at his death although done for the purpose of excluding her from inheriting anything from him for his dominion over his personalty is absolute and she is not a quasi creditor: *Brodt v. Rannels*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

Delivery of a specified part of the separate property to the husband on request to permit him to pay a debt with it, and his transfer of it to his creditor for the purpose, with her knowledge and without objection, is an express assent that he may dispose of it for his own use: *Frano v. Nirdlinger*, 41 O. S. 298, IV Longsdorf's Notes, 62. See also *HUSBAND AND WIFE*.

A wife may by gift *causa mortis* dispose of her entire personal property, to the exclusion of her surviving husband who had

abandoned her: *South v. Fair*, 60 O. S. 595, 41 Bull. 343 [without opinion in supreme court].

A society to assist Italians, promote their union and instruction, but not to be interested in politics or religion, has no right against objection of a minority to donate nearly half its funds to aid the building of an Italian church to which most of the members belonged: *Podesta v. Societa di Unione*, 10 O. C. C. 19, 6 O. C. D. 210. See also CORPORATIONS.

V. EVIDENCE.

A gift can not be established by the testimony of the donee alone. A gift must be made out by corroborative testimony: *Sutton v. Galbraith*, 7 O. N. P. (N.S.) 293, 18 O. D. (N.P.) 864 [reversing *In re Galbraith*, 4 O. L. R. 186, 51 Bull. 326; affirmed, *Galbraith v. Sutton*, 11 O. C. C. (N.S.) 262, 20 O. C. D. 653; affirmed, without opinion, *Galbraith v. Sutton*, 82 O. S. 421].

Donees, to show gift by way of trust, must prove an express and certain trust, and if imposed on a third person, the property or title must be shown to have passed from the donor in his lifetime to the donees or the trustee: *Worthington v. Redkey*, 86 O. S. 128 [reversing *Redkey v. Worthington*, 13 O. C. C. (N.S.) 177, 32 O. C. D. 63].

Gifts *inter vivos*, like those *causa mortis*, are watched with caution by the courts, and evidence to support them must be clear and convincing: *Flanders v. Blandy*, 45 O. S. 108, IV Longsdorf's Notes, 259.

Proof of a gift *causa mortis* must be clear and positive: *Meyer v. Shaney*, 2 W. L. J. 183.

While the evidence of a gift *inter vivos* must, under the Ohio law, be clear and convincing, there is no rule requiring it to be direct and positive: *Miller v. McLean*, 11 O. C. C. (N.S.) 489, 21 O. C. D. 80 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

Where a father having an equitable right to land causes the deed to be made to his son, the father's executors, claiming the land, may, in order to rebut the presumption of an advancement or gift, put the deed in evidence wherein the son is called trustee, and may show the father's prior declarations and instructions that it was to be made to the son in trust for the father: *Paddock v. Adams*, 56 O. S. 242, IV Longsdorf's Notes, 689.

In determining whether a gift has been perfected by a donor who has since died, an attorney of such donor can not testify to the communications made to him by such donor as client, nor can he testify as to his

advice to such client: *McKelvey v. McKelvey*, 14 O. C. C. (N.S.) 331.

Where property is claimed as a gift by way of a trust which is not testamentary, it devolves upon the donees to prove an express and certain trust for their benefit, either assumed by the donor himself or imposed upon a third person, and in the latter case that the property or the legal title thereto passed beyond the dominion or control of the donor in his lifetime, to the donees or to the person designated as a trustee for them: *Worthington v. Redkey*, 86 O. S. 128.

Conversations between an attorney and his now deceased client, relative to her purchase of money orders in the name of another with the intention of giving them to such other were said to be incompetent as against the donor's administrator: *McKelvey v. McKelvey*, 14 O. C. C. (N.S.) 331, 23 O. C. D. 117. See also WITNESSES.

Where a wife has full knowledge that her husband is using her property as his own, investing part of it in real estate, taking title in his own name, selling part and re-investing the proceeds without in any way recognizing her as a creditor or beneficiary, her assent thereto during more than thirty years of harmonious and affectionate married life is clearly corroborative of declarations that a gift was intended: *Miller v. McLean*, 11 O. C. C. (N.S.) 489, 21 O. C. D. 80 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

The maker of a note sued by the payee's administrator, but claiming a gift of the note from the payee, may prove declarations of the payee of an intention to make such gift: *Larimore v. Wells*, 29 O. S. 13, III Longsdorf's Notes, 433. See also EVIDENCE.

The burden is on the donee, to show the solvency of the donor at the time of making the gift, if he was then in debt: *MacLaren v. Stone*, 18 O. C. C. 854, 9 O. C. D. 794. See also FRAUDULENT CONVEYANCES.

VI. REVIEW

A donee *causa mortis* sued an administrator to establish title in the notes or their proceeds, claimed as a gift. The case was appealed without objection: *Gano v. Fisk*, 43 O. S. 462, IV Longsdorf's Notes, 176. See also APPEALS.

GIRLS' INDUSTRIAL HOME.

See also BOYS' INDUSTRIAL SCHOOL; HOUSE OF REFUGE.

The Girls' Industrial Home is not a penal institution, but a school, in which the state

should use its best endeavors for the reformation of incorrigible girls. The fact that girls are subjected to restrictions does not make the institution a prison: *State v. Stiles*, 12 O. D. (N.P.) 338.

The proceeding provided for in G. C., §§ 2107 to 2110, is summary in character, but it is not a criminal prosecution. The affidavit made charge in the words of the statute that the accused is leading a vicious and criminal life, without stating the particular fact relied upon, as constituting the offense: *State, ex rel., v. Stiles*, 12 O. D. (N.P.) 338.

A probate judge is not entitled to fees to be paid by the county, where a boy or girl is prosecuted and convicted of an offense against the state, and committed to the Industrial School or the Industrial Home; but where committed under the compulsory education law, or where no prosecution and conviction is required, the compensation of the probate judge is the same as that fixed for clerks of courts of common pleas in like cases: *Millard v. Commissioners*, 5 O. C. C. (N.S.) 145, 16 O. C. D. 445.

A proceeding before a probate judge under G. C., § 2107, providing for the commitment to the Girls' Industrial Home, of girls over nine and under fifteen years of age charged with having committed crimes or with living vicious and criminal lives, is summary in its character, but it is not a criminal prosecution: *State v. Stiles*, 12 O. D. (N.P.) 338.

Under G. C., § 2107, declaring the proceedings necessary for the commitment of a girl to the Girls' Industrial Home and requiring notice in writing thereof, to be given to the father where he resides in the county, the notice is a jurisdictional fact as to the father, the failure to give which, notwithstanding the proceedings are conclusive upon the minor unless reversed on error, will render the order of commitment invalid as to him, and *habeas corpus* will lie upon his application: *State v. Stiles*, 12 O. D. (N.P.) 338 [distinguishing *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905].

The father under such circumstances, may be required, before the order is made, to prove that he is a suitable person to have the custody of his daughter: *State v. Stiles*, 12 O. D. (N.P.) 338.

A statute authorizing the court to commit a minor to the house of refuge or reform farm, if the grand jury recommended it instead of indicting him on evidence seeming sufficient to put him on trial, is not contrary to United States Constitution, 5th amendment, for that does not limit the power of a state, or to Art. I, §§ 5 or 10, constitution of Ohio, guaranteeing a jury trial, for this

18-c

is not a crime or common law proceeding nor a punishment, but a guardianship: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938. See also *HOUSE OF REFUGE*.

Under G. C., § 2111, a girl under the age of eighteen sentenced to the penitentiary before the passage of this statute may be transferred to the Girls' Industrial Home: *State, ex rel., v. Peters*, 43 O. S. 629, IV Longsdorf's Notes, 187.

A probate court has no jurisdiction to hear a cause and order a girl committed to the Girls' Industrial Home without first notifying the board of county visitors of the hearing and the attendance of the board, either as a board or by committee; and the trustees of the Girls' Industrial Home have not lawful custody of a girl unless the order of commitment shows that the board of county visitors was notified and attended the hearing: *Girls' Industrial Home v. Steffen*, 7 O. N. P. 409, 9 O. D. (N.P.) 696.

GLOVE-FIGHTING.

See *PRIZE-FIGHT*.

GLUCOSE.

For glucose, see *FOODS AND DRUGS*.

For the use of glucose, constituting adulterations if added to molasses, see *FOODS AND DRUGS*.

GOD.

For the act of God, see *ACT OF GOD*.

When a party has two modes of performing a contract and one becomes impossible by the act of God, he is bound to perform it in the other mode: *Board of Education v. Townsend*, 63 O. S. 514, IV Longsdorf's Notes, 861.

Where one has negligently failed to perform a duty which he had contracted to do, he will not be allowed to take refuge in an inquiry whether his own negligence or a *vis major* was the proximate cause of the resulting injury; but where the injury was proximately caused by the act of God, the law does not concern itself with duties the observance or breach of which had nothing to do with the damage: *Sharp v. Cincinnati*, 4 O. C. C. (N.S.) 19, 16 O. C. D. 59.

There is an implied condition in executory agreements to the effect that their performance shall not be rendered impossible by the intervention of unforeseen, accidental, and uncontrollable superior agencies and that their performance will be excused when it is prevented by such agencies: *Board of Ed-*

ucation v. Townsend, 63 O. S. 514, IV Longsdorf's Notes, 861. See also CONTRACTS.

When the consent of any person is required to the execution of the power, that, like every other condition, must be complied with. And if the person whose consent is necessary, die before the execution of the power, and without having assented, the power is gone, although his death was an act of God. So where the consent of several persons is required, the death of one of them destroys the power, for the consent of the survivors will not satisfy the words of the power: *Gwinne v. Gwinne*, 8 O. N. P. 307, 11 O. D. (N.P.) 429. See also POWERS.

GOLD COIN.

For contracts for payment in gold coin, see CONTRACTS.

GOOD BEHAVIOR.

See OFFICE.

GOOD CHARACTER.

For good character, see CHARACTER.

GOOD CONSCIENCE.

See EQUITY and cross references thereunder.

GOOD CONSIDERATION.

See CONTRACTS; DEEDS.

GOOD FAITH.

See also BONA FIDE BUYER.

Good faith does not mean that one meant no wrong, for in law it is not to be measured always by a man's own standard of right, but by that which the law has adopted and prescribed as a standard for the observance of all men in dealing with each other: *Bank v. Trebein*, 59 O. S. 316, IV Longsdorf's Notes, 765.

Courts require good faith on the part of all who seek redress from them; sham actions are not tolerated. To obtain relief a party must have suffered a wrong and be in court seeking redress therefor, and the presumption of good faith in the person bringing a suit under G. C., § 4311, and G. C., § 4314, to enjoin certain corporate acts obtains unless the same is put in issue: *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125 [reversed, *Raynolds v. Cleveland*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215].

Good faith must unequivocally appear in order that want of knowledge may constitute a defense to an action under G. C., § 6195, against the landlord of a house which was being used as a house of ill fame where intoxicating liquors are sold: *State v. Reese*, 10 O. N. P. (N.S.) 612, 23 O. D. (N.P.) 19.

In order to bring a sale of liquor in "dry" territory within the exception making a sale for pharmaceutical purposes lawful, it must appear that the transaction was in good faith on the part of the seller, and the mere keeping of a book containing the record, signed by the purchaser, that the liquor in question was to be used for pharmaceutical purposes, does not relieve the seller from compliance with the requirement of good faith: *Carmack v. State*, 13 O. C. C. (N.S.) 362, 22 O. C. D. 46. See also INTOXICATING LIQUOR.

Intemperate language in a resolution creating an investigating committee and the license and revolutionary procedure proposed thereby, together with the declaration that all laws are being violated by an organized band which no one dares to oppose, make it clear that hope is not based on additional legislation which obviously could not be rendered effective under such circumstances, but these considerations cause it to be evident that the resolution was not adopted in good faith for the purpose of providing remedial laws, and places it beyond the pale of the constitution: *State v. Gayman*, 11 O. C. C. (N.S.) 257, 21 O. C. D. 59 [affirmed, without opinion, *Gayman v. State*, 79 O. S. 444]. See also LEGISLATURE.

Good faith on the part of one purchasing securities from a guardian, the proceeds from which were misappropriated, is not material in an action against such party for recovery of the amount so lost, where it appears that the guardian was without authority to make the sale: *Bank v. Schirk*, 5 O. C. C. (N.S.) 569, 17 O. C. D. 125. See also GUARDIAN AND WARD.

A stockholder has the right to bring a suit in equity and ask for the appointment of a receiver where the directors and the officers of the corporation are acting in violation of their trust; and it is not a sufficient defense to the interposition of chancery powers of the court for such officers to say they acted in good faith, especially where there is a favoring of one stockholder or director or a misappropriation of the corporate funds: *Hamilton v. Coal Co.*, 12 O. C. D. 637. See also RECEIVERS.

Courts are bound to treat actions therein as having been filed in absolute good faith for the purposes and objects stated in the pleadings. Hence, testimony of plaintiff that a partition action was filed for the purpose of forcing settlement of questions with

other cotenants, and that it was understood that the case was to lie dormant for awhile, and later on to be withdrawn, but never to reach a hearing or final determination, will not be received to defeat the right of the court to apportion costs therein: *Edwards v. Whims*, 2 O. N. P. (N.S.) 464, 15 O. D. (N.P.) 57. See also PARTITION.

A material representation made in good faith by one not acquainted with the facts is in the nature of a warranty, and must be made good to one who has rightfully relied upon it to his injury without knowledge of its falsity: *Harter Co. v. Pearsons*, 5 O. C. C. (N.S.) 304, 16 O. C. D. 601. See also REPRESENTATION.

A libelous charge against a public officer can not be defended by the newspaper printing it on the ground that it was of public interest, and as such was privileged, but to make the defense of privilege available it must be shown that reasonable diligence was used to ascertain the truth of the charge and that it was published in good faith: *Todd v. Publishing Co.*, 9 O. C. C. (N.S.) 249, 19 O. C. D. 155. See also LIBEL AND SLANDER.

The doctrine of *de facto* corporations and officers is based upon principles of public policy, and a person availing himself of the doctrine must have dealt with such corporation or officers in good faith. The question of good faith is one of fact to be determined

by the evidence, and is not one of law: *Beck v. Board of Education*, 14 O. D. (N.P.) 312. See also DE FACTO.

The accused may show good faith and ignorance of facts, which made his acts criminal, to rebut guilty intention in an act in apparent violation of statute, when good faith is a material element: *Farrell v. State*, 32 O. S. 456, III Longsdorf's Notes, 643. See also KNOWLEDGE.

The presumption of good faith in demanding a prisoner may be overcome by proof, and when former extradited prisoners have been lynched, without effort to protect by the same demanding state, extradition will be refused unless some assurance is given that law will be observed: *In re Hampton*, 1 O. N. P. 180, 2 O. D. (N.P.) 579. See also EXTRADITION.

From the mere fact that the attachment was voluntarily discharged on the motion of the plaintiff, the court is not authorized to assume that it was obtained fraudulently or not in good faith: *Collins v. Bingham*, 22 O. C. C. 533, 12 O. C. D. 825. See also ATTACHMENT.

GOOD-FAITH PURCHASES.

See BONA FIDE BUYER.

GOOD-WILL.

Scope Note.—Includes definition and nature; property rights of an established business or trade; sales and other contracts relating thereto; and remedies for breach of contract. Excludes contracts in restraint of trade; unfair competition; rights of partners in respect to good will of partnership business.

Cross References.

For the validity of agreements not to compete in a sale involving good will, see also CONTRACTS.

For the rights of a retiring partner as to the use of the firm name, see TRADE-MARKS AND TRADE NAMES.

For infringements upon good will, see TRADE-MARKS AND TRADE NAMES.

For other questions, see TRADE-MARKS AND TRADE NAMES; TRADE SECRETS.

For unfair competition, see MONOPOLIES AND UNLAWFUL COMBINATIONS.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Nature.
- III. Sale.
- IV. Competition of Vendor of Good-will.
 - A. Covenant not to compete.
 - B. Covenant to compete.
- V. Remedies.
 - A. Damages.
 - B. Injunction.
- VI. Pleading.
- VII. Evidence.

I. DEFINITION.

Good will is an advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices: *Morgan v. Perhamus*, 36 O. S. 517, III Longsdorf's Notes, 873.

The good will of a business practically consists of that favorable reputation it has established creating a disposition or inclination of persons to extend their patronage to the business on that account, and, as the business is always associated with the name under which it is conducted, the name becomes a part, and often an important part, of its good will: *Manufacturing Co. v. Snyder*, 54 O. S. 86, IV Longsdorf's Notes, 625.

Good will of a partnership is a part of the property of the firm. It is every advantage that has been acquired by the old firm in carrying on its business whether connected with the premises in which the business was previously carried on or with the name of the last firm: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

II. NATURE.

The firm name is an important part of the good will of a business. It is in the nature of property and is so treated by courts of equity: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

The good will of a partnership is a part of the property of the firm: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

Good will of an establishment, like the flavor of wine, is inseparable from it. If the establishment had a good will when taking in an experienced partner for a specified number of years, on dissolution he takes his skill and experience, and the establishment takes the good will, it not having enhanced: *Jung v. Weyland*, 9 Dec. Rep. 483, 14 Bull. 143.

The good will resulting from building up a trade and establishing a reputation for courtesy and good commodities is an asset but must be appraised separately: *In re Good Will of Business*, 7 O. N. P. 556, 5 O. D. (N.P.) 572. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

In returning newspaper property for taxation it should be listed at its true value in money, and in ascertaining such value good will and earning capacity should be considered together with every other fact or circumstance bearing on the question of value; and this rule is applicable although the property may have attained large earning capacity by reason of the ability and skill of its individual managers, and its earnings might be greatly diminished were the management changed: *Chew v. Grieve*, 13 O. N. P. (N.S.) 358, 23 O. D. (N.P.) 119.

The measure of damages on account of the wrecking of a drug store by an explosion of gas, due to the negligence of the gas company, is the loss in value of the goods, fixtures, and appliances by reason of the explosion, to which may be added loss of good will, and expenses incurred in caring for the goods after the explosion: *Forry v. Gas Co.*, 6 O. L. R. 163, 53 Bull. 403 [affirmed, without opinion, *Gas Co. v. Forrey*, 80 O. S. 733]. See also GAS COMPANIES.

III. SALE.

A sale of all the fixtures, tools and business to a person, reciting an intent that the buyer shall succeed the seller in the business conveys the good will: *Moody v. Thomas*, 12 Dec. Rep. 630, 1 D. 294.

The seller of a business, including the good will, may set up the same business in the neighborhood, provided he does not directly interfere with his former business: *Moody v. Thomas*, 12 Dec. Rep. 630, 1 D. 294.

Where a partnership is dissolved, one of the partners transferring to the other all his interest in the firm's business and assets with the understanding that they are to succeed to the business of the old firm, such sale carries with it the seller's interest in the good will: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

Where a withdrawing partner sells to his copartner the real estate, fixtures and machinery used in the business together with the good will and the exclusive right to the firm name, as an entirety for an agreed sum in gross, reserving the right to do business in his own name or in any name other than the firm name, he sells the good will of the business and not of the premises merely, and the exclusive right to use the firm name as a trade mark: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

A partner who has sold the good will to continuing partners can open a like business and solicit old customers, provided he does

not represent himself as continuing or succeeding the old firm: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

If the buyer organizes or sells to a corporation formed to succeed to the business it may adopt a name formed on that of such firm: *Manufacturing Co. v. Snyder*, 54 O. S. 86, IV Longsdorf's Notes, 625.

A purchaser of the assets and good will of a dissolved firm, whether sold by the partners or by a receiver, may continue the business as its successor and use its firm name for that purpose: *Manufacturing Co. v. Snyder*, 54 O. S. 86, IV Longsdorf's Notes, 625.

Where one partner, upon the dissolution of the firm, conveyed to the other partner all of his interest in both the real estate where the business was carried on, and all other property of the partnership except the use of the firm name, which was to be abandoned, the good will of the firm is thereby sold to the continuing partner, and this includes the exclusive right to mail addressed to the old firm, and such is not the use of the firm name: *Pedretti v. Pedretti*, 6 O. N. P. (N.S.) 113, 18 O. D. (N.P.) 224.

The good will of a partnership is a part of the firm property, and with it goes every advantage that may have been gained by the firm in carrying on the business, and as such passes to a continuing partner unless expressly reserved: *Pedretti v. Pedretti*, 6 O. N. P. (N.S.) 113, 18 O. D. (N.P.) 224.

The good will does not survive as of right to the surviving partner, and the appraisement under G. C., § 8085, to enable him to take, should take the good will into account though it be not a distinct asset, and if it was not considered and is appropriated by the surviving partner he may be compelled to account for its value to the deceased partner's estate: *Rammelsberg v. Mitchell*, 29 O. S. 22, III Longsdorf's Notes, 436. See also PARTNERSHIP.

A surviving partner taking articles already manufactured at a valuation under G. C., § 8089, based on the firm's price lists, less a deduction for expense of selling, pays for the good will as to those: *Rammelsberg v. Mitchell*, 29 O. S. 22, III Longsdorf's Notes, 436.

IV. COMPETITION OF VENDOR OF GOOD-WILL.

A. COVENANT NOT TO COMPETE.

A married woman, engaged in carrying on the business of millinery and dressmaking with her separate property, sold her stock of goods, together with the good will of the

business, and engaged not to carry on the business at any time in the future within the town or at any place within such distance of said town as would interfere with such business, whether the same was carried on by the purchasers, or their successors; such agreement in equity is binding: *Morgan v. Perhamus*, 36 O. S. 517, III Longsdorf's Notes, 873.

Where the wife of a party, who has so sold his business and entered into such a contract, attempts to carry on the same business within the prescribed territory, and the husband is employed by her at a fixed salary, or in lieu of compensation, receives his support from her out of the profits of her business, such conduct of the husband and wife is a mere evasion and clear violation of the contract of sale, and the husband will be enjoined from assisting in carrying on said business of the wife, and the wife will be enjoined from employing the husband in her business within the prescribed territory, and from selling goods manufactured by him without said territory: *Empson v. Bissinger*, 8 Dec. Rep. 629, 9 Bull. 86.

Where a party agreed in the sale of his business not to go into business again within four squares of the old stand, may be enjoined from carrying on such business in his wife's name a few feet more than four squares distant: *Peterson v. Schmidt*, 13 O. C. C. 205, 7 O. C. D. 202.

B. COVENANT TO COMPETE.

The reservation by a withdrawing partner of the right to do business in his own name or in any name other than that of the old firm, will not warrant or excuse acts impairing the good will, such as holding himself out as the successor of the old firm, printing and circulating bill heads, cards, etc., calculated and intended to deceive customers of the old firm, offering special inducements to such customers to trade with him, etc.: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

Special efforts made by a withdrawing partner to induce customers of the old firm to believe he is its successor, or to deceive them by imitating its trade mark, and special inducements offered to old customers to induce them to his place of business and all other unfair means resorted to by him or his agents are forbidden by the plainest principles of common honesty: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

A withdrawing partner selling to his co-partner the real and personal property "to-

gether with the good will of the business heretofore done by said firm" and stipulating not to do business in said firm name but reserving the right to do business in his own name or under any other name, is liable for his wrongful acts whereby his copartner is deprived in whole or in part of such good will and exclusive use of said firm name to the extent of the injury sustained: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

V. REMEDIES.

A. DAMAGES.

In an action by the purchaser of the good will of a firm, for breach of the contract of sale, the measure of damages is not the amount of improper solicitation of the customers of the old firm, irrespective of its effect upon the business of the purchaser. The damages should be measured by the injury sustained, and not by the ineffectual attempts to injure: *Burckhardt v. Burckhardt*, 36 O. S. 261, III Longsdorf's Notes, 848 [reversing *Burckhardt v. Burckhardt*, 7 Dec. Rep. 258, 5 Dec. Rep. 185, 3 Am. L. Rec. 418, 2 Bull. 22].

While the court or jury may not be able to calculate the damages resulting from the wrongful acts of a withdrawing partner impairing or destroying the good will of a business, with the certainty required in the case of a bill of particulars, yet it may from the facts and circumstances estimate the damages sustained: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253]. For the final determination of damages in case of *Burckhardt v. Burckhardt*, after the decision in 36 O. S. 261, III Longsdorf's Notes, 848, 42 O. S. 474, IV Longsdorf's Notes, 125, and the general considerations upon which it was based, see *Burckhardt v. Burckhardt*, 9 Dec. Rep. 477, 14 Bull. 108, which was modified and affirmed, without opinion, *Burckhardt v. Burckhardt*, 15 Bull. 321. See also DAMAGES.

B. INJUNCTION.

Infringement of the good will of a proprietary medicine called Piso's Cure for Consumption, by using or imitating the name, will be enjoined until it is proved that consumption is incurable, and therefore the name is a misrepresentation. The court will not judicially notice that consumption is incurable: *Piso Co. v. Voight*, 4 O. N. P. 347, 6 O. D. (N.P.) 479.

Where, at a receiver's sale, one purchases the plant and good will of a dissolved firm

and continues the business at the old stand, a member of the old firm going into the same business will be enjoined from soliciting customers of the old firm to leave the old stand and deal with him: *Richardson v. Westjohn*, 8 Dec. Rep. 194, 6 Bull. 233, 6 Dec. Rep. 1043, 9 Am. L. Rec. 723. See also INJUNCTION.

VI. PLEADING.

In an action brought by a withdrawing partner on notes and mortgage given by a copartner purchasing the real and personal property together with the good will and the exclusive use of the firm name for the unpaid purchase-money, such purchaser may assert, by counterclaim, his claim for damages on account of the wrongful acts of such withdrawing partner depriving him in whole or in part of such good will and exclusive use of said firm name: *Burckhardt v. Burckhardt*, 36 O. S. 261, III Longsdorf's Notes, 848 [reversing *Burckhardt v. Burckhardt*, 7 Dec. Rep. 258, 2 Bull. 22, 3 Am. L. Rec. 418]; *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

For the general discussion of the subject of pleading, see PLEADINGS.

VII. EVIDENCE.

Owing to the peculiar character of property, known as the good will of a business, which depends upon the contingencies of trade, that degree of certainty as to proof of damages is, in the nature of things, not attainable as in most cases of breach of contract. All that is required is that degree of certainty which the nature of the case will admit: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

Where the injury complained of results in seriously affecting the business of a purchaser of the good will, as the successor of the old firm, by which a large part of it was for the time taken away, he is entitled to recover adequate damages, and is not limited in his proof of the same, to loss of commissions or profits on the business done by customers of the old firm who were induced to deal with the seller: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

Although the tangible property and the good will were sold by a withdrawing partner as an entirety, for a gross sum, it is competent to show the value of the property,

with and without the good will, and how much less valuable the purchase is with the good will impaired or destroyed than the purchase price. This will measure the damages, when more satisfactory proof is not attainable or where from the nature of the case it is difficult or impossible to show the actual loss of the business, by the wrongful acts complained of: *Burckhardt v. Burckhardt*, 42 O. S. 474, IV Longsdorf's Notes, 125 [reversing *Burckhardt v. Burckhardt*, 8 Dec. Rep. 496, 8 Bull. 253].

Where the injury is an interruption of business, causing diminution of it, it is difficult to establish damages to a high degree of certainty and by direct proof, and proof of special pecuniary damages is not necessary to the interposition of a court of equity: *Brass & Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487.

For the general discussion of the subject of evidence, see EVIDENCE.

GOODS AND CHATTELS.

See PERSONAL PROPERTY and cross references thereunder.

GOODS SOLD AND DELIVERED.

See SALES; ASSUMPSIT.

GOVERNMENT.

One of the chief functions of government is to prevent extortion and oppression and to foster a productive industry by maintaining a just division of the fruits of industry. This is distributive justice as it is known to jurisprudence: *Kealey v. Faulkner*, 7 O. N. P. (N.S.) 49, 18 O. D. (N.P.) 498.

GOVERNMENTAL AGENCIES.

A state agency can not claim exemption, as may a private property owner, from the operation of an act prescribing duties to be performed by another state agency: *Board of Education v. Sawyer*, 7 O. N. P. (N.S.) 401, 19 O. D. (N.P.) 1.

A suit against a public corporation having no other powers than the performance of a function of the government and accomplishing no other object, is a suit against the government and its property, although nominally the suit is against the corporation only: *Overholser v. Home for Disabled Soldiers*, 68 O. S. 236, IV Longsdorf's Notes, 942.

A workhouse does not cease to be a public or governmental agency because some revenue is derived from the labor of the inmates, where the revenue is applied in most part for its maintenance and operation. In such case the revenue is incidental to the main purpose: *Bell v. Cincinnati*, 80 O. S. 1, IV Longsdorf's Notes, 1049 [affirming *Bell v. Cincinnati*, 7 O. N. P. (N.S.) 35, 19 O. D. (N.P.) 123; distinguishing *Toledo v. Cone*, 41 O. S. 149, IV Longsdorf's Notes, 56]. See also WORKHOUSES.

A board of education has the capacity to bring suit to enjoin oppressive and arbitrary acts of another state agency, whereby schoolhouses are closed and school children deprived of the advantages of the public schools: *Board of Education v. Sawyer*, 7 O. N. P. (N.S.) 401, 53 Bull. 383. See also SCHOOLS, PUBLIC.

Public records are open to the inspection of all persons, regardless of their lack of interest. Mandamus lies to enforce such right. The proceedings of the tax commission of Ohio are such public records: *State, ex rel., v. Dittely*, 12 O. N. P. (N.S.) 319, 23 O. D. (N.P.) 31. See also TAXATION.

The National Home for Disabled Volunteer Soldiers is a corporation created by Congress for the purpose of performing an appropriate and constitutional function of the federal government, and for national purposes only; and as such is a part of the government of the United States, and can not be sued in an action sounding in tort: *Overholser v. Home for Disabled Soldiers*, 68 O. S. 236, IV Longsdorf's Notes, 942. See also SOLDIERS' HOME AT DAYTON.

If it be true that holding and maintaining of public parks by a municipality is done in its private capacity rather than as a governmental function, G. C., § 3714, may be construed as including parks under the heading of "public grounds," and therefore as imposing the same obligations upon the city with reference to public parks as with reference to streets and bridges: *Harff v. Cincinnati*, 11 O. N. P. (N.S.) 41.

A municipality in acquiring and maintaining public parks acts in a private rather than a governmental capacity, and is liable for negligence in keeping the pathways in such condition that injury results to one rightfully in the park and exercising due care: *Harff v. Cincinnati*, 11 O. N. P. (N.S.) 41. See also STREETS.

A municipal corporation acting through a board of health, which within the scope of its statutory powers fumigates premises wherein a person has been sick with a contagious disease, acts in a governmental capacity: *West v. Mt. Washington*, 9 O. N. P.

(N.S.) 251, 20 O. D. (N.P.) 125. See also MUNICIPAL CORPORATIONS.

GOVERNMENTAL POWERS.

In the exercise of purely governmental functions public authorities charged with them are bound to transmit the powers intrusted to them unimpaired to their successors; but in the exercise of proprietary functions, they are controlled by no such rule, and may exercise their business judgment as private trustees might do: *Ampt v. Cincinnati*, 2 O. N. P. (N.S.) 489, 15 O. D. (N.P.) 237, 1 Hosea, 304.

A city is not conducting a private corporate enterprise in putting some of the prisoners confined in its workhouse to labor in a quarry and selling some of the product obtained by them, but is exercising a delegated state function in furtherance of upholding the public peace: *Bell v. Cincinnati*, 7 O. N. P. (N.S.) 35, 19 O. D. (N.P.) 123 [affirmed, *Bell v. Cincinnati*, 80 O. S. 1, IV Longsdorf's Notes, 1049].

A municipality constructs and maintains a workhouse by virtue of the governmental as distinguished from the corporate powers with which it is vested: *Rose v. Toledo*, 1 O. C. C. (N.S.) 321, 14 O. C. D. 540.

The power to regulate the price of public utilities is a governmental power, the surrender of which is never to be presumed: *Chillicothe v. Gas Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24.

The power conferred on municipalities to preserve the peace and protect persons and property by the arrest of offenders and their commitment and detention in jail or workhouses, is of a public or governmental nature, in which the sovereign state exercises its functions through the aid of a municipality: *Green v. Commissioners*, 3 O. C. C. (N.S.) 212, 13 O. C. D. 43.

A municipality is not liable to a prisoner confined in a workhouse maintained by it, who complains that he suffered in health by being placed in a small, damp and insubstantial dungeon: *Rose v. Toledo*, 1 O. C. C. (N.S.) 321, 14 O. C. D. 540.

Municipal corporations while exercising governmental powers are not liable for the wrongful acts of its agents and employees in carrying out or performing such powers: *Rose v. Toledo*, 1 O. C. C. (N.S.) 321, 14 O. C. D. 540.

Under the grant of power delegated by the state to municipalities, investing them with corporate power, the chief function of which is to regulate and govern in local affairs which concern the inhabitants of

each particular locality, each municipality becomes the agency of the state in the exercise of governmental functions to the extent and in the respect to which the grant is for the purposes of subordinate local administration: *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125.

A municipal governmental function is one imposed or required for the protection and benefit of the general public, not having regard to any particular benefit to be derived as a corporate body or to the citizens collectively outside their relation to the state: *Bloom v. Newark*, 3 O. N. P. (N.S.) 480, 16 O. D. (N.P.) 393.

A city can not be held liable for wrongs or torts resulting from the exercise of governmental functions: *Bloom v. Newark*, 3 O. N. P. (N.S.) 480, 16 O. D. (N.P.) 393. See also MUNICIPAL CORPORATIONS.

The duty to maintain the streets of a city is governmental, and the liability of the city for damages for injuries resulting from negligence in maintaining them in the absence of a statute is questioned: *Dayton v. Glaser*, 76 O. S. 471, IV Longsdorf's Notes, 1026.

Streets belong to the public and as such are peculiarly subject to legislative control. It is none the less a governmental power that the legislature sees fit to exercise its power through the agency of a municipal corporation: *Sullivan v. Columbus*, 12 O. D. (N.P.) 650.

A city in exercising its jurisdiction over its streets, performs a public duty placed upon it as agent of the state and not in its private right or by reason of its private existence: *Wright v. Oberlin*, 3 O. C. C. (N.S.) 242, 13 O. C. D. 509.

G. C., § 3729, authorizing the vacation of streets and alleys by a city council is a summary proceeding having reference to the interests of the general public, and is not binding upon abutting property owners who do not petition or consent. Such proceeding invokes governmental functions, which can not be reached by process of injunction on the part of one who is individually affected: *Schlemmer v. Steinman Co.*, 2 O. N. P. (N.S.) 293. See also STREETS.

The power given a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power: *Mans-*

field v. Bristol, 76 O. S. 270, IV Longsdorf's Notes, 1024. See also NUISANCE.

A municipal corporation, in managing and controlling a workhouse under the provisions of G. C., § 3624, acts in a governmental capacity, and not in a proprietary or business relation to the inmates or persons in its employ: *Bell v. Cincinnati*, 80 O. S. 1, IV Longsdorf's Notes, 1049 [affirming *Bell v. Cincinnati*, 7 O. N. P. (N.S.) 35, 19 O. D. (N.P.) 123].

One employed and acting at the time as a guard of workhouse prisoners working in a stone quarry within the corporation, and who is injured by an explosion while attempting to remove the lid of a box of percussion caps to be used in setting off a blast in the quarry, can not recover damages of the municipal corporation for injuries sustained by the explosion: *Bell v. Cincinnati*, 80 O. S. 1, IV Longsdorf's Notes, 1049 [affirming *Bell v. Cincinnati*, 7 O. N. P. (N.S.) 35, 19 O. D. (N.P.) 123]. See also WORKHOUSES.

The powers vested by statute in trustees charged with acquiring lands and building and equipping an improved system of water supply for the city of Cincinnati, are "proprietary" in their nature, and not "govern-

mental": *Ampt v. Cincinnati*, 2 O. N. P. (N.S.) 489, 15 O. D. (N.P.) 237, 1 Hosea, 304. See also CINCINNATI.

Permanent structures within the lines of a public road (being stone abutments of a railroad bridge), however long continued will not bar action to compel their removal (denying application of *Evans v. Cincinnati*, 5 O. S. 549). And it makes no difference that the road was a toll turnpike when the obstructions were built and was not abandoned as such for over twenty-one years thereafter and especially where the railroad had no charter power to occupy highways in such a way as to interfere with public use. The interest of the county in a public road is governmental and not proprietary: *Commissioners v. Railway Co.*, 12 O. N. P. (N.S.) 129. See also LIMITATION.

GOVERNMENT BONDS.

See TAXATION.

GOVERNMENT LANDS.

See GRANTS; PUBLIC LANDS; JURISDICTION; VIRGINIA MILITARY LANDS.

GOVERNOR.

Scope Note.—Includes the appointing power of the governor, the power to pardon and reprieve, the power to sign and veto bills, extradition, issuing commissions, power to convey on behalf of the state, and the control of his conduct by the courts.

Cross Reference.

For the necessity of presenting bills to the governor, see STATUTES.

ANALYTICAL OUTLINE.

- I. Appointing Power, 8323.
- II. Power to Pardon and Reprieve, 8326.
- III. Power to Sign and Veto Bills, 8327.
- IV. Extradition, 8327.
- V. Issuing Commissions, 8328.
- VI. Power to Convey on Behalf of State, 8328.
- VII. Control of Conduct by Courts, 8329.

I. APPOINTING POWER.

The power to appoint officers does not inhere in the office of governor. When no such power is conferred on the governor by the constitution or by a valid enactment of the legislature, he can not exercise such power. The power to appoint to fill vacancies has been delegated by the people to the legisla-

tive branch of the government, and that branch has by law directed the governor to perform it, it becomes therefore a purely ministerial duty to appoint: *State, ex rel., v. Nash*, 66 O. S. 612, IV Longsdorf's Notes, 919.

The legislature can confer on the governor a power to appoint: *State, ex rel., v. Cov-*

ington, 29 O. S. 102, III Longsdorf's Notes, 444.

The duty and power of making appointment to fill a vacancy in the office of lieutenant governor, is not specially conferred on the executive branch of the government by the constitution and rests wherever the legislature may vest it. Such duty being imposed on the governor by statute, it is not an executive function, but is a ministerial duty: *State, ex rel., v. Nash*, 66 O. S. 612, IV Longsdorf's Notes, 919.

There is no provision in the constitution for filling a vacancy in the office of lieutenant governor except as authorized under Art. II, § 27, and when such vacancy occurs it must in all cases be filled by appointment by the governor as provided in G. C., § 141: *State, ex rel., v. Nash*, 66 O. S. 612, IV Longsdorf's Notes, 919. See also LIEUTENANT GOVERNOR.

The governor must fill a vacancy which occurs in the office of lieutenant governor, and such appointee is to hold office until his successor is elected and qualified, and such election will be the first election at which a lieutenant governor would have been chosen if no vacancy had existed, occurring more than thirty days after such vacancy: *State, ex rel., v. Nash*, 66 O. S. 612, IV Longsdorf's Notes, 919.

Commissioners to erect a soldiers' monument are not officers, and, accordingly, their appointment by the legislature would not be unconstitutional. If they were officers, a statute for their appointment by the governor from the Soldiers' and Sailors' Union would not infringe the constitution, for the statute is impersonal: *Gleason v. Cleveland*, 49 O. S. 431, IV Longsdorf's Notes, 463. See also CONSTITUTIONAL LAW.

The governor may be invested by the legislature with power to appoint a city board. And this does not impair any of the undelegated powers which by Art. I, § 20, of the Ohio constitution, remain with the people: *State, ex rel., v. Smith*, 44 O. S. 348, IV Longsdorf's Notes, 216.

Whether the act of 95 v. 203, as to the Toledo police commissioners was void because violative of the principles of local government, or because conferring upon the governor powers which he is not competent to receive and exercise, was not decided: *State v. Jones*, 66 O. S. 453, IV Longsdorf's Notes, 912.

The governor's power of removal of a police commissioner under R. S., § 1872 (repealed, 96 v. 96), is administrative and not judicial, and hence not in conflict with Art. IV, § 1, of the constitution of Ohio, conferring the judicial power on the courts: *State,*

ex rel., v. Hawkins, 44 O. S. 98, IV Longsdorf's Notes, 195. See also OFFICE.

II. POWER TO PARDON AND REPRIEVE.

A statutory provision similar to G. C., § 99, with reference to reprieve does not render invalid an unconditional reprieve which does not change the nature of the punishment but merely postpones the time at which such punishment shall be inflicted, even if the prisoner does not consent thereto: *Sterling v. Drake*, 29 O. S. 457, III Longsdorf's Notes, 489.

G. C., § 12399, does not, when read in connection with G. C., § 93, attempt to withdraw the pardoning power from the governor, but merely forbids the board of pardons to recommend for pardon a person convicted of murder in the first degree: *State v. Schiller*, 70 O. S. 1, IV Longsdorf's Notes, 967; *State v. Jones*, 5 O. N. P. 390, 8 O. D. (N.P.) 645.

A full, unconditional pardon, delivered, is irrevocable; and where a person imprisoned on a sentence for felony seeks a discharge by *habeas corpus*, based on such pardon, the pardon having been issued by the governor pursuant to the constitution and statute, on the certificate of the physician to the penitentiary that the prisoner is in imminent danger of death, it is not competent in this state, under existing statutes, to impeach the pardon, in such proceeding, by proof that the physician's certificate was obtained by false representations of the prisoner, and his fraudulent acts, with respect to his health, such representations having been made, and acts done, for the purpose of obtaining such certificate and such pardon: *Knapp v. Thomas*, 39 O. S. 377, III Longsdorf's Notes, 1037.

The commutation of the punishment of a lunatic convict by the governor is valid and takes effect without the acceptance or consent of the convict, and can not be defeated or invalidated by the convict's rejection or refusal of it when restored to reason. Accordingly, the commutation of a death sentence to life imprisonment made while the convict is insane is valid; and after the convict is restored to reason he can not be released on *habeas corpus*: *Ex parte Victor*, 31 O. S. 206, III Longsdorf's Notes, 574.

Under Art. III, § 11, of the constitution, the governor is authorized of his own motion to reprieve or suspend for a specified interval of time the execution of a prisoner under sentence of death. Such reprieve is not conditional and the consent of the prisoner thereto is unnecessary: *Sterling v.*

Drake, 29 O. S. 457, III Longsdorf's Notes, 489.

A reprieve takes effect without the consent of the convict, and upon the expiration of the time fixed for the reprieve, the original sentence may be carried into effect: *Sterling v. Drake*, 29 O. S. 457, III Longsdorf's Notes, 489.

III. POWER TO SIGN AND VETO BILLS.

An entry in a record which is kept in the office of the governor pursuant to law, and which with his acquiescence is used to perpetuate evidence of the presentation to him of bills which have been passed by both houses of the general assembly, such entry being made by a subordinate of the governor in the discharge of the duties prescribed by him, and showing the presentation of an identified bill on a certain day, is competent and sufficient to prove such presentation; and it is not competent to show, in contradiction of such record, that the governor was, by reason of illness, disabled from receiving or considering such bill, the governor not having in fact relinquished the duties of his office: *Wrede v. Richardson*, 77 O. S. 182, IV Longsdorf's Notes, 1031 [affirming *Wrede v. Richardson*, 5 O. N. P. (N.S.) 127].

IV. EXTRADITION.

The governor's powers in issuing extradition requisitions rest on the constitution and laws of the United States, and not on those of the state. Accordingly, G. C., § 109, providing for extradition in cases of felony, can neither grant nor limit his power, and he has power, and it is his duty to issue a requisition in cases of misdemeanor: *State v. Hudson*, 2 O. N. P. 1, 2 O. D. (N.P.) 41 [affirmed, *State v. Hudson*, 10 O. C. D. 812, and affirmed, without opinion, *Hudson v. State*, 52 O. S. 673]. See also EXTRADITION.

The governor has no discretion if the case comes within the statutes, but he may determine whether the case does in fact come within the statutes: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

If the governor finds that extradition is sought for some ulterior motive, such as compelling the payment of a civil liability, he may refuse to issue a warrant for the arrest of the alleged fugitive: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

If the governor determines that the proceedings are brought for ulterior motives, he may revoke a warrant issued by his predecessor, even if the alleged fugitive is in the custody of the agent of the demanding state: *Work v. Corrington*, 34 O. S. 64, III Longsdorf's Notes, 698.

If the demand for extradition charges the accused with being "a fugitive from justice," the governor may construe such language to charge that the accused has fled to avoid prosecution: *Ex Parte Sheldon*, 34 O. S. 319, III Longsdorf's Notes, 719.

The determination by the governor that a crime has been committed is not binding on the courts: *In re Hampton*, 1 O. N. P. 181, 2 O. D. (N.P.) 559.

If a governor signs a blank warrant and in his absence and without his express authority the secretary fills in the name of the accused in the appropriate blank, such warrant is defective and the accused must be discharged, although it is said that the governor may issue a valid warrant upon the same paper: *In re Craig*, 7 O. N. P. (N.S.) 307, 19 O. D. (N.P.) 843; *In re Payne*, 7 Dec. Rep. 288, 2 Bull. 76.

If the governor has signed a warrant in blank and subsequently authorizes the issuing of such warrant with the name of the accused inserted, such warrant is valid, even if such authority is given by long distance telephone from New York: *In re Polly*, 3 O. N. P. (N.S.) 265, 16 O. D. (N.P.) 427.

The fact that the governor has issued a warrant as a result of his determination that the demanding state was entitled to extradition of the accused does not prevent the court from reviewing the same questions at this hearing: *Wilcox v. Nolze*, 34 O. S. 520, III Longsdorf's Notes, 733; *In re Mutchler*, 8 O. N. P. (N.S.) 345, 19 O. D. (N.P.) 587.

V. ISSUING COMMISSIONS.

Until a commission issues to one who is elected judge, he is not a judicial officer and has no right to act as such: *State, ex rel., v. Moffit*, 5 O. S. 358, I Longsdorf's Notes, 289.

Under a statute which provides that the term of the justice of the peace is three years without specifying the date from which such term is to run, his term runs from the date of his commission. At the end of three years from such date he has no power to act as a justice of the peace and a judgment rendered by him is a nullity: *Bushnell v. Koon*, 8 O. C. C. (N.S.) 163, 18 O. C. D. 367 [affirmed, without opinion, *Koon v. Bushnell*, 71 O. S. 521].

VI. POWER TO CONVEY ON BEHALF OF STATE.

When the governor, in the exercise of authority expressly conferred upon him by statute, grants to a municipality "all the interest of the state" in lands which it owns in fee to be used for streets and other purposes, the municipality, reserving the right

to use the same for street purposes without compensation, may execute a valid lease of such lands to a railroad company for its general purposes: *Railroad v. State, ex rel.*, 85 O. S. 251.

VII. CONTROL OF CONDUCT BY COURTS.

A writ of mandamus may issue against the governor commanding him to perform a purely ministerial act, but not to control his discretion in the performance thereof: *State, ex rel., v. Nash*, 66 O. S. 612, IV Longsdorf's Notes, 919 [approving and following *State, ex rel., v. Chase*, 5 O. S. 528, II Longsdorf's Notes, 198]. See also MANDAMUS.

The governor's decision in exercising the political and executive powers conferred upon him by the constitution is conclusive. But as to ministerial acts which might have been devolved upon any other officer, and affecting any specific private right, he is amenable to the compulsory process of this court by mandamus. The independence of branches of government from the control of each other arises not from the grade of the officer, but from the nature of the acts to be done: *State, ex rel., v. Chase*, 5 O. S. 528, II Longsdorf's Notes, 198. See also CONSTITUTIONAL LAW.

The governor of the state may be enjoined from trying an officer illegally: *Weber v. Bishop*, 7 Dec. Rep. 661, 4 Bull. 775.

An officer's only evidence of title to act is his commission. If the officer is one elected by the general assembly, and they refuse a certificate, or if the governor refuse a commission, mandamus may lie. But where the governor's only right to issue a commission is on certificates of election by the house of the legislature, he can not be compelled to issue it without the certificates: *State, ex rel., v. Moffitt*, 5 O. 358, I Longsdorf's Notes, 289. See also OFFICE.

GRACE, DAYS OF.

For days of grace, see NEGOTIABLE INSTRUMENTS.

GRADE.

For the grade in municipal corporations, see MUNICIPAL CORPORATIONS.

For the grade of roads, see ROADS.

For the grade of streets, see STREETS.

No judicial interpretation is necessary under G. C., §§ 8753, *et seq.*, to authorize a railway company to change the grade of its line in order to avoid difficult grades or curves, the presumption being that the company would not undertake an expensive im-

provement unless the change is necessary, but where an appropriation of land is required in order to make the proposed change, proof should be made to the court as to the necessity for such change: *Commissioners v. Railway Co.*, 11 O. C. C. (N.S.) 419, 12 O. C. D. 805.

The authority granted by G. C., §§ 8863, *et seq.*, to county commissioners and a railway company to abolish a dangerous railway crossing and substitute therefor a crossing other than at grade, is not limited to the substitution of an overhead or under-grade crossing at the point of the old intersection, but a detour may be made for a short distance in the highway in order to reach a more practical location for the new crossing: *Stoner v. Railway Co.*, 9 O. N. P. (N.S.) 337, 20 O. D. (N.P.) 448.

It is necessary prerequisite to a proceeding in the probate court by a railway company to condemn the right to cross with its track or tracks a street or alley at grade within a municipality, that a petition be first filed in the common pleas for the purpose of obtaining an order permitting such a crossing and the conditions under which it may be made, and a petition in such a proceeding which does not aver the granting of such an order is open to a motion to make more definite and certain: *Railway v. East Liverpool*, 10 O. N. P. (N.S.) 157 [affirmed, by common pleas court, September 2, 1909, and by the circuit court, November 11, 1909, without opinion; see *Railway v. Liverpool*, 10 O. N. P. (N.S.) 157]. See also RAILROADS.

GRADE CROSSINGS.

For grade crossings, see RAILROADS; STREETS.

GRADED SCHOOLS.

See SCHOOLS, PUBLIC.

GRADE OF OFFENSE.

See FELONY; MISDEMEANOR.

GRADE, PAVE, WIDEN, ETC.

See ASSESSMENTS; STREETS; PUBLIC CONTRACTS.

GRAFT, GRAFTING.

See BRIBERY; OFFICE.

GRAIN, ETC.

The Pennsylvania Co., being engaged in the construction of certain side-tracks, switchers and other improvements, caused to be posted near the place where said work was being done, written notices that it would "protect all claims for materials, labor and board." It was held that the claim of M for hay, grain, straw and feed furnished by him to a contractor, for teams employed on said work, was not a claim for either material, labor or board within the language and meaning of said notice, and was not a claim which the Pennsylvania Company, by the posting of said notices, thereby assumed, or obligated itself to protect and pay: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018.

G. C., § 8351, while it in terms extends the provisions of G. C., § 8345, to such persons as furnished hay, grain, etc., on the order of a contractor or subcontractor for their use or the use of persons employed by them or either of them while furnishing material or labor for or in the construction of such railroad, does not extend or enlarge the meaning of the word "materials;" nor does it impose upon the railroad company a personal liability for the articles thus furnished if no lien therefore be taken and perfected: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018.

The term "materials" as used in G. C., § 8345, providing for a lien against rail-

roads, comprehends and includes such articles only as are furnished for and to be used in the construction of such railroad. A person who furnishes hay, grain, straw and feed to a contractor or subcontractor for the teams employed on said railroad is not furnishing materials within the purview and meaning of the section: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018. See also RAILROADS.

GRAMMATICAL CONSTRUCTION.

See CONTRACTS; DEEDS; STATUTES; WILLS, LEGACIES AND DEVISES.

GRAND ARMY.

G. C., § 13208, which provides that "whoever sells, exposes for sale, gives, barter, or disposes of * * * articles of traffic, within four miles of the place where an assemblage of people is collected or collecting for religious worship, or for holding a harvest home festival, grand army, sons of veterans' or union veterans' union celebration or reunion" without having obtained a permit from the trustees or managers of such assemblage, and imposing a penalty for the violation thereof, is an unconstitutional exercise of power by the legislature: *State v. Coats*, 10 O. N. P. (N.S.) 349, 20 O. D. (N.P.) 561. See also CONSTITUTIONAL LAW.

GRAND JURY.

Scope Note.—Includes selection, qualifications, and powers of persons sworn to inquire into public offences and find indictments; and the general conduct of the business of the grand jury. Excludes matters relating to juries in general; and nature, necessity and essentials of an indictment.

Cross References.

For grand jury, see also INDICTMENT; JURY; TRIAL.

For the admissibility of testimony given before a grand jury, see EVIDENCE.

For costs of grand jury, see JURY.

For the requisites of an indictment for perjury before the grand jury, see PERJURY.

For method of attacking defects in selection, see INDICTMENT.

For testimony of grand jurors, see NEW TRIAL.

ANALYTICAL OUTLINE.

- I. Selection.
- II. Power of Court.
 - A. To fill vacancies.
 - B. To summon new grand jury.
- III. Number of grand jurors.
- IV. Qualifications.
- V. Oath.

- VI. Charge.
- VII. Powers of Grand Jury.
- VIII. Evidence.
- IX. Witnesses.
- X. Who May Have Access.
- XI. Record.

I. SELECTION.

For selection of jurors, see JURY.

Indictments found and returned by grand jury impaneled and sworn on labor day are not invalid when that day was fixed for the commencement of the term: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813. See also INDICTMENT.

An indictment found and returned at a term presided over by judge not designated therefor as provided by G. C., § 1539, is not invalid: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813. See also COURTS.

A plea in abatement does not lie to an indictment for murder in the first degree, where based on the ground that the judges of the common pleas court in appointing the jury commission failed to designate the number of names which the commission should place in the jury wheel of persons to serve as grand and petit jurors during the current year: *State v. Cleveland*, 9 O. L. R. 203.

II. POWER OF COURT.

A. TO FILL VACANCIES.

Where a grand juror is discharged on account of sickness after the grand jury has been sworn, and another person with the proper qualifications is sworn in his stead and takes his place on the panel, the body so constituted is a legal grand jury though a foreman be not again appointed, nor the oath readministered to him, nor to other members as a body: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813.

Proper reasons for excusing a juror will be presumed in the absence of facts showing the contrary: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29.

A deficiency of six grand jurors in the regular grand jury may be filed under the provisions of G. C., § 13567, and it is unnecessary to issue a special venire: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

B. TO SUMMON NEW GRAND JURY.

Hamilton county was not exempted from G. C., § 13568, by R. S., §§ 5189-a, 5189-f,

when in force, but if it had been exempted, an indictment presented by a new grand jury, selected and impaneled as provided for in G. C., § 13568, without any objection from anyone, would not be quashed, or a verdict of guilty set aside solely for this reason: *McCarthy v. State*, 5 O. C. C. 627, 3 O. C. D. 306 [affirmed, without opinion, *McCarthy v. State*, 27 Bull. 332].

The court or sheriff may call persons whom they deem fit for service upon a jury, and the competency of such persons to serve as jurors is not affected by the fact that their names were not drawn from the jury wheel: *State v. Metzger*, 10 O. N. P. (N.S.) 97, 21 O. D. (N.P.) 72 [exceptions overruled, without opinion, *State v. Metzger*, 83 O. S. 513].

Assuming to act under G. C., § 11426, the common pleas judge ordered thirty-five names to be drawn from the jury wheel to act as grand or petit jurors, without designation whether they should be grand or petit, or what number should constitute either, in his direction to the clerk. Thirty-four having appeared at the first day of the term the judge selected fifteen of said persons and directed the clerk to call them as grand jurors. This left the remaining nineteen as the regular petit panel. Later at the term the judge discharged the entire regular petit panel because it or they were "so interested in causes coming on further to be heard in this court, so as to disqualify them from sitting thereon," and ordered the new jury drawn to appear on the day the accused was tried. It was held that a court or judge, under G. C., § 11426, has no authority to so exercise his personal selection of the entire grand jury panel in the manner stated. The order to the clerk should stipulate the number of each panel to be drawn and the clerk should draw from the wheel the grand and petit juries as distinct panels. A court has no authority to discharge the entire panel of the petit jury for the cause above stated; and it is an abuse of discretion so to do. The irregularity in the selection of the grand jury, thus pursued, can not be attacked by plea in abatement: *Deiter v. State*, 12 O. C. C. (N.S.) 97, 21 O. C. D. 299 [reversed in *State v. Deiter*, 81 O. S. 504, with memorandum opinion on the

ground that the discharge of the petit jury was not reversible error].

III. NUMBER OF GRAND JURORS.

The act of January 9, 1823, providing for the impaneling of a grand jury, prescribed the number of grand jurors as neither more nor less than fifteen: *Young v. State*, 6 O. 435, I Longsdorf's Notes, 349.

An indictment found by a grand jury, composed of less than fifteen persons, having the qualifications required by the statute, is not sufficient to put the accused upon trial, and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications, is a good plea in bar: *Doyle v. State*, 17 O. 222, I Longsdorf's Notes, 806.

A grand jury in Ohio consists of fifteen members, that being the number prescribed by former statutes in this state. While the present statutes do not specifically fix the number of grand jurors, it may be inferred from G. C., § 11427, which provides for the drawing of twenty-seven names for grand and petit jurors for special terms and from G. C., § 13568, which provides for calling a new grand jury of fifteen bystanders, that the number remain unchanged: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

If twelve grand jurors agree in finding an indictment, it can not be invalidated by showing misconduct of one of the fifteen jurors, nor can inquiry be made upon what grounds any one of the twelve jurors concurred in the finding: *Turk v. State*, 7 O. (pt. 2) 240, I Longsdorf's Notes, 404.

IV. QUALIFICATIONS.

The qualifications of a grand and petit juror are not the same: *State v. Easter*, 30 O. S. 542, III Longsdorf's Notes, 542.

The statute exempting public officers and certain others from service as jurors does not disqualify the persons so exempted but merely extends to them a privilege that may be waived: *Glassinger v. State*, 24 O. S. 206, III Longsdorf's Notes, 169.

The fact that township trustees caused one of their number to be returned as grand juror, does not disqualify him from serving as such: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638.

That a person has subscribed funds for the purpose of legitimately suppressing crime, does not disqualify him from sitting on the grand jury; nor is it ground of disqualification that he has evinced a desire and purpose to enforce the laws: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638.

An earlier form of G. C., § 11421 (R. S., § 5164, as amended, 82 v. 166), requiring township trustees and councilmen to select annually good judicious persons who are electors and have not served as a regular juror in any court of record within two years, did not so far disqualify persons who have so served on a regular jury as to render invalid indictments found by grand juries of which they were members: *State v. Elson*, 45 O. S. 648, IV Longsdorf's Notes, 301; *contra*, *Roth v. State*, 3 O. C. C. 59, 2 O. C. D. 33.

That a member of the grand jury preferring an indictment, was a nephew of the person murdered is not a disqualification: *State v. Easter*, 30 O. S. 542, III Longsdorf's Notes, 542.

A grand juror who was imprisoned in the penitentiary of another state for stealing \$25, is not an illegal grand juror under G. C., § 12391, for that crime would not have been a felony or penitentiary offense in this state and an indictment returned by grand jury of which he was a member is not subject to a plea in abatement: *State v. Davis*, 7 O. N. P. 650, 8 O. D. (N.P.) 680, 33 Bull. 92 (editorial).

The fact that one of the grand jurors was the husband of the prosecuting witness; nor that other members of the grand jury were active outside of the grand jury in seeking evidence to secure an indictment; nor that members of the grand jury were personal and political enemies and business rivals of the accused; nor that some of the grand jurors had before being sworn expressed hostility to the accused and declared him guilty; nor that unsworn statements and publications were considered by the grand jury, does not constitute grounds for quashing an indictment on a plea in abatement: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

A panel is not rendered illegal because vacancies therein were filled by persons largely from one locality: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

Where the court or sheriff calls persons whom he deems fit for service to serve as grand jurors, they are not rendered incompetent to serve as such by reason of the fact that their names were not drawn from the jury wheel as provided in G. C., § 11420: *State v. Metzger*, 10 O. N. P. (N.S.) 97, 21 O. D. (N.P.) 72 [exceptions overruled, without opinion in *State v. Metzger*, 83 O. S. 513].

It is impracticable that the qualifications of grand jurors should be inquired into with the same care as in the case of petit jurors, and if a citizen were wrongly indicted by a

grand jury whose qualifications have been favorably passed upon by the jury commission and who have taken the required oath, his remedy is not by a plea in abatement, but he must rely upon a judge and petit jury to establish his innocence: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

V. OATH.

The language of the oath seems to indicate that the grand juror may be called upon to act in cases both of enemies and friends. If the first, his oath is that neither malice, hatred, nor ill will shall influence his deliberate and impartial judgment. If the last, no consideration of passion or friendship shall disturb the just discharge of his duties: *State v. Easter*, 30 O. S. 542, III Longsdorf's Notes, 542.

VI. CHARGE.

It is the duty of the court to call the attention of the grand jury to matters requiring investigation, and if a mistake were made in that respect it would not afford ground for a plea in abatement: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

Error in the charge to the grand jury can not be reached by a plea in abatement: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29.

A reviewing court will not review the propriety of an inflammatory address by the lower court in charging the grand jury: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed, *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640].

VII. POWERS OF GRAND JURY.

A special grand jury called to investigate a particular offense may investigate any violation of the criminal laws of this state: *In re Commissioners*, 7 O. N. P. 450, 5 O. D. (N.P.) 691.

The grand jury before its final adjournment may find another indictment against the same person for the same transaction without recalling the witnesses or waiting until the former is nollied: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412.

The right of visitation, which permits a grand jury under certain circumstances to investigate the affairs of a corporation, does not permit of the delegation by the jury of its power in that behalf to a corps of experts charged with the duty of examining a large number of books and papers of an intricate character, in the belief or hope that discoveries will be made which will justify the examination, and that from the opinion

formed by the experts as a result of the examination the grand jury may themselves formulate an opinion as to whether the course pursued by the corporation as to the matters under suspicion has been within the law: *In re Grand Jury*, 8 O. L. R. 188.

VIII. EVIDENCE.

The evidence before the grand jury to warrant finding an indictment ought to be more than to create a probability. It should be such as to authorize a conviction by a petit jury, but the grand jury are not to assume that evidence to explain it away will be had on the trial. The rule of evidence beyond reasonable doubt does not apply. The jury in weighing the evidence may consider the fact that a witness has committed a crime: *In re Commissioners*, 7 O. N. P. 450, 5 O. D. (N.P.) 691.

A grand jury may return an indictment based wholly on facts within the knowledge of the jurors and without hearing any evidence upon such question: *State v. Woolard*, 12 O. N. P. (N.S.) 395, 22 O. D. (N.P.) 652.

A motion will not be to compel an official stenographer to produce for the use of the accused a copy of the testimony given by the accused before the grand jury which indicted him: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1.

The court of common pleas has no power to entertain a motion by the defendant to inspect the minutes of the grand jury, or a transcript made by the official stenographer of the testimony before the grand jury: *State v. Haugh*, 4 O. N. P. (N.S.) 79, 16 O. D. (N.P.) 477.

The court has no discretion to permit a disclosure of the proceedings before the grand jury except in the actual trial of the case, where the testimony of a witness is a matter of issue in determining the facts which are to be weighed by the jury: *State v. Haugh*, 4 O. N. P. (N.S.) 79, 16 O. D. (N.P.) 477 [affirmed, without opinion, *Haugh v. State*, 76 O. S. 582].

A person charged with crime is not entitled, before or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, nor to an inspection of a transcript of such evidence, and it is error for the court to order the prosecuting attorney to deliver said minutes, or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecuting attorney to permit either of them to make an inspection thereof: *State v. Rhoads*, 81 O. S. 397.

IX. WITNESSES.

If the vital provision of G. C., § 13564, that "before any witness is examined by the grand jury, an oath shall be administered to him by the clerk" be observed, an indictment found upon the testimony of the witness will not be held to have been illegally found, because the court has not certified that such oath or affirmation had been administered by the clerk, or because such certificate, if made, has not been delivered to the witness, and by him presented to the foreman of the grand jury, when he is admitted for examination: *Duke v. State*, 20 O. S. 225, II Longsdorf's Notes, 991.

Where witnesses have been duly sworn and sent to a grand jury, and there examined, and an indictment found and presented, it is not necessary that they should be recalled and re-examined to warrant the grand jury in finding another indictment against the same person, and before the former one has been nollied: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412.

It is improper practice to subpoena persons suspected of a crime as witnesses before the grand jury which is to inquire respecting that crime: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

Compensation of clerk of court for swearing witnesses to testify before grand jury, giving certificates of their qualification and issuing certificates for their fees, is provided by G. C., § 2903, but there is no provision of pay for the return of a certificate of qualification to the clerk and its filing by him: *Commissioners v. Welliver*, 12 O. C. C. 440, 5 O. C. D. 569.

An indictment will not lie for the giving of false testimony before a grand jury, where from a reading of the indictment it is impossible to determine why or upon what ground the matter to which the defendant testified was material to the investigation which was being carried on by the grand jury: *State v. Tanner*, 9 O. L. R. 18.

X. WHO MAY HAVE ACCESS.

Even prior to the enactment of G. C., § 13561, the presence of an official stenographer to take the testimony of witnesses before the grand jury, was not prejudicial to one against whom an indictment was found, where it appeared that the stenographer was present only during the examination of witnesses, that no comment was made upon the testimony in his presence, that the jurors neither expressed their views nor voted in his presence, that he did not influence in any way the indictment, and that his notes were securely kept and

not transcribed until after the discharge of the grand jury, when a "personal" copy was delivered to the prosecutor: *State v. Mumaw*, 12 O. D. (N.P.) 785.

The presence in the grand jury room of the assistant to the official stenographer does not invalidate an indictment, where it does not appear that the assistant participated in the discussion, or offered any comment, or was present at the time the vote was taken, or in any other way prejudiced the rights of the defendant: *State v. Metzger*, 10 O. N. P. (N.S.) 97, 21 O. D. (N.P.) 72 [exceptions overruled, without opinion, *State v. Metzger*, 83 O. S. 513].

G. C., § 13560 was cited with reference to the privilege of the prosecuting attorney to interrogate witnesses before the grand jury: *State v. Rhoads*, 81 O. S. 397.

The prosecuting attorney has no right to remain in the grand jury room while the jurors are expressing their views or casting their votes upon a matter before them; the phrase "no other person" used in G. C., § 13560, means no other person than the members of the grand jury, and no other person than the prosecutor or his assistant: *State v. Stichtenoth*, 8 O. N. P. (N.S.) 297, 19 O. D. (N.P.) 623.

The mere presence of the prosecuting attorney or his assistant in the same room with the grand jury while the grand jurors are deliberating or casting their votes, is not sufficient to sustain a plea in abatement and discharge an indictment, in the absence of any proof as to misconduct on the part of these officers which resulted in prejudice toward the accused, or in the finding of an indictment which would not otherwise have been found: *State v. Stichtenoth*, 8 O. N. P. (N.S.) 297, 19 O. D. (N.P.) 623.

XI. RECORD.

If the names of the grand jurors do not appear in some part of the record, error will lie, though it is probable that the reviewing court would, on motion, cause a more perfect record to be sent up, so as to cure the defect: *Mahan v. State*, 10 O. 233, I Longsdorf's Notes, 507.

A record reciting that the "grand jury, impaneled and sworn, * * * presented the following bill of indictment" is sufficient without specifying the number of jurors: *Young v. State*, 6 O. 435, I Longsdorf's Notes, 349.

Where the record shows a grand jury sworn, it will be presumed to have been composed of the requisite number of suitable persons, unless the contrary be shown: *Williams v. State*, W. 42, I Longsdorf's Notes, 4.

It is not essential that the record of the conviction of a person of the crime of murder, should set out and show expressly that the grand jurors who returned the indictment had the requisite qualifications of electors of the county: *Parks v. State*, 4 O. S. 234, II Longsdorf's Notes, 89.

It is not necessary that the records of the court should show how, or by whom, the grand jurors were selected and drawn. The legal presumption is that duty was regularly performed by the proper officers; but if it was not so done, that is not a valid objection to an indictment: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813.

Where a defendant has been convicted and sentenced on an indictment duly returned by the grand jury, he can not, on error, avail himself for the first time of the objection that the record omits to show the impaneling of the grand jury. Such objection should be made in the court below, by motion to quash, before pleading to the indictment: *Young v. State*, 23 O. S. 577, III Longsdorf's Notes, 145.

A plea impeaching the conduct of the grand jury, and setting up facts contradicting the record can not be allowed: *Turk v. State*, 7 O. (pt. 2) 240, I Longsdorf's Notes, 404.

GRAND LARCENY.

See LARCENY.

GRANDCHILDREN.

See DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES.

GRANTEE.

See DEEDS; GRANTS.

GRANTORS.

See DEEDS; GRANTS, and specific classes of grantors by name, such as INFANTS; CORPORATIONS, ETC.

GRANTS.

Scope Note.—Includes definition, implied and presumptive grant, oral grant, construction and effect; who may make grant, and to whom grant may be made; and termination and remedies. Excludes deeds, devises, dedication and easement.

Cross References.

For questions of dedication, see DEDICATION.

For grants of rights of way in streets to railroads, or to street railways, see RAILROADS; STREET RAILWAYS AND INTERURBAN RAILWAYS.

For implied grant or implied reservation, see also DEEDS.

For the creation of easements by grant either express or implied, see also EASEMENT.

For grants of canal lands, see also CANALS; MUNICIPAL CORPORATIONS.

For licenses, see LICENSES [IN REALTY].

For conveyances, see DEEDS.

For grants of rights in oil and gas, see OIL AND GAS.

For grants of mineral rights, see MINES AND MINING.

For grants of franchises, see also FRANCHISES.

For grants of governmental power, see CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS; COUNTIES AND COUNTY COMMISSIONERS; TOWNSHIPS AND TOWNSHIP TRUSTEES; SCHOOLS, PUBLIC.

For questions of evidence, see also EVIDENCE.

For the general subject of grant by will, see WILLS, LEGACIES AND DEVISES.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Implied Grant.
- III. Presumptive Grant.
- IV. Oral Grant.
- V. Construction and Effect.
- VI. Who May Make Grant.
- VII. To Whom Grant May be Made.
- VIII. Termination.
- IX. Remedies.

I. DEFINITION.

The word "grant" is a generic term, applicable to all transfers of real property and incorporeal rights, though, in its largest sense, it comprehends everything that is granted or passed from one to another. The term, however, is so seldom, if ever, applied to the transfer of a chose in action, that nothing short of a manifest purpose to apply it, would carry that meaning with the use of the word: *Elliott v. Shaw*, 32 O. S. 431, III Longsdorf's Notes, 641.

II. IMPLIED GRANT.

Four persons were equal owners in common of four hundred acres of oil land. Three of them conveyed to the fourth, without specifying that only three-fourths was conveyed, and the deed reserved the full, sole and whole privilege of taking oil, all oil taken from said lands to belong to the grantors, *habendum* to hold said four hundred acres subject to said reservations. It was held that the grantee is not entitled to one-fourth of the oil. The grantors' right to the oil is not an exception or reservation, because it is of a larger interest than they have, but is by an implied grant: *Atkinson v. Baden*, 1 O. C. C. 537, 1 O. C. D. 300. See also **DEEDS**.

Where plaintiff owning a large lot fronting on a descending street in order to dispose of seepage water in his cellar on the higher part, ran a drain from it under the sidewalk in front of the lower part of his lot, and afterwards sold the lower part without reserving or mentioning the drain, such drain being a necessity to his property, and seeming to be known to the grantee, the grantee will be enjoined from removing it. The plaintiff can not, however, use it for anything but natural seepage water. As plaintiff allowed the meltings from a large icebox to drain through it the costs of the case will be divided: *Brewing Co. v. Fasse*, 11 Dec. Rep. 16, 24 Bull. 132. See also **EASEMENT**.

Where the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another, as a means of egress and ingress to the latter from the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and also adds materially to its value, and afterwards sells and conveys by deed the part with the way to it, and retains the part with the way over it, his grantee takes his part, to be enjoyed with reference to the way as the same existed at the time of the conveyance, with an implied grant of the way to

it over that retained by the grantor, as an easement therein: *Mosher v. Hibbs*, 1 O. C. C. (N.S.) 49, 14 O. C. D. 375.

A private way is an appurtenance to the tract conveyed, and the right thereto passes without being expressed in the deed: *Mosher v. Hibbs*, 1 O. C. C. (N.S.) 49, 14 O. C. D. 375. See also **EASEMENT**.

Where the owner of land constructs a private way over it from his home to the highway, which way is apparent, continually used, and reasonably though not absolutely necessary to the enjoyment of the land and adds materially to its value, and afterwards divides the land among his children, each takes his part with reference to the way as existing; there is an implied grant of the way by the servient to the dominant part: *Baker v. Rice*, 56 O. S. 463, IV Longsdorf's Notes, 695. See also **EASEMENT**.

III. PRESUMPTIVE GRANT.

A grant may sometimes be presumed; but if it is produced and is defective, no presumption can aid the defect: *Roads v. Symmes*, 1 O. 281, I Longsdorf's Notes, 82.

Plaintiff claimed under a patent issued in 1818, and defendant claimed under a possession beginning in 1795. It was held that the statute of limitations will not run against the government, and no grant from the government can be presumed from lapse of time, because presumptions can not displace facts proved, but only supply the want of proof: *Wallace v. Miner*, 6 O. 366, I Longsdorf's Notes, 343; *Wallace v. Miner*, 7 O. (pt. 1) 249, I Longsdorf's Notes, 378.

A grant may be presumed in favor of a defendant in ejectment who has had adverse possession for twenty-one years against a plaintiff whose title has been such that the statute of limitations does not run against it. The same rule applies where the patent was issued since the inception of the adverse possession: *Fitzpatrick v. Forsythe*, 6 Dec. Rep. 682, 7 Am. L. Rec. 411. See also **LIMITATIONS, STATUTE OF**.

Mere possession for a less period than would bar ejectment will not warrant the presumption of a deed, but it may if accompanied by other circumstances: *Courcier v. Graham*, 1 O. 330, I Longsdorf's Notes, 86; *Bierce v. Pierce*, 15 O. 529, I Longsdorf's Notes, 729.

Where B bought A's land warrants before their location, located them, and paid the taxes, and has been in possession ever since, but not long enough to be protected by the statute of limitations, but the land was granted to A, will not raise the presumption of a conveyance from A to B:

Starke v. Smith, 5 O. 455, I Longsdorf's Notes, 300.

The presumption in favor of an occupant of 4,000 acres held by him for many years under defective deeds for 3,400 acres from holders of equitable titles that he held a good title to the equitable estate will not extend to raise a presumption that he had also bought up the other 600 acres: *Bierce v. Pierce*, 15 O. 529, I Longsdorf's Notes, 729.

If a canal company allows a turnpike company to construct its road alongside the water's edge so that both occupy the berme bank for many years a grant will be presumed: *Railroad Co. v. Zinn*, 18 O. S. 417, II Longsdorf's Notes, 905.

Presumption of a deed by a trustee to a *cestui* will be presumed if he ought to have made it and the *cestui* has been in long possession. But the presumption is only to protect possession and does not arise to favor one attacking an adverse holder: *Kinsman v. Loomis*, 11 O. 475, I Longsdorf's Notes, 586; *Harman v. Kelley*, 14 O. 502, I Longsdorf's Notes, 682; *Bierce v. Pierce*, 15 O. 529, I Longsdorf's Notes, 729.

To support a continued possession of land for over forty years by one claiming an equitable title, the trustee holding the legal title—though the statute of limitations does not apply by reason of his nonresidence—will be enjoined, and the title quieted except as to the interest in which the trustee also owned the equitable title. And, so, though the occupant holds under a defective deed from the original *cestui*, the latter making no claim, the equitable title will be presumed perfect in the occupant: *Bierce v. Pierce*, 15 O. 529, I Longsdorf's Notes, 729.

Presumption of title from long user obtains in case of incorporeal hereditaments in favor of quiet enjoyment. But in case of corporeal hereditaments the statute of limitations furnishes the only protection, though length of possession may be corroborative evidence of a grant as distinguished from a conclusive presumption: *Starke v. Smith*, 5 O. 455, I Longsdorf's Notes, 300. See also EVIDENCE.

A person having waterpipes under a street from a spring owned by him on one side to his mill on the other, by license from the city, does not acquire the right by the lapse of twenty-one years. His possession is not adverse, nor is it open and notorious—nor can a grant be presumed of what the city had no power to grant: *Elaster v. Springfield*, 49 O. S. 82, IV Longsdorf's Notes, 442. See also LIMITATIONS, STATUTE OF.

Owners of unpatented entries and surveys in the Virginia Military District, who have made no claim for twenty-one years, will not

be aided in equity against those in possession. Lapse of time equal to the statute raises a presumption of grant from the owners to the possessors: *Morrison v. Balkins*, 6 Dec. Rep. 882, 8 Am. L. Rec. 577.

Use of a right of way over another's land for ingress or egress, with his knowledge and without hindrance, is of itself adverse and will ripen into a right by prescription in twenty-one years: *Pavey v. Vance*, 56 O. S. 162, IV Longsdorf's Notes, 686.

IV. ORAL GRANT.

One who by parol grants or promises a right of way between the lots of the parties to reach the rear thereof, in reliance on which the promisee adjusts the erection of his building thereto is estopped, and equity will enjoin obstruction of such easement: *Kints v. Zwisler*, 7 O. N. P. 15, 9 O. D. (N.P.) 145.

V. CONSTRUCTION AND EFFECT.

Grants and licenses which are doubtful in their scope are always construed most favorably toward those who seek to protect property rights from invasion: *Chestnut v. Railway*, 15 O. D. (N.P.) 336.

To constitute a legislative contract or grant the statute must be clear and certain, and clearly show such intent. It can not be inferred nor rest in implication: *Newton v. Commissioners*, 26 O. S. 618, III Longsdorf's Notes, 334.

A grant, by federal statute, vesting title in the legislature of Ohio is a grant to the state itself: *Trustees v. Campbell*, 16 O. S. 11, II Longsdorf's Notes, 754.

A grant of land by the United States to Ohio for the Black Swamp road does not pass tracts already sold, but not forfeited for nonpayment at the time of the grant: *Oreps v. Wilkinson*, 9 O. 200, I Longsdorf's Notes, 477.

An ordinance, under which a branch railroad track is laid in an unfinished street, such as the Eggleston avenue connection track in Cincinnati, if ambiguous, as authorizing it only to assist in making the street or for general use, is not necessarily to be construed strictly against granting a franchise, but construction by conduct applies to municipal contracts, as by later ordinances and resolutions recognizing the track as one for general use, though some of them were adopted without the recommendation of the board of public works. The consent to the track is not revocable, but the right to regulate its use continues: *Railway Co. v. Cincinnati*, 9 Dec. Rep. 695, 16 Bull. 367 [affirmed, without opinion, by

supreme court, *Cincinnati v. Railway Co.*, 24 Bull. 416].

Meander lines in surveying fractional parts of public lands bordering navigable waters are ordinarily run not as boundaries of the tract, but to define the sinuosities of the bank and to ascertain the quantity of land to be paid for by the purchaser. But if the survey notes and plat show that a meander line was run as the border or boundary between fractional sections and a marsh, and that the sold ground between the marsh and a lake was surveyed as an island, with separate acreage, marked by township and not by section, the first-named line is the boundary of the marsh. The fractional section does not include the part surveyed as an island: *James v. Howell*, 41 O. S. 696, IV Longsdorf's Notes, 83. See also **BOUNDARIES**.

A grant of a thing will include whatever the grantor has power to convey, which is reasonably necessary to the enjoyment of the thing granted. Therefore, where the grantor of lands upon which he had constructed a house, sold the same and divided the land by metes and bounds, so that the eaves of the house projected over the adjoining lot, and subsequently constructed another house so that the eaves of the former extended under the eaves of the latter, the relative positions of which are open and visible, the projection of the eaves of the former is an appurtenance upon the premises of the latter at the time the grantor was the owner of both properties, and passed with the deeds, so that the purchaser of the latter took with the burdens and easements then existing: *Allen v. Lewis*, 12 O. D. (N. P.) 81. See also **EASEMENT**.

Where the state grants to a city a canal for street purposes and afterwards conveys to the city all its rights in such land, the latter deed gives the city an ownership discharged from any easement in the public and it can sell the land: *Paige v. Cherry*, 17 O. C. C. 579, 9 O. C. D. 364 [affirmed, without opinion, *Paige v. Cherry*, 52 O. S. 644]. See also **CANALS**.

The grant by Kentucky and Tennessee to Cincinnati of the right to construct a railroad through those states and valuable and necessary franchises, created no property right in those states to the railroad, and does not require their consent to authorize its sale by the city: *Cincinnati v. Dexter*, 55 O. S. 93, IV Longsdorf's Notes, 654. See also **MUNICIPAL CORPORATIONS**.

A grant by a city of the right to put a street railroad in a street is strictly construed, and a doubt is fatal. The words "and all necessary sidetracks, curves, switches, and other appliances," mean appliances of

the same kind as sidetracks, etc., and will not include a transfer house in the middle of the street to shelter passengers for transfer, and so although the city allowed all the company's lines to centre there: *Transit Co. v. Hamilton*, 1 O. N. P. 366, 4 O. D. (N.P.) 10. See also **STREET RAILWAYS AND INTERURBAN RAILWAYS**.

The statute authorizing contracts with railroads for the use of streets did not intend to surrender the street to the railroad, and deprive the public of the same further than necessary. Streets are held in trust for the public, and if they can be used both by railroad and the city, the city can grant only a use in common with the public, and a grant of such use as the railroad should deem necessary means such use as is actually necessary, with due regard to public convenience, and the city will not be enjoined from repairing a crossing of an intersecting street: *Railway Co. v. Elyria*, 14 O. C. C. 48, 7 O. C. D. 312. See also **RAILROADS**.

If a park is donated to a city for park purposes and forbidding all other purposes, the city has no power to grant a street railroad route through it, for this is a grant of a private right and not a park purpose: *Railway Co. v. Barriss*, 33 Bull. 314 [without opinion in the supreme court].

An ordinance granting the right to put pneumatic tubes for carrying packages in the streets is unreasonable and void where by reason of no limit as to time it may be perpetual, and by reason of not providing for use by other companies it may be exclusive, and where it reserves no right to regulate charges to patrons, nor fixes any maximum charge, and does not prescribe the number, size or material of the conduits: *Ampf v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394. See also **MUNICIPAL CORPORATIONS**.

Where a city ordinance granted a right to lay pipes in streets, provided a bond were first given to the approval of a board and the city solicitor, and that work shall begin in a year from the taking effect of the ordinance or it shall be void, and the city solicitor enjoins, and the case is not dismissed until a year has elapsed, and then the bond tendered is refused on the ground of time, it was held that the conditions will be regarded as subsequent unless clearly appearing to be precedent; that the pendency of the action may excuse the delay, and postpones the ordinance taking effect; and that mandamus to compel action on the bond will lie: *State, ex rel., v. Boyce*, 43 O. S. 46, IV Longsdorf's Notes, 145 [reversing *State, ex rel., v. Boyce*, 9 Dec. Rep. 165, 11 Bull. 131].

The congressional grant of 500,000 acres to states for internal improvement, can not

be converted into school lands by the states without consent of congress. The insertion of a clause to that effect in the constitution of the state (Kansas), and the then admission of such state into the Union, is not a repeal of the act of congress, and does not disqualify the state to grant such land for internal improvement purposes: *King v. Railroad Co.*, 8 Dec. Rep. 187, 6 Bull. 213 [affirming *Railroad v. King*, 4 Dec. Rep. 325, 1 Clev. L. Rep. 313.

A grant to the state by the United States for canal construction, of 500,000 acres, to be selected by the state, is a present grant; the methods of selection are directory and not precedent. A subsequent patent by the United States to a person of part of the land selected by the state, but not in the precise statutory mode, if he have notice of the selection, can not hold against a buyer from the state. The patent did not preclude inquiry into prior equities and an imperfect execution by the state of its power to grant could be perfected by the courts or legislature, and a third person could not intentionally defeat this right. The grant by the state and confirmation by congress of the selection raises a presumption of the sufficiency of the selection to give the grantee an equity: *Strong v. Lehmer*, 10 O. S. 93, 11 Longsdorf's Notes, 414.

VI. WHO MAY MAKE GRANT.

A city is trustee of streets for the use of the public, and, hence, can not validate a nuisance nor grant rights inconsistent with public needs. Accordingly, a license to maintain a private pipe across it under ground must be revocable at will: *Elster v. Springfield*, 49 O. S. 82, IV Longsdorf's Notes, 442.

An *ultra vires* grant by a city to a corporation, such as the right to extend a street railroad, can be made valid by a retroactive statute, giving each power if the defect of power is one that could have been removed by prior enactment: *Railway Co. v. Carthage*, 18 O. C. C. 216, 8 O. C. D. 833. See also MUNICIPAL CORPORATIONS.

VII. TO WHOM GRANT MAY BE MADE.

A grant to one not capable of receiving it is void, as to one not *in esse*, or to the commissioners of a county thereafter to be elected, or to the inhabitants of a town not yet incorporated: *Sloane v. McConahy*, 4 O. 157, I Longsdorf's Notes, 214.

A contract with a dowress, who grants a right of way for a toll road, that she and her children, who own the fee, and their descendants can travel over the tract free of toll inures only to descendants capable of ascertainment and whose interests are defi-

nite. Children of the third generation are not privy to the contract, and no person can enforce a promise to another unless he was a privy: *Turpin v. Pike Co.*, 7 O. N. P. 12, 9 O. D. (N.P.) 68.

One easement can not be imposed upon another easement. A grant to a toll road company, not in fee but merely of a right of way, reserving a right in the grantor and her descendants to pass along the tract without paying toll, does not run with the land, for she could not reserve a right of way in the right of way different from the public, and the privilege of passing can not be reserved to more remote descendants than the present owners: *Turpin v. Pike Co.*, 7 O. N. P. 12, 9 O. D. (N.P.) 668.

VIII. TERMINATION.

A telephone company after expiration of a ten-years' grant by a city to occupy the streets may be ousted therefrom by *quo warranto*. Its right to occupy the streets is conditioned on its agreeing with the authorities as to the mode of use, or, failing that, by direction of the probate court. Such right is dependent on such agreement or direction and terminates with its expiration: *State, ex rel., v. Telephone Co.*, 11 O. C. C. 55, 5 O. C. D. 311. See also MUNICIPAL CORPORATIONS.

Delay of forty-three years by a holder of a certificate of purchase of state lands, without possession and without excuse, to perfect title by getting a deed, prevents denying the title of a *bona fide* buyer for full value from a subsequent grantee of the state, by showing the recitals in the latter's deed from the state to be untrue, in his suit to quiet title: *Bridenbaugh v. King*, 42 O. S. 410, IV Longsdorf's Notes, 120. See also EQUITY.

IX. REMEDIES.

The obligation of a street railroad to operate an extension of its road arises from its grant from the city or county, which is a contract, and not a trust, and hence can not be enforced by mandamus. The remedy under G. C., § 4311, is adequate: *State, ex rel., v. Railway Co.*, 15 O. C. C. 200, 8 O. C. D. 474. See also MANDAMUS.

GRATUITIES.

While profits made by an agent belong to his principal, yet gratuities to the agent, for individual benefits to others from his services to his principal—as where an insurance agent adjusts a loss for his principal, and other companies using the adjustment make him a present—where neither he nor the principal had a legal claim thereto, are not

profits, and are his: *Insurance Co. v. Church*, 21 O. S. 492, III Longadorf's Notes, 39. See also AGENCY.

GRATUITOUS BAILMENT.

See BAILMENT.

GRAVEL-ROADS.

See ROADS.

GRAVE-ROBBING.

For grave-robbing, see CORPSE.

GRAVESTONE.

For the expense of erecting a gravestone see EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

GRAVEYARDS.

See CEMETERIES.

GREENBACKS.

Deposit of greenbacks having been made taxable by congress can not escape taxation for past years on the ground of ignorance that they were taxable: *Carpenter v. Lewis*, 6 O. N. P. 468, 9 O. D. (N.P.) 498.

Greenbacks deposited in bank, and certificates taken not promising return of the identical bills, become a mere debt, and the certificates are taxable: *Murch's Case*, 41 Bull. 320.

Greenbacks in bank, prior to their being made taxable by congress in 1894, were taxable as a credit unless deposited under instructions to keep them separate and return the identical bills: *Carpenter v. Lewis*, 6 O. N. P. 468, 9 O. D. (N.P.) 498. See also TAXATION.

GROG-SHOPS.

See INTOXICATING LIQUOR.

GROSS.

The word "gross" does not mean great, or big, or excessive, necessarily, but rather such a willful, flagrant and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act: *Rose v. Baxter*, 7 O. N. P. (N.S.) 132, 18 O. D. (N.P.) 658 [affirmed, without opinion, *Rose v. Baxter*, 81 O. S. 522].

GROSS IMMORALITY.

The expression "gross immorality" has acquired, through long use, a standard of interpretation and understanding that prevents its being longer subject to the charge of being indefinite: *Rose v. Baxter*, 7 O. N. P. (N.S.) 132, 18 O. D. (N.P.) 658 [affirmed, without opinion, *Rose v. Baxter*, 81 O. S. 522].

The provisions of the act establishing a state board of medical examiners which authorizes the board to revoke a certificate for "gross immorality" is not void for want of definiteness, or because what constitutes gross immorality is left to the caprice of individual members of the board: *Rose v. Baxter*, 7 O. N. P. (N.S.) 132, 18 O. D. (N.P.) 658 [affirmed, without opinion, *Rose v. Baxter*, 81 O. S. 522]. See also PHYSICIANS AND SURGEONS.

A physician who maintains two different offices under two different names and under circumstances which indicate an intention to perpetrate a fraud upon the public in his professional character is guilty of gross immorality within the meaning of the act establishing a state board of medical examiners, and an injunction against the revocation of his license will not lie: *Rose v. Baxter*, 7 O. N. P. (N.S.) 132, 18 O. D. (N.P.) 658 [affirmed, without opinion, *Rose v. Baxter*, 81 O. S. 522].

GROSS NEGLIGENCE OF DUTY.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

GROSS NEGLIGENCE.

See NEGLIGENCE.

GROSS RECEIPTS.

The words "gross receipts," as used in the act providing for the collection from public utility corporations of an excise tax and penalties (see G. C., §§ 5497 and 5499; repealed, 101 v. 399), embraces only such receipts as are the property of the corporation making the payment, and do not include that part of the proceeds from a joint enterprise which have been collected and are still in hand but which belong to another, and must be paid over to such other by such corporation as agent: *State v. Gas Co.*, 12 O. N. P. (N.S.) 570, 22 O. D. (N.P.) 412. See also TAXATION.

GROUND OF ACTION.

See ACTIONS and cross references thereunder; PLEADINGS.

GROUND-RENT.

A "ground rent" being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands within the meaning of G. C., § 8578, relating to descent and distribution: *McCammon v. Cooper*, 69 O. S. 366, IV Longsdorf's Notes, 959.

Where the owner of such ground rent dies intestate and without issue, the right descends under the provisions of the sections of the general code which control the descent of real estate; and is not within the purview of G. C., § 8578, which relates to personal property: *McCammon v. Cooper*, 69 O. S. 366, IV Longsdorf's Notes, 959. See also DESCENT AND DISTRIBUTION.

GROUNDS OF ATTACHMENT.

See ATTACHMENT.

GROUNDS OF DIVORCE.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

GROUSE.

See FISH AND GAME.

GROWING CROPS.

See EMBLEMENTS and cross references thereunder.

GUARANTY.

Scope Note.—Includes definition; promises to answer for the payment of a debt or performance of an obligation by another; liability for such promise; consideration; form; classes of; construction; assignment; notice; discharge; parties; pleading and evidence. Excludes guaranties by particular classes of persons; suretyship; partners; principal's liability for acts of agent; and requirements of statute of frauds.

Cross References.

For the effect of the statute of frauds upon oral guaranties, see FRAUDS, STATUTE OF.
 For questions of fraud in contracts of guaranty, see FRAUD AND DECEIT.
 For contracts of suretyship, see SURETYSHIP.
 For questions arising upon negotiable bonds, see BONDS, NEGOTIABLE.
 For questions arising from negotiable instruments, see NEGOTIABLE INSTRUMENTS.
 For questions of alteration, see ALTERATION OF INSTRUMENTS.
 For the nature of partnership liabilities, see PARTNERSHIP.
 For the question of parties, see also PARTIES.
 For the effect of extension of time, see also SURETYSHIP.
 For the principal's liability for the act of his agent, see AGENCY.

ANALYTICAL OUTLINE.

- I. Definition, 8355.
- II. Guaranty Distinguished from Other Contracts, 8355.
- III. Guarantor, 8356.
- IV. Who May Take Advantage of Guaranty, 8357.
- V. Consideration, 8359.
- VI. Form of Contract, 8360.
- VII. Classes of Guaranty, 8361.
- VIII. Construction, 8362.
- IX. Assignment, 8365.
- X. Notice, 8365.
 - A. Of acceptance, 8365.
 - B. Of breach, 8367.
- XI. Discharge, 8368.
- XII. Parties, 8369.
- XIII. Pleading, 8370.
- XIV. Evidence, 8371.
- XV. Judgment, 8372.

I. DEFINITION.

A guaranty, in its strict legal and commercial sense, is said to be "an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same": *Sturges v. Bank*, 11 O. S. 153, II Longsdorf's Notes, 488.

II. GUARANTY DISTINGUISHED FROM OTHER CONTRACTS.

"Originally, the words warranty and guaranty were the same, the letter g, of the Norman-French, being convertible with the w of the German and English, as in the name William or Guillaume. They are now sometimes used indiscriminately; but in general, warranty is applied to a contract as to the title, quality or quantity of a thing sold; and guaranty is held to be the contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party." 1 Parsons on Contracts, 493. Each is alike an undertaking by one party to another to indemnify or make good the party assured against some possible default or defect, in the contemplation of the parties. A guaranty is, perhaps, always understood, in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in future. The term warranty on the other hand is generally understood as an absolute undertaking *in presenti*, as well as *in futuro*, against the defect, or for the quantity or quality contemplated by the parties in the subject matter of the contract. But this contract of warranty, whether qualified or collateral, as applied to the performance of a duty, payment of a debt, or happening of an event, when denominated a guaranty; or unqualified and absolute, as in cases of warranty when applied to the quality or title of things, has alike, in either case, all the characteristics of a contract or undertaking. It must be supported by a sufficient consideration; it must appear to be an agreement of the minds of the two contracting parties to the proposition constituting the contract. The same remark is also equally applicable to each, that no particular form of words is required to express the contract. Any form of words expressing an undertaking upon consideration to insure the other party against the nonpayment or delinquency of a third party, may constitute a guaranty. And any affirmation or words sustained by a consideration, showing an undertaking that the quality or title of the thing sold is such as represented may amount to a warranty. The

consideration in each case may arise out of the transaction. In the case of a guaranty that it was operative to cause the negotiation or acceptance of the paper; in that of a warranty that the affirmation or undertaking was operative in causing the purchase, would in each case be a sufficient consideration: *Sturges v. Bank*, 11 O. S. 153, II Longsdorf's Notes, 488.

The words "I give A the liberty of using my name, if of use to him, to the amount of \$1,500" is not a guaranty of the amount, but authorizes A to sign the maker's name to a note for the loan: *Palmer v. Yarrington*, 1 O. S. 253, I Longsdorf's Notes, 971. See also AGENCY.

The promise of a party to pay certain claims for work being done for a partnership firm, on the faith of which the work is completed, does not constitute such party a partner of the firm so that he can be held as such, on such claims, but such promise is a contract of guaranty: *Russell v. Fenner*, 21 O. C. C. 527, 11 O. C. D. 754. See also PARTNERSHIP.

Where in an action seeking to charge defendants as indorsers of a note, the copy of the note shows the names of defendants as entire strangers on its back, and it does not appear from the petition that the name was put on the note at the time of its execution or in pursuance of any agreement to become responsible, such defendants are guarantors and not indorsers: *Conkey Co. v. Skillman*, 11 O. D. (N.P.) 812.

III. GUARANTOR.

A produce commission firm sent out a traveling agent to solicit a consignment of peaches on a strictly commission basis; being unable to obtain fruit at a certain town without guaranteeing it should net the shipper a certain price, he gave such guarantee and fruit was shipped thereunder, but without notice thereof to the consignee and without inquiry on the part of the shipper as to the agent's authority to make the guarantee; in the absence of any evidence showing a usage or custom of the produce commission business to make such guarantees. It was held that the guarantee was not within the scope of the agent's authority, and his principal was not bound by it: *Produce Co. v. Meyers*, 4 O. C. C. (N.S.) 264, 16 O. C. D. 165. See also AGENCY.

An agreement to protect the title or indemnify the purchaser against incumbrances, orally made by the executor, does not bind the estate without authority from the will or court: *Arnold v. Donaldson*, 46 O. S. 73, IV Longsdorf's Notes, 313. See also EXECUTORS,

ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

A guaranty by a national bank of the payment of bonds which it is selling is *ultra vires* if it does not own them. But a contract by it to repurchase them at the same price could on demand and tender of the bonds have been enforced: *Bank v. Shaeffer*, 16 O. C. C. 457, 9 O. C. D. 182. See also **BANKS AND BANKING.**

A wife may by express agreement charge her separate estate as guarantor for her husband: *Arnold v. Wilder*, 6 Dec. Rep. 819, 8 Am. L. Rec. 348.

Where a trust company as trustee under a deed of trust or mortgage certifies that "this bond is one of a series of bonds mentioned in the mortgage or deed of trust within referred to," well knowing that none of the property described in such mortgage belongs to the mortgagor, and redelivers to the mortgagor the bond thus certified without restriction on its use, it becomes liable to a pledgee of such bond who relied upon such certificate to his prejudice, regardless of the motive in making such certificate: *Dreifus v. Bank*, 13 O. C. C. (N.S.) 441, 23 O. C. D. 46. See also **BONDS, NEGOTIABLE.**

If the maker is already insolvent and without property subject to execution, it is not necessary to get judgment and execution returned "no property" to hold the guarantor of collectibility. Nor need a mortgage security be first exhausted, for that is an independent contract. It will, however, inure to the guarantor by substitution: *Stone v. Rockefeller*, 29 O. S. 625, III Longsdorf's Notes, 505.

The guaranty of the payment of the debt of another made at the time the debt is contracted, does not constitute the guarantor and the principal debtor joint promisors: *Deming v. College*, 31 O. S. 41, III Longsdorf's Notes, 561.

IV. WHO MAY TAKE ADVANTAGE OF GUARANTY.

A letter to B, stating that the writer will be responsible for all goods bought by C in that city, will not inure to persons who sold goods to C merely having heard of the letter. The just presumption is that B alone could say who should sell to C and what quantity. Anyone selling to him without consulting B, either sells on C's credit alone or is guilty of bad faith: *McClung v. Means*, 4 O. 196, I Longsdorf's Notes, 216.

A letter of credit to A, stating that B desires to buy goods and that the writer "will be responsible to the amount of two thousand dollars for goods delivered him," is special to A, and no other person selling

goods to B on the faith of it can hold the writer: *Taylor v. Wetmore*, 10 O. 490, I Longsdorf's Notes, 531.

A letter thus, "Now, John, if you can get that draft from Hugh M, I will be responsible, and F will pay them," meaning a particular draft belonging to Rudolph M, and not to Hugh M, for which John had given his note, binds the writer to Rudolph, he having given up the draft in reliance on it: *Dorland v. Mulhollan*, 10 O. S. 192, II Longsdorf's Notes, 428.

A, to induce a favorable vote of electors for a township subscription to railroad stock, agreed to indemnify the township against loss by taking the stock and paying the township bonds to the holders, the bonds having been adjudged to be void. It was held that the indemnity was to protect the township alone and did not inure to the bondholders. The railroad company can not claim that the township was merely the agent of A. The township not having to pay the bonds, the indemnity can not be resorted to. A is not estopped to deny the validity of the bonds for he is not in privity with the bondholders: *Hopple v. Hipple*, 33 O. S. 116, III Longsdorf's Notes, 660.

The guaranty of a horse as sound and a good family horse is not available to the purchaser as a basis for damages resulting from his running away, where the purchaser from personal experience became aware of the vicious disposition of the horse before the runaway occurred: *Degenhardt v. Billings*, 13 O. C. C. (N.S.) 414, 23 O. C. D. 232.

If A falsely represents another as worthy of credit in a letter to B, other persons seeing and relying on the letter can not hold A: *McCracken v. West*, 17 O. 16, I Longsdorf's Notes, 792. See also **FRAUD AND DECEIT.**

A written guarantee given to the lessor at the time of making a lease passes to one purchasing the property from the lessor: *Becker v. Shoemaker*, 7 O. N. P. (N.S.) 272, 19 O. D. (N.P.) 184 [affirming *Shoemaker v. Becker*, 16 O. D. (N.P.) 82, 3 O. L. R. 14, 1 Hosea, 234; affirmed, without opinion, *Becker v. Shoemaker*, 81 O. S. 532]. See also **LANDLORD AND TENANT.**

A, at New Orleans, in order to enable B to buy and ship goods to him, wrote B a letter, promising to accept and pay bills on him, accompanied by bills of lading, to the extent of ten thousand dollars; and up to July 1st, on the faith of this letter, the plaintiff bank made successive advances to B on such drafts, and A paid them, but refused to pay the last two, claiming to hold the shipments against a balance due him from B. It was held that the bank could sue

A on his promise to accept. The objection of want of privity is nothing, for the letter was intended for any one who might act upon it. Notice by the bank to A of its acceptance of the letter of credit, or of the drafts drawn under it, was not necessary, for this is not a guaranty by A, but an original substantive promise: *Lonsdale v. Bank*, 18 O. 126.

Parties who buy up claims against a partnership for work, upon the faith of a promise made by a third party, after the completion of such work, that she would pay the claim can not hold her upon such promise as a partner: *Russell v. Fenner*, 21 O. C. C. 527, 11 O. C. D. 754. See also PARTNERSHIP.

V. CONSIDERATION.

Past transactions can be covered by a guaranty, though there is no consideration for it, as to them alone, if it also covers and is supported by the consideration arising out of future dealings: *Smith v. Butler*, 17 O. C. C. 68, 9 O. C. D. 645.

Where A agreed to buy from B three thousand bicycle pedals, to be furnished during the season, and after the contract is made, but before delivery of any of them C guarantees to B payment by A, the guaranty is not supported by any consideration, for B was already obliged by contract to furnish them: *Smith v. Moore Co.*, 19 O. C. C. 617, 9 O. C. D. 751.

Where the payee of a note of seven hundred and fifty dollars left her dividends of one hundred and fifty dollars from the maker's estate in bankruptcy uncollected, on the promise of the latter's wife to protect the claim, the wife's indorsement on the note of a guaranty of it, and her subsequent signature with her husband on a new note in place of the original, with reduction of interest, are upon sufficient consideration: *Cahill v. Smith*, 9 O. C. C. 4, 6 O. C. D. 74.

An answer stating that the guaranty of profit on a purchase of land is without consideration is good, provided the detailed statement is not inconsistent with it. Stating that the guaranty was required after the conveyance was made means after delivery as well as execution; accordingly, the original transaction was complete and could not be a consideration: *McMillan v. Burkham*, 7 Dec. Rep. 101, 1 Bull. 111. See also CONTRACTS.

The writer of a letter of credit is not liable on an implied acceptance of drafts taken on the faith of it, unless taken for a valuable consideration. A promise to have them discounted, and to take up notes on which the promisor is liable as indorser, is not a valuable consideration: *Sherwin v.*

Brigham, 39 O. S. 137, III Longsdorf's Notes 1013 [affirming *Sherwin v. Brigham*, 4 Dec. Rep. 94, 1 Clev. L. Rep. 22]. See also NEGOTIABLE INSTRUMENTS.

VI. FORM OF CONTRACT.

A guaranty of any debt A may owe does not cover his liability as surety for A & Co.: *Donley v. Bank*, 40 O. S. 47, IV Longsdorf's Notes, 4.

A guaranty of the payment of the monthly estimates for building a railroad will include work done during the last month, though the final estimate included all the percentages held back during preceding months and all that was due, and if the last month's work can be computed from the final estimate, it may be so estimated, and it is error to withhold such final estimate from the jury: *Rutherford v. Brachman*, 40 O. S. 604, IV Longsdorf's Notes, 44 [reversing *Rutherford v. Brachman*, 8 Dec. Rep. 109, 5 Bull. 696].

A sale of notes by one bank to another on the former's statement, "we know them to be good," is a guaranty of collectibility at maturity, and the plaintiff can recover on the guaranty after due diligence to collect the note: *Bank v. Bank*, 45 O. S. 236, IV Longsdorf's Notes, 272 [affirming *Bank v. Bank*, 6 Dec. Rep. 1229, 13 Am. L. Rec. 748].

A desired to buy a certain bill of exchange from a bank and sent on the money. B, its cashier, sent them a different bill of exchange, writing that it was perfectly safe, and A replied that this was satisfactory. It was held that B, the cashier, acted as agent of the bank. His letter amounted to a guaranty by the bank that the bill was collectible: *Sturges v. Bank*, 11 O. S. 153, II Longsdorf's Notes, 488.

An assignor of a note and mortgage guarantees the collectibility of the note. The mortgage security must be exhausted before he can be sued on the guaranty: *Timmerman v. Howell*, 2 O. C. C. 27, 1 O. C. D. 342.

A stipulation that a surety or his mortgage shall not be resorted to until the principal debtor is exhausted is satisfied if he has no property subject to execution. The creditor is not bound to pursue equities or marshal prior liens: *Ribley v. Davis*, 24 O. S. 114, III Longsdorf's Notes, 164.

A written agreement by one for whom a building is constructed that the lumber company might charge to his account all lumber delivered to the contractor for use in constructing a building for the owner, on the basis of an estimate of a certain date amounting to a certain sum of money, does not limit the liability of such promisor to the amount therein named, since the word

"estimate" imports an approximation merely: *Mills-Carleton v. Huberty*, 84 O. S. 81.

VII. CLASSES OF GUARANTY.

Unless the contract of guaranty admits of no other construction than that it is a continuing guaranty, the presumption is that it is not so intended: *Bank of Commerce v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447 [following *Birdsall v. Heacock*, 32 O. S. 177, III Longsdorf's Notes, 625; distinguishing *Iron Co. v. Keynes*, 56 O. S. 501, IV Longsdorf's Notes, 696].

An unlimited guaranty may be defined as one that is unlimited, both as to time and amount, and a continuing guaranty is one that is not limited in time or to a particular transaction or to specific transactions, but is operative until revoked: *Bank v. Cole*, 83 O. S. 50 [affirming, on rehearing, *Bank v. Newton*, 82 O. S. 444, which affirmed, without opinion, *Cole v. Bank*, 15 O. C. C. (N.S.) 315].

A guaranty by a wife for goods to be sold to her husband on open account, not exceeding five hundred dollars, and shipment of cigars upon his order, the object of the guaranty being to enable the buyer to embark in business, is a continuing guaranty: *Rockford v. Rothschild*, 16 O. C. C. 287, 9 O. C. D. 47.

A guaranty by stockholders individually for the benefit of a corporation in these words: "We * * * hereby jointly and severally guarantee to you the payment of any and all sums of money that may be loaned by you to * * * ; providing said loan shall not exceed in the aggregate three thousand dollars," is not a continuing guaranty, but is restricted to the first three thousand dollars loaned: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447.

While stockholders who are guarantors by soliciting further loans for the corporation may have estopped themselves from claiming to have been totally relieved in consequence of credit having been given beyond the sum named, such acts do not of themselves extend the terms of the original guaranty to cover the balances due upon credits given beyond the amount named: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447.

"Send my son the lumber he asks for—it will be all right," is a guaranty of punctual payment, but not a continuing guaranty: *Birdsall v. Heacock*, 32 O. S. 177, III Longsdorf's Notes, 625.

The tendency is against construing a guaranty as continuing, unless such intent is clear beyond reasonable doubt: *Birdsall v.*

Heacock, 32 O. S. 177, III Longsdorf's Notes, 625.

Thus, "send my son the lumber he asks for and it will be all right," is not a continuing guaranty, and does not apply to subsequent purchases: *Birdsall v. Heacock*, 32 O. S. 177, III Longsdorf's Notes, 625.

A guaranty thus, "The bearer, Mr. B, is visiting your city buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guarantee," is not a continuing guaranty: *Morgan v. Boyer*, 39 O. S. 324, III Longsdorf's Notes, 1030.

A writing that if plaintiffs would give credit to B, the signer will pledge her estate to the extent of and for the payment of one thousand dollars, is not a continuing guaranty, but ends when one thousand dollars worth has been bought: *Arnold v. Wilder*, 6 Dec. Rep. 819, 8 Am. L. Rec. 348.

"Please let A have such goods as he may purchase in person or order from time to time to amount of five hundred dollars, and I hereby guarantee the prompt payment of same," is a continuing guaranty: *Wolf v. Shillito*, 9 Dec. Rep. 367, 12 Bull. 31.

Where the debtor is totally insolvent and all its property is held by the sheriff under execution and a receiver is in possession, a guarantee of "ultimate payment" of a debt may be sued upon: *Iron Co. v. Keynes*, 56 O. S. 501, IV Longsdorf's Notes, 696.

A corporation, notwithstanding the execution of a guaranty to a certain bank to pay any and all loans made by it up to a stipulated amount, has the right to make other loans from such bank and discharge them without reference to loans for which its guarantors had become bound. Hence, payments upon the later loans are not necessarily, or as a matter of law, required to be credited upon the loans guaranteed: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447 [distinguishing *Birdsall v. Heacock*, 32 O. S. 177, III Longsdorf's Notes, 625]. See also PAYMENT.

VIII. CONSTRUCTION.

Construction of a guaranty should be to ascertain the intention of the parties, and, as in other contracts, the surrounding circumstances may be regarded: *Iron Co. v. Keynes*, 56 O. S. 501, IV Longsdorf's Notes, 696.

Clauses in apparent conflict must be construed so as to effect the parties' intention as gathered from the whole instrument, and if the object to be accomplished is declared therein, the clause contributing most essentially thereto will control. Therefore, a guaranty by the owner of property to a lum-

ber company to pay for all lumber furnished to a contractor for a building thereon, to be charged on the basis of the company's estimate of \$3,844.00, does not limit the guarantor's liability to that amount: *Mills-Carleton Co. v. Huberty*, 84 O. S. 81. See also CONTRACTS.

If language used in a guaranty is equally capable of being construed as a limited or continuing guaranty, the construction which treats it as a limited guaranty will be preferred: *Birdsall v. Heacock*, 32 O. S. 177, III Longsdorf's Notes, 625; *Morgan v. Boyer*, 39 O. S. 324, III Longsdorf's Notes, 1030; *Iron Co. v. Keynes*, 56 O. S. 501, IV Longsdorf's Notes, 696; *Bank v. Cole*, 83 O. S. 50 [affirming, on rehearing, *Bank v. Newton*, 82 O. S. 444, which affirmed, without opinion, *Cole v. Bank*, 15 O. C. C. (N.S.) 315].

The rule construing language against the promisor is not applied to a guarantor. A guarantor, like a surety, is bound only by the express terms of his contract. The language is to be taken in its plain and ordinary sense, in the light of the surroundings and situation and object of the parties, and the intention adhered to: *Morgan v. Boyer*, 39 O. S. 324, III Longsdorf's Notes, 1030.

A contract of guaranty is not subject to the rule that a promise will be construed against the promisor, and liability will not by construction be enlarged beyond the fair import of its terms, but in order to arrive at the mutual intention of the parties in the language used, resort may be had to the circumstances of the transaction and the situation in which the parties stood: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633].

Evidence of surrounding circumstances is competent in order to arrive at the intention of the parties if consistent with the meaning of the words of the written contract: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633].

In construing a contract of guaranty evidence is admissible to show that the guarantor was the president of the lumber company whose debt he guaranteed; and that he was personally familiar with the entire transaction out of which the debt arose: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633].

The words of the guarantor are to be taken most strongly against him: *Stone v. Rockefeller*, 29 O. S. 625, III Longsdorf's Notes, 505.

A contract of guaranty, like any other contract, will be given that construction and

effect which best accords with the intention of the parties as manifested by the terms thereof, considered in connection with the subject-matter to which it relates, and the circumstances accompanying the transaction: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447.

Guarantors should be held to every obligation reasonably and fairly embraced within their contracts, but the guaranty should not be strained beyond its obvious meaning for the purpose of enlarging the liability of guarantors: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447.

Subsequent transactions not amounting to a modification of the contract, and not part of the concomitant circumstances, can not be considered as a part of the circumstances under consideration in formulating the terms of the contract, and accordingly, can not be looked to for the purpose of ascertaining the sense in which or the intent with which such terms were used; but subsequent transactions under or in pursuance of the contract, or with the contract in view, may be looked to for the purpose of discerning the interpretation the parties have put upon its doubtful provisions: *Bank v. Garn*, 3 O. C. C. (N.S.) 428, 13 O. C. D. 447.

Where the directors of a corporation guarantee the ultimate payment of material purchased by it from plaintiff during the ensuing year, this should be construed to authorize plaintiff to give the corporation a reasonable credit, though that be for a longer time than had been customary with it, and a sale on six months' time, taking notes therefor, though prior dealings had been four months, is not an unreasonable extension of time, especially considering that the guarantors were, as directors, pecuniarily interested and were chargeable with general superintendence over the management: *Iron Co. v. Keynes*, 56 O. S. 501, IV Longsdorf's Notes, 696.

Where A agreed to buy from B three thousand bicycle pedals in a certain season, and afterwards C guaranteed to B that A would pay for all bicycle supplies furnished that season, the guaranty covers supplies not covered by the contract: *Smith v. Moore Co.*, 19 O. C. C. 617, 9 O. C. D. 751.

A guaranty of collectibility or goodness of a debt means by ordinary process of law: *Bashford v. Shaw*, 4 O. S. 263, II Longsdorf's Notes, 91; *Stone v. Rockefeller*, 29 O. S. 625, III Longsdorf's Notes, 505.

The guarantor of a promissory note secured by warehouse receipts, can not rely on the quantity and quality of the property set out in the receipts, in such a manner as to escape liability to the promisee for a deficiency in the actual amount found to be

on hand, when the guaranty is for loans "for which warehouse receipts are taken as collateral security": *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. (N.S.) 303, 22 O. C. D. 633].

A guaranty to save another from "liability" on debts—as here to an outgoing partner—unlike saving harmless or from damages, may be sued upon when judgment has been had against the indemnified party on a liability, though he has not paid it, and the creditor may intervene in the action so as to obtain the fruits of the action: *Pratt v. Walworth*, 15 O. C. C. 412, 8 O. C. D. 472 [affirmed, without opinion, *Walworth v. Pratt*, 62 O. S. 639]. See also SURETY.

An action against one who guaranteed a lessee's performance and payments, the lessee having abandoned, must be for all damages. Successive actions as for rent do not lie. Accordingly, it is error to limit plaintiff's recovery to rent then due: *Wrubel v. Muth*, 11 O. C. C. 559, 5 O. C. D. 173. See also CONTRACTS.

Where a corporation, engaged in erecting a building, guarantees to a dealer in brick the financial responsibility of the contractor to whom the brickwork in said building is awarded, the guaranty is that the said contractor will pay for the brick sold to him for use in said building, and not merely that said contractor is a financially responsible person: *Supply Co. v. Investment Co.*, 14 O. N. P. (N.S.) 383, 23 O. D. (N.P.) 474.

IX. ASSIGNMENT.

A guaranty to the buyer of bonds is assignable to subsequent buyers of the bonds as an incident thereto: *Bank v. Jones*, 16 O. S. 145, II Longsdorf's Notes, 764.

Whether a guaranty indorsed on a note is negotiable or not if it is general in its terms, not limited to any one, it will inure to any holder: *Bank v. Sewell*, 8 Dec. Rep. 210, 6 Bull. 288.

X. NOTICE.

A. OF ACCEPTANCE.

Notice of acceptance and intention to act under the guaranty is not necessary if the guaranty is absolute, but only when the instrument is in legal effect an offer or proposal, and thus requires mutual assent to become a contract: *Powers v. Bumcratz*, 12 O. S. 273, II Longsdorf's Notes, 561; *Wise v. Miller*, 45 O. S. 388, IV Longsdorf's Notes, 282.

The seller of goods on the faith of an absolute letter of credit need not give any notice to the writer of intention to act on it, nor that goods have been furnished:

Powers v. Bumcratz, 12 O. S. 273, II Longsdorf's Notes, 561 [overruling *Taylor v. Wetmore*, 10 O. 490, I Longsdorf's Notes, 531].

Stockholders' agreement to protect one of their number for indorsing paper of the corporation, executed by all at the same time, and delivered to a third person for their use with the intention that it be acted on, is not a mere proposal of guaranty, but an absolute contract of indemnity. The delivery is equivalent to a delivery by each signer to the others, and no further acceptance or notice of an intention to act under it is necessary: *Wise v. Miller*, 45 O. S. 388, IV Longsdorf's Notes, 282.

A guaranty to become responsible to A up to fifteen thousand dollars on any default of B to meet at maturity any engagement with A requires notice of acceptance and of the amount of advances: *Roots v. Jenifer*, 3 Dec. Rep. 214, 4 Gaz. 401.

Notice is not necessary where the matter does not properly lie more in the knowledge of one party than the other. Accordingly, a covenant that A will sell and account for all goods put into his hands by B for a year requires no notice of his failure to account: *Bush v. Critchfield*, 4 O. 103, I Longsdorf's Notes, 151.

A, at New Orleans, in order to enable B to buy and ship goods to him, wrote B a letter, promising to accept and pay bills on him, accompanied by bills of lading, to the extent of ten thousand dollars, and up to July 1st, on the faith of this letter the plaintiff bank made successive advances to B on such drafts, and A paid them, but refused to pay the last two, claiming to hold the shipments against a balance due him from B. It was held that the bank could sue A on his promise to accept. The objection of want of privity is nothing, for the letter was intended for any one who might act upon it. Notice by the bank to A of its acceptance of the letter of credit, or of the drafts drawn under it, was not necessary, for this is not a guaranty by A, but an original substantive promise: *Lonsdale v. Bank*, 18 O. 126, I Longsdorf's Notes, 840. See also NEGOTIABLE INSTRUMENTS.

Demand on the debtor and notice to the guarantor are necessary where the fact on which the latter's liability depends is peculiarly within the guarantee's knowledge, or depends on his option. *Contra*, if the guarantor knows, or is bound to know it, as if both parties have equal means of knowledge. If the guarantor is entitled to notice, want of it discharges him only if it has caused loss to him, and only to the extent of the loss. If the debtor was solvent and becomes insolvent before notice, the guarantor is discharged. But if he was insolvent ever since

the debt matured, notice is not necessary, for its omission causes no loss: *Bashford v. Shaw*, 4 O. S. 263, II Longsdorf's Notes, 91.

Notice of acceptance is not necessary of a guaranty for the payment of goods to be furnished on open account to the sum of five hundred dollars: *Rockford v. Rothschild*, 16 O. C. C. 287, 9 O. C. D. 47.

B. OF BREACH.

Stockholders promising to indemnify one who will indorse for the corporation are liable on such contract to the indorser until performance. A signer's notice that he revoked would be bound by no liability thereafter, but is not released after obligations have been incurred, nor because after such notice the indorsed paper was renewed: *Wise v. Miller*, 45 O. S. 388, IV Longsdorf's Notes, 282.

Stockholders being indirectly liable for debts of the corporation, their promise to indemnify one who will indorse its paper for mutual benefit makes his relation to them analogous to that of surety with corresponding rights and remedies: *Wise v. Miller*, 45 O. S. 388, IV Longsdorf's Notes, 282.

Guaranty of payment, unlike guaranty of collectibility, or payment after final process, is enforceable without demand and notice, or first suing the maker: *Bashford v. Shaw*, 4 O. S. 263, II Longsdorf's Notes, 91.

Where the holder of a note transfers it, thus, "I guarantee the payment of the within," etc., this is an unconditional guaranty, that is, not dependent on any contingency, and demand and notice are not necessary to make a *prima facie* case: *Clay v. Edgerton*, 19 O. S. 549, II Longsdorf's Notes, 968; *Kautzman v. Weirick*, 26 O. S. 330, III Longsdorf's Notes, 307; *Neil v. Trustees*, 31 O. S. 15, III Longsdorf's Notes, 559.

An indorsement on a note by a stranger, thus, "I obligate myself that this note shall be paid in three years," is not collateral but an original promise to pay, and no demand or notice is necessary: *Reed v. Evans*, 17 O. 128, I Longsdorf's Notes, 800; *contra, Greene v. Dodge*, 2 O. 430, I Longsdorf's Notes, 137.

Where strangers had indorsed a note in blank and afterwards there was written over the names, "We bind ourselves as security for the payment of the within note," this was held to be collateral and requiring demand and notice at maturity to hold the guarantors: *Greene v. Dodge*, 2 O. 430, I Longsdorf's Notes, 137.

A guaranty of collectibility or goodness of a debt requires pushing the collection to insolvency and also notice of non-collectibility before suing the guarantor: *Bashford v.*

Shaw, 4 O. S. 263, II Longsdorf's Notes, 91; *Wolfe v. Brown*, 5 O. S. 304, II Longsdorf's Notes, 188.

No demand and notice at maturity is necessary to charge a payee who indorsed a note over with a special guaranty to be responsible if due diligence to collect is used. He is only entitled to notice of the default on which his liability depends: *Forest v. Stewart*, 14 O. S. 246, II Longsdorf's Notes, 650.

The suit against the debtor and also the notice to the guarantor must be within a reasonable time, and the guarantor may show that he was injured by delay of notice: *Wolfe v. Brown*, 5 O. S. 304, II Longsdorf's Notes, 188.

If the terms of a letter of credit, promising to accept drafts, show that the drafts are to be discounted at a particular bank, a person taking them with notice that the bank has refused them can not recover: *Sherwin v. Brigham*, 39 O. S. 137, III Longsdorf's Notes, 1013 [affirming *Sherwin v. Brigham*, 4 Dec. Rep. 94, 1 Clev. L. Rep. 22]. See also NEGOTIABLE INSTRUMENTS.

XI. DISCHARGE.

Failing to sue within a reasonable time does not release if the guaranty does not prescribe any degree of diligence, and where the debtor's continued insolvency prevented the delay from entailing any loss: *Bashford v. Shaw*, 4 O. S. 263, II Longsdorf's Notes, 91.

A letter of credit to enable a person to buy goods to retail them implies that he shall have reasonable time to collect and pay over, and his giving a note evidencing his balance is not inconsistent with the guarantor's liability, and does not discharge him. Hence, if A agrees that C shall sell and account for goods entrusted to him by B, and B and C settle, and C gives his note at one day for the balance due, this does not discharge A: *Bush v. Critchfield*, 5 O. 109, I Longsdorf's Notes, 250.

Releasing a guarantor does not affect the principal debtor's liability: *Deming v. Trustees*, 31 O. S. 41, III Longsdorf's Notes, 561.

A guarantor is equally within the rule of release by extension as a surety: *Rutherford v. Brachman*, 40 O. S. 604, IV Longsdorf's Notes, 44; *Jones v. Turner*, 6 Dec. Rep. 1059, 10 Am. L. Rec. 31, 6 Bull. 231.

The principle that delay releases him only to the extent he is injured does not apply: *Jones v. Turner*, 6 Dec. Rep. 1059, 10 Am. L. Rec. 31, 6 Bull. 231. See also SURETY.

Sureties on a bond securing payment for goods sold on credit are released, where contrary to the terms of the bond payment for

the first car load was not required when the third car was ordered, and settlement was not insisted on as provided for on a specified date, and on the first day of each succeeding month thereafter, but time for payment was extended by permitting the amount due to increase from month to month: *Gerke v. Breving Co.*, 13 O. C. C. (N.S.) 357.

If a seller's agent procured a continuing guaranty of payment, the guarantor, on being sued, may show that a subsequent guaranty given by him to the agent was on condition that the prior guaranty be canceled, there being nothing to put the guarantor on inquiry as to any limitation on the agent's power: *Wolf v. Skillito*, 9 Dec. Rep. 273, 12 Bull. 31. See also AGENCY.

The test and acceptance of an ice plant by the purchaser is not a waiver of defects therein, when the contract of sale guaranteed, in case of its acceptance, that it would accomplish the results specified therein for one year: *Wolf v. Storage Co.*, 11 O. C. D. 582.

XII. PARTIES.

To a letter of credit, signed by H, J endorsed a statement that he made himself jointly responsible with H on it. It was held that this did not make H's contract joint with J, and no joint action lies: *Camp v. James*, 6 O. 417, I Longsdorf's Notes, 347.

A assigned to B a judgment against C (who lived in Iowa), guaranteeing to pay it if not collected after prosecuting C to insolvency. B, in the name of A, for B's use, sued C in Iowa, but C pleaded payment and won the suit. B gave A no notice of this defense, but now sues A on the guaranty. It was held that B could show the Iowa record to show failure of the effort to prosecute C; but as no notice was given A, he was not included, being but a nominal party, and could show that the judgment was valid and subsisting: *Woodward v. Moore*, 13 O. S. 136, II Longsdorf's Notes, 601.

A subscriber to a fund and a contemporaneous guarantor of its payment accepted as one instrument and on one consideration, may be sued as jointly liable. But they are jointly liable only as to the remedy, and not so that an alteration by adding or releasing a guarantor affects the debtor's liability: *Deming v. Trustees*, 31 O. S. 41, III Longsdorf's Notes, 561.

A guarantor of fulfillment of a contract, though on the same paper, may be sued without the principal debtor: *Zerkle v. Price*, 5 O. N. P. 480, 7 O. D. (N.P.) 465. See also PARTIES.

For the general discussion of the subject of parties, see PARTIES.

XIII. PLEADING.

In suing the guarantor of the payment of a note the declaration must show that his indorsement was on a consideration: *Greene v. Dodge*, 2 O. 430, I Longsdorf's Notes, 137.

A declaration that defendant warranted a borrower to be a respectable man of Tuscarawas county, named Adam Riggle, whereas he was not of that name or that county, whereby the loan was lost, is demurrable; for, if in assumpsit, the promise is collateral and conditional, and notice should be averred; if for deceit, an intent to deceive should be averred. Nor is the injury shown to arise from the representation: *Bank v. Beebe*, 6 O. 497, I Longsdorf's Notes, 353.

A guaranty of ultimate payment with costs means after prosecution of the maker and prior indorsers to insolvency. A delay of a term of court before suing the maker and indorsers, or any delay in issuing execution, will release the guarantor, hence the petition against him must aver the dates, else diligence is not shown: *Bank v. Follett*, 1 Dec. Rep. 87, 2 W. L. J. 78.

A guarantor of payment after due diligence to collect is not chargeable with negligence in the suit to collect, in not preventing by attachment the debtor's putting his property out of reach, unless it is also averred that he knew, or by due diligence would have known, of the facts in time to obtain the extraordinary process: *Forest v. Stewart*, 14 O. S. 246, II Longsdorf's Notes, 650.

On a voidable contract, unlike an illegal or immoral one, a guarantor may be held, and he can not plead its voidability. Thus, where a corporation agreed that if a person would take stock it would, if he wished to rescind within three years, pay him back his subscription. This, though *ultra vires*, is merely voidable when no stockholders or creditors are objecting, and a guarantor of its fulfillment is bound, especially where he is a stockholder and has thus waived the objection: *Zerkle v. Price*, 5 O. N. P. 480, 7 O. D. (N.P.) 465.

In an action for damages for breach of guaranty in a contract of sale, it is not sufficient to allege that the article sold and guaranteed was broken or refused to act, without plaintiff's fault, but it must also be alleged that such occurred through the fault of defendants or of defects in manufacture: *Wolf v. Storage Co.*, 11 O. C. D. 582. See also SALES.

A petition on a contract of indemnity stipulating how a notice shall be given to surety to make it liable must allege when the plaintiff first became aware of the principal's default and when he notified the de-

fendant for the rule that an averment is sufficient for conditions precedent, does not apply to conditions subsequent: *Telephone Co. v. Marble Works*, 12 O. N. P. (N.S.) 158, 23 O. D. (N.P.) 219. See also SURETY.

Where stock is sold under an agreement guaranteeing the payment of dividends and agreeing to take the stock back at its face value upon demand at the end of a stipulated period, it is the duty of the purchaser, if he desires to hold the seller to his agreement, to appear at his office on the day named and tender back the stock and demand payment for the same; and a petition for recovery under such agreement is demurrable which does not allege such demand and tender: *Jones v. Jaeger*, 9 O. N. P. (N.S.) 206, 21 O. D. (N.P.) 711 [affirmed, without opinion, *Jones v. Jaeger*, 86 O. S. 332]. See also CORPORATIONS.

An answer that defendants did not enter into any arrangement whereby they guaranteed a note, on which they are sued as indorsers, is bad: *Conkey v. Skillman*, 11 O. D. (N.P.) 812.

For the general discussion of the subject of pleading, see PLEADINGS.

XIV. EVIDENCE.

An unlimited guaranty without words showing it was intended to be continuing is ambiguous in respect to being continuing, and surrounding circumstances may be proved to put the court in the place of the parties to arrive at the mutual intention: *Bank v. Cole*, 83 O. S. 50 [affirming on rehearing *Bank v. Newton*, 82 O. S. 444, which affirmed, without opinion, *Cole v. Bank*, 15 O. C. C. (N.S.) 315].

If a guaranty is given in the following language, "I hereby guarantee the payment of all notes of A and B held by the Merchants' National Bank, also renewals of the same, or any new loans made to either A or B by said bank," and is signed by C, such guaranty is equivocal or ambiguous with reference to its being a continuing guaranty; and C may introduce evidence of the surrounding circumstances, showing that A and B were at that time engaged in paving streets and building sewers in the city of Toledo, and that such guaranty was given to enable them to perform such contracts; and accordingly that such guaranty did not include subsequent loans to enable A and B to perform contracts which they took four or five years after the guaranty was given for construction work in other states: *Bank v. Cole*, 83 O. S. 50 [affirming on rehearing *Bank v. Newton*, 82 O. S. 444; which affirmed, without opinion, *Cole v. Bank*, 15 O. C. C. (N.S.) 315].

A guarantor of payment can not show by parol and understanding that he should be liable only as guarantor of collectibility: *Neil v. Trustees*, 31 O. S. 15, III Longsdorf's Notes, 558.

A written promise to pay \$100 towards the repair of B's coach can not be recovered on unless the jury are satisfied by proof that the work was done, though the writing tends to prove the issue: *Pike v. White*, W. 758, I Longsdorf's Notes, 60.

If a promise by an administratrix to pay or see that certain labor claims connected with a business, in which her decedent was a partner were paid, amounts to a guaranty, it can not be enforced unless it is in writing, nor unless sued upon. Such a promise is not available in an action based upon averments that the administratrix was, by agreement or otherwise, a member of the partnership: *Russell v. Fenner*, 21 O. C. C. 527, 11 O. C. D. 754. See also PARTNERSHIP.

If a contract of guaranty dated January 3, 1905, refers to a "note dated January 5, 1905, amounting to \$26,345.86 and to renewal of the same and any part thereof," evidence is admissible to show that the guaranty was prepared some time before the date which it bore and that both note and guaranty were delivered at the same time; and that accordingly the note dated January 5 was the note referred to by such guaranty: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633].

In construing a contract of guaranty evidence is admissible to show that the guarantor was the president of the lumber company whose debt he guaranteed; and that he was personally familiar with the entire transaction out of which the debt arose: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633].

Evidence of surrounding circumstances is competent in order to arrive at the intention of the parties if consistent with the meaning of the words of the written contract: *Bank v. Laidlaw*, 86 O. S. 91 [reversing *Bank v. Laidlaw*, 13 O. C. C. (N.S.) 303, 22 O. C. D. 633]. See also FRAUDS, STATUTE OF.

For the general discussion of the subject of evidence, see EVIDENCE.

XV. JUDGMENT.

An indorser or guarantor who is liable by indorsement upon an instrument in writing and against whom judgment is rendered in a court of record in this state in an action upon such instrument, is not surety or bail within the meaning of G. C., § 11713, so

as to entitle such indorser or guarantor to be certified in the record or in the judgment as surety or bail: *Crawford v. Turnbaugh*, 86 O. S. 43.

For the general discussion of the subject of judgments, decrees and orders, see JUDGMENT.

GUARANTY COMPANY.

See BONDS, NEGOTIABLE; FIDELITY AND TRUST COMPANY; INSURANCE.

GUARANTY CREDIT.

See INSURANCE.

GUARANTY INSURANCE.

See INSURANCE.

GUARD, OHIO NATIONAL.

See MILITIA.

GUARDIAN AD LITEM.

Scope Note.—Includes definition of guardian ad litem; the necessity of one; the necessity and effect of appointment, notice and acceptance; his duties towards his ward; by whom the answer should be filed and its effect; the compensation; the non-allowance of attorney fees as costs. Excludes general, foreign and special guardians, and guardians for imbeciles and insane persons.

Cross References.

For general subject of guardians, see GUARDIAN AND WARD.

For incapacity, see specific titles such as INFANTS; INSANE, IMBECILES AND IDIOTS.

ANALYTICAL OUTLINE.

- I. Definition, 8373.
- II. Necessity, 8373.
- III. Appointment, 8375.
- IV. Notice and Acceptance, 8376.
- V. Duties, 8376.
- VI. Service of Process, 8377.
- VII. Answer Filed By, 8378.
- VIII. Judgment by Default or Confession of, 8379.
- IX. Compensation, 8379.
- X. Attorney Fees, 8380.
- XI. Review, 8380.

I. DEFINITION.

A guardian *ad litem* is one appointed by the court to defend an infant and to bring the legal rights of his ward directly under the consideration of the court for decision when the ward is the defendant in the action: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845; *Ream v. Wolls*, 61 O. S. 131, IV Longsdorf's Notes, 803.

II. NECESSITY.

The court having obtained jurisdiction by service on a minor fourteen years old in an action for necessities, the judgment was held valid against collateral attack, though no guardian *ad litem* was appointed, and proceedings in aid of execution would not be

dismissed on that ground: *Walter v. Drapp*, 7 O. N. P. 232.

Under the act of 1824, defining the duties of executors and administrators, where the minor defendants were made parties, and had guardians *ad litem* appointed, who answered, an order for the sale of land will be sustained, though such minors were not served with process: *Lewis v. Lewis*, 15 O. 715, I Longsdorf's Notes, 740.

Process must be properly served before it is competent for the court to appoint a guardian *ad litem*: *Keys v. McDonald*, 12 Dec. Rep. 146, 1 H. 287.

Appointment of guardian *ad litem* can not be dispensed with, except when authorized by statute: *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802.

The judgment of a court of general jurisdiction held binding upon a minor defendant, properly served by publication, although no guardian was appointed: *Lessee of Morgan v. Burnet*, 18 O. 535, I Longsdorf's Notes, 861.

It was error, on a bill of revivor, to decree against infant defendants until a guardian *ad litem* had been appointed: *St. Clair v. Smith*, 3 O. 355, I Longsdorf's Notes, 178.

The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not affect an appearance for them, nor give the court jurisdiction over them. The appointment of a guardian *ad litem* is for the purpose of defense, after appearance has been effected by service of process on the infants: *Lessee of Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987.

Where a statute required a guardian to defend all suits, the omission to appoint a guardian *ad litem* for infant defendants to a petition for dower is not material if the general guardian answers for them: *Rankin v. Kemp*, 21 O. S. 651, III Longsdorf's Notes, 49.

A title founded on a decree of foreclosure of a mortgage against infant heirs of the mortgagor will be held binding though no guardian *ad litem* was appointed: *Morgan v. Burnet*, 18 O. 525, I Longsdorf's Notes, 861.

A judgment in replevin can not be collaterally attacked in an action on the replevin bond on the ground that the original defendant was a minor and no guardian *ad litem* was appointed: *Taylor v. Graves*, 4 Dec. Rep. 261, 1 Clev. L. Rep. 178.

A proceeding under G. C., § 8031, for the committal of a child to a home or benevolent institution being strictly statutory, a guardian *ad litem* is not necessary: *Stine v. Anderson*, 1 Dayton Term Rep. (Iddings) 18.

III. APPOINTMENT.

There is a presumption of service if a guardian *ad litem* is appointed for infant defendants: *Robb v. Lessee of Irwin*, 15 O. 689, I Longsdorf's Notes, 739.

The appointment of a guardian *ad litem* for minor defendants, who have not been served with process, does not effect an appearance for them, nor give the court jurisdiction over them: *Moore v. Sparks*, 1 O. S. 369, I Longsdorf's Notes, 987.

A denial of the appointment and qualifications of a guardian *ad litem* is a defense in abatement. It does not go to the merits or bar recovery: *Ott v. Stein*, 14 O. D. (N. P.) 93.

An insane nonresident being served by publication, the court has a right to appoint a guardian *ad litem* for him if there is no regular guardian or he a nonresident: *Sturges v. Longworth*, 1 O. S. 544, I Longsdorf's Notes, 1006.

Appointing a guardian *ad litem* for infants not served with process does not effect their appearance: *Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987.

The appointment of a guardian *ad litem* after service on a minor under fourteen, without service on his custodian, will be set aside as improvident: *Keys v. McDonald*, 12 Dec. Rep. 146, 1 H. 287.

Although as a general rule, under the code, a defense in abatement may be pleaded with a defense in bar, in a will contest, which is a special statutory proceeding in which but one issue, that of the validity of the will, may be submitted to the jury, a defense in abatement must be raised before a defense is made upon the merits, or it will be considered as waived. Hence, an issue as to the appointment and qualification of the plaintiff's guardian *ad litem* can not be submitted to the jury in such a proceeding, and if not raised by plea in abatement before a submission of a defense upon the merits it will be deemed waived: *Ott v. Stein*, 14 O. D. (N.P.) 93. See also PLEADINGS.

IV. NOTICE AND ACCEPTANCE.

The guardian appointed to defend must have notice of his appointment, and must do something to signify his acceptance: *St. Clair v. Smith*, 3 O. 355, I Longsdorf's Notes, 178.

V. DUTIES.

A proper defense should be made by the guardian *ad litem* to bring the rights of the ward before the court. His answer is not a mere matter of form; he should ascertain the rights of his ward by due inquiry: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

It is the duty of the guardian *ad litem* to make for the infant a proper defense, and for that purpose to bring the rights of his ward under the consideration of the court for decision: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

The appointment of a guardian *ad litem* in a partition proceeding is not a mere form. It is his duty to bring the rights of his ward under the consideration of the court for decision and to investigate the value of the property, before one of the parties is permitted to take it at the ap-

praised value: *Murr v. Murr*, 17 O. D. (N. P.) 773, 5 O. L. R. 125.

A guardian *ad litem* and trustee for infant heirs can not acquire their property for himself pending litigation as to it: *Massie v. Matthews*, 12 O. 351, I Longsdorf's Notes, 612. See also FRAUD AND DECEIT.

VI. SERVICE OF PROCESS.

In a chancery proceeding, where it appears affirmatively that minor defendants have not been served with process, a decree purporting to determine the rights of such minors is void: *Lessee of Moore v. Starks*, 1 O. S. 369, I Longsdorf's Notes, 987.

Under the act of 1824 the practice was general to serve the process upon the general guardian, or a guardian *ad litem*, or to permit an appearance without process, by either: *Sheldon v. Newton*, 3 O. S. 494, II Longsdorf's Notes, 57.

The rule under former practice was that process in chancery should be served on minor defendants, and the case be established by proof, even on default for answer: *Massie v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

In an action against an insane defendant to recover damages for wrongful death, where the guardian waived the issue and service of process and entered his appearance, and summons was issued to another county for the insane defendant, and was personally served upon him by the sheriff of such county, and subsequently the plaintiff dismissed the action as to the guardian only, it is error to quash the service on the insane defendant and to dismiss the action for want of jurisdiction over his person: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

An action for wrongful death may be brought in the county where the insane defendant has his legal residence, and his legally appointed guardian may be joined with him as party defendant: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

An administrator's petition to sell land to pay debts was filed against the infant heirs. In the body of the petition three were named, but the fourth was not, nor anywhere in the record. A guardian *ad litem* was "appointed to the minor heirs" and acknowledged an appearance as such. The fourth child afterwards brought ejectment against the purchaser of the lands under the decree. It was held that the title obtained by the sale was valid against collateral attack. The appointment of the guardian is broad enough to include all the

minors, and will be so presumed to sustain the jurisdiction. The guardian's not answering is nothing; it is the appearance that gives the jurisdiction: *Snevely v. Lowe*, 18 O. 368, I Longsdorf's Notes, 851.

A proceeding to sell land to pay debts under the act of 1831, like the act of 1824, was *in rem*, and pursuant to repeated decisions of this court must be followed as a rule of property, that the want of personal service on infant heirs required by the statute does not affect the jurisdiction or render the sale void, and service on the guardian *ad litem* is sufficient: *Benson v. Cilley*, 8 O. S. 604, II Longsdorf's Notes, 370.

The defendant having died, leaving infant heirs, a bill of revivor against the infants was filed and guardian *ad litem* appointed. It was held to be error to render a decree until the guardian *ad litem* had accepted and appeared, or been served as in other cases: *St. Clair v. Smith*, 3 O. 355, I Longsdorf's Notes, 178. See also ABATEMENT AND REVIVOR OF ACTIONS.

VII. ANSWER FILED BY.

Where the answer of the guardian admits the bill to be true, the complainant must prove its allegations with the same strictness as if the answer had interposed a direct and positive denial: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845; *Heirs v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

A decree against minor defendants, rendered upon the answer of their guardian *ad litem*, may be impeached and reversed for fraud: *Massie v. Matthews*, 12 O. 351, I Longsdorf's Notes, 612.

It is sufficient if infant heirs appear by their general guardian: *Ewing v. Hollister*, 7 O. 138, I Longsdorf's Notes, 396.

The answer of the guardian *ad litem*, alleging his ignorance of the matters contained in the petition, and praying that the rights of his wards may be protected, has the effect of a general denial, and requires proof of all the material averments of the petition: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

The law of 1824 did not prescribe the mode of making the heirs defendants, and such proceedings having, before the statute, been *ex parte*, the court might direct the mode, and an appearance and answer made by their guardian *ad litem*, appointed by the court in the case, was a reasonable and proper mode under that statute: *Biggs v. Bickel*, 12 O. S. 49, II Longsdorf's Notes, 547.

If the guardian *ad litem*'s answer merely prays the protection of the court, that is,

does not deny the plaintiff's case, but the record shows that the court regarded it as a denial and required the plaintiff to prove his case, the error is one of form only and not prejudicial, and not reversible error: *Randall v. Turner*, 17 O. S. 262, II Longsdorf's Notes, 832.

If his answer admits the petition to be true the plaintiff must prove his case with the same strictness as if denied: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

Though the answer of a guardian *ad litem* contained material admissions, if the judgment recited that the hearing was on the pleadings and exhibits, it will be presumed that sufficient evidence was offered: *Rankin v. Kemp*, 21 O. S. 651, III Longsdorf's Notes, 49.

VIII. JUDGMENT BY DEFAULT OR CONFESSION OF.

A default judgment, as by confession, can not be rendered on failure of a guardian *ad litem* of an infant or lunatic to answer: *Massie v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

A judgment against a minor may be vacated or modified in the common pleas court after the term, under authority of G. C., § 11631, paragraph 5, on the ground that no guardian *ad litem* was appointed or answer filed, where the fact of infancy appears only in the precept for summons: *Palmer v. Palmer*, 5 O. C. C. (N.S.) 242, 15 O. C. D. 660. See also JUDGMENT.

IX. COMPENSATION.

G. C., § 11250, limits the compensation to services which the guardian shall render and does not authorize compensation for services any other person may render: *Worther v. Ruehrwein*, 8 O. N. P. 494, 10 O. D. (N.P.) 116.

A father can not prosecute an action for loss of services of his son where, as next friend, in his son's suit, which included loss of earning capacity, he is presumed to have relinquished such claim: *Furste v. Henderson Co.*, 13 O. C. C. (N.S.) 536.

As the owner of a life estate which was under mortgage, petitioned for its sale and a reinvestment of the proceeds, on the ground that the taxes and necessary improvements exceeded the income. The court ordered a sale and appointed a trustee to reinvest the fund directing that the costs, plaintiff's attorney's fees, taxes due, and a fee due to the guardian *ad litem* should be paid out of the fund, but refused to order that

the present value of the mortgage be ascertained and the amount paid out of the fund although directing that the amount due the mortgagee be paid out of the income arising from the fund, prior to the payment of any other claim or lien, except the cost of investing and caring for the fund. It was held that there was no authority of law for the payment out of the fund of the costs in such a case, or a fee to plaintiff's attorney, or the taxes, unless after a forfeiture was declared. The fee to the guardian *ad litem* was properly paid: *Sherman v. Sherman*, 2 O. C. C. (N.S.) 454, 15 O. C. D. 768. See also COSTS.

X. ATTORNEY FEES.

An attorney appointed guardian *ad litem* of a minor defendant, and who acted as attorney in the defense of an action against the minor to recover damages for assault and battery, is not entitled, upon the successful result to his ward, to an allowance, as costs, of an attorney's fee for his services as such attorney: *Worther v. Ruehrwein*, 8 O. N. P. 494, 10 O. D. (N.P.) 116.

No allowance for attorney's fees can be taxed as costs in favor of a guardian *ad litem* in a tort case. Nor can an attorney by having himself appointed guardian *ad litem*, have such compensation taxed as costs, for the services are not incident to the office, and attorney's fees are not imposed on the other party when there is no fund in the court's control: *Worther v. Ruehrwein*, 8 O. N. P. 494, 10 O. D. (N.P.) 116.

XI. REVIEW.

Guardian *ad litem*, though having no personal interest in the suit, is entitled to take an appeal as the representative of the infant, who is a party to the suit, but without legal capacity to make a defense: *Harper v. Cilley*, 4 O. C. C. (N.S.) 55, 15 O. C. D. 770. See also APPEALS.

While the guardian *ad litem* may be without authority to bind the estate of his ward by the giving of an undertaking in appeal, he is nevertheless liable individually on the bond: *Harper v. Cilley*, 4 O. C. C. (N.S.) 55, 15 O. C. D. 770.

A petition in error will not lie to review a judgment against a minor on the ground that no guardian *ad litem* was appointed or answer filed, where the fact of infancy does not appear in the record and only in the precept for summons: *Palmer v. Palmer*, 5 O. C. C. (N.S.) 242, 15 O. C. D. 660. See also ERROR.

GUARDIAN AND WARD.

Scope Note.—*Includes the nature and appointment of guardians for infants, insane, drunkards and deaf and dumb persons; the termination of the relationship; the duties, powers and rights of guardians in that capacity; and legal proceedings relating thereto. Excludes guardians ad litem; and matters relating to infants, insane and drunkards ir-respective of guardianship.*

Cross References.

- For questions of review, see **APPEALS**; **ERROR**.
- For questions of revivor, see **ABATEMENT AND REVIVOR OF ACTIONS**.
- For questions of costs, see also **COSTS**.
- For administration of decedents' estates, see **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES**.
- For the power of the courts to regulate matters of guardianship, see also **COURTS**.
- That the funds belonging to the ward in the hands of a guardian are to be regarded as trust funds, see also **TRUSTS**.
- For rights and liabilities as between a guardian of a minor and a parent of such minor, see **PARENT AND CHILD**.
- For the effect of divorce, see also **DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**.
- For questions of fraud, see also **FRAUD AND DECEIT**.
- For questions of fraudulent conveyances, see also **FRAUDULENT CONVEYANCES**.
- For the power of a guardian to petition for an improvement, see **ASSESSMENTS**.
- For guardian *ad litem*, see **GUARDIAN AD LITEM**.
- For the general subject of insane persons, see **INSANE, IMBECILES AND IDIOTS**.
- For the subject of drunkards, see **INTOXICATION**.

ANALYTICAL OUTLINE.

- I. Definitions, 8385.**
- II. Nature of Relation, 8385.**
- III. Natural Guardian, 8386.**
- IV. Selection, 8387.**
- V. Jurisdiction to Appoint, 8387.**
- VI. Qualification and Eligibility, 8389.**
- VII. Appointment, 8389.**
 - A. *Notice*, 8389.
 - B. *Order*, 8390.
 - C. *Review*, 8390.
 - D. *Collateral attack*, 8391.
- VIII. Termination, 8391.**
 - A. *Age of ward*, 8391.
 - B. *Death of ward*, 8392.
 - C. *Removal of guardian from state*, 8392.
 - D. *Removal of guardian by the court*, 8392.
 - 1. *Jurisdiction*, 8392.
 - 2. *Grounds*, 8392.
 - 3. *Review*, 8393.
 - 4. *Effect*, 8393.
 - E. *Marriage*, 8393.
- IX. Powers and Duties, 8393.**
 - A. *General scope*, 8393.
 - B. *To collect assets*, 8394.
 - C. *To manage estate*, 8395.
 - D. *To list for taxation*, 8395.
 - E. *To bind estate by contract*, 8395.

- F. *To repair*, 8396.
- G. *To lease realty*, 8396.
- H. *To invest funds*, 8396.
- I. *To sell property of ward*, 8397.
 - 1. *Personalty*, 8397.
 - 2. *Realty*, 8398.
 - a. *Jurisdiction*, 8398.
 - b. *Venue*, 8398.
 - c. *Purpose*, 8399.
 - d. *What interest may be sold*, 8399.
 - e. *Parties*, 8399.
 - f. *Pleading*, 8400.
 - g. *Additional bond*, 8400.
 - h. *Order of sale*, 8400.
 - i. *Purchaser*, 8401.
 - aa. *Interest acquired by purchaser*, 8401.
 - bb. *Liability on resale*, 8401.
 - j. *Terms of payment*, 8402.
 - k. *Return*, 8402.
 - l. *Distribution*, 8402.
- J. *Support*, 8403.
- K. *Represent ward in litigation*, 8404.
- X. *Accounts*, 8405.
 - A. *Power of court to compel*, 8405.
 - B. *Contents*, 8407.
 - 1. *Debits*, 8407.
 - 2. *Credits*, 8407.
 - C. *Duty of court to examine*, 8408.
 - D. *Notice of accounting*, 8408.
 - E. *Exceptions*, 8408.
 - F. *Cost of reference*, 8409.
 - G. *Effect of order*, 8409.
 - 1. *Conclusive effect of order*, 8409.
 - 2. *Correction of mistake and fraud*, 8410.
 - 3. *Review*, 8411.
 - H. *Liability of guardian to pay balance to ward*, 8412.
 - I. *Liability of ward to pay balance to guardian*, 8413.
- XI. *Compensation*, 8413.
- XII. *Bond*, 8413.
 - A. *Necessity*, 8413.
 - B. *Form*, 8414.
 - C. *Joint bond*, 8414.
 - D. *Successive bonds*, 8414.
 - E. *Breach*, 8414.
 - F. *Sureties*, 8415.
 - 1. *Number*, 8415.
 - 2. *Liability*, 8415.
 - 3. *Discharge*, 8416.
 - 4. *Rights of surety*, 8417.
 - G. *Action on bond*, 8418.
 - 1. *Right to action*, 8418.
 - 2. *Limitation*, 8419.
 - 3. *Jurisdiction*, 8419.
 - 4. *Parties*, 8420.
 - 5. *Pleading*, 8420.
 - 6. *Review*, 8421.

XIII. Transactions Between Guardian and Ward, 8421.**XIV. Action by and Against Guardian, 8422.**

- A. *Nature of action*, 8422.
- B. *Jurisdiction*, 8423.
- C. *Parties*, 8423.
- D. *Pleading*, 8424.
- E. *Procedure*, 8424.
- F. *Review*, 8425.

XV. Guardians for Imbeciles, 8425.

- A. *Appointment*, 8425.
 - 1. In general, 8425.
 - 2. When proper, 8425.
 - 3. *Jurisdiction*, 8426.
 - 4. *Notice*, 8426.
- B. *Accounts*, 8426.
- C. *Bond*, 8426.
- D. *Actions*, 8426.
- E. *Effect of appointment of guardian*, 8427.
- F. *Termination*, 8428.

XVI. Guardian for Drunkard, 8429.**XVII. Guardian for Deaf and Dumb Persons, 8429.****I. DEFINITIONS.**

A guardian of property is one, who being duly qualified, is duly appointed by a court of competent jurisdiction and who has, while the guardianship lasts, lawful possession and control of the property of the ward: *Sommers v. Boyd*, 48 O. S. 648, IV Longsdorf's Notes, 434.

A guardian *de facto* is one who is disqualified by positive statute, and who is appointed by a court, notwithstanding such disqualification: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

II. NATURE OF RELATION.

The guardian is a trustee for his ward: *Strong v. Strauss*, 40 O. S. 87, IV Longsdorf's Notes, 6.

A guardian stands to the ward in *loco parentis*: *Davis v. Ford*, 7 O. (pt. 2) 104, I Longsdorf's Notes, 391.

The relation of guardian and ward after the confirmation of the guardian's final account, is that of debtor and creditor, and not trustee and beneficiary: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, which was affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. — and *Stevens v. Robinson*, 88 O. S. —].

Where a fund is given to a guardian, the principle to be divided among the wards when they become of age, and in the meantime the interest and income from such

principal to be paid to a third person, the guardian will hold the principal as guardian for his wards, and the interest thereon as trustee for such third person: *In re Kaufman*, 7 O. N. P. 552, 5 O. D. (N.P.) 407.

III. NATURAL GUARDIAN.

The father is by law and nature the guardian of his minor child, and the necessity for the appointment of a guardian does not arise except for cause: *Hare v. Sears*, 4 O. N. P. (N.S.) 566, 17 O. D. (N.P.) 590.

Where no present reason exists for departure from the rule that the father should have custody of the child, the right of the father is superior to that of any other person: *In re Coons*, 20 O. C. C. 47, 11 O. C. D. 208.

A court has no right to appoint a guardian for the person of a child who has a parent without proof and finding, on notice to the parent, of the parent's unfitness. The right to the child is a property right and can not be taken away without due process of law: *Boescher v. Boescher*, 7 O. N. P. 418, 5 O. D. (N.P.) 184.

Grandparents are natural guardians of infants after the death of the parents: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612.

Upon *habeas corpus* the parent of the child will be awarded its custody as against a guardian, it appearing that said child is without estate: *In re Baier*, 8 O. N. P. 107, 11 O. D. (N.P.) 47. See also PARENT AND CHILD.

IV. SELECTION.

The right of an infant to select a guardian under G. C., § 10918, does not arise where the necessity for the appointment of a guardian does not exist: *Hare v. Sears*, 4 O. N. P. (N.S.) 506, 17 O. D. (N.P.) 590.

A minor may select one guardian for its estate and another for its person if the interest of such minor will be promoted by such choice: *Fisher v. Madden*, 12 O. D. (N.P.) 83 [affirmed, without opinion, *Madden v. Fisher*, 68 O. S. 691].

A decree of divorce which gives the custody of a minor child to one of the parents does not clothe that parent with authority to appoint a testamentary guardian for the child, and as between the testamentary guardian and the surviving parent, the court will consider only the best interests of the child in choosing its guardian: *In re Coons*, 20 O. C. C. 47, 11 O. C. D. 208; *In re Gerbig*, 11 O. N. P. (N.S.) 529.

Where by antenuptial agreement it is provided that any children should be brought up in a particular religious faith, and after both parents are dead, relatives on each side contend for the guardianship, the court, other things being equal, must appoint the relative of the agreed faith: *In re Luck*, 7 O. N. P. 49, 10 O. D. (N.P.) 1.

But where the children have for several years been under the control of the surviving parent while alive who was opposed to such faith, have been domiciled in the family of his mother and sisters and their affections have become engaged and the children's happiness will be risked by a change and the other relatives had become virtually estranged, the welfare of the children requires that these considerations shall control the antenuptial agreement: *In re Luck*, 7 O. N. P. 49, 10 O. D. (N.P.) 1.

As the court's award of the custody of a child to the mother is a continuing order, and the child remains subject to the court, the mother has no power by her will to appoint a guardian for the child: *In re Coons*, 20 O. C. C. 47, 11 O. C. D. 208. See also **DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.**

V. JURISDICTION TO APPOINT.

To authorize the appointment of a guardian for a minor, the latter must, at the time of appointment, have an actual or constructive residence within the county: *Massom v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

The actual presence of the ward is not essential to the jurisdiction, unless by reason of his right to choose a guardian, or for other reasons, the statute so requires:

Shroyer v. Richmond, 16 O. S. 455, II Longsdorf's Notes, 790.

Appointment of a guardian is without jurisdiction if the minor had no actual or constructive residence in the county; the domicile of the minor is that of the surviving parent, if such parent was entitled to its custody: *Gazette Co. v. Dean*, 11 Dec. Rep. 207, 25 Bull. 250 [affirmed, without opinion, *Dean v. Gazette Co.*, 33 Bull. 271].

Where a minor five years old leaves his grandfather's home where said minor is domiciled, with permission and consent, to live with his aunt in another county, the probate court of the latter county is without jurisdiction to appoint a guardian, while the grandfather has not changed domicile: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612 [on appeal, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652].

Where the father, who is the last surviving parent of a minor, dies while domiciled with the father's parents, and the minor continues to live with the grandfather for a time, the minor is a resident of the county in which the grandfather is domiciled, within the meaning of G. C., § 10915: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612 [on appeal, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652].

A minor, himself, can not change his domicile, and as the residence of a minor is determined by the domicile of a parent or some one *in loco parentis*, the word "resident," as used in G. C., § 10915, means domicile: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612 [on appeal, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652].

The appointment of a person as guardian, who is ineligible (under G. C., § 10917) because of being administrator, is without jurisdiction and makes him merely a guardian *de facto*. Accordingly, the probate court of another county to which the minor has removed can appoint another guardian without an order being made vacating the former appointment: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

Probate court has no authority to appoint a guardian of the person of a minor who is without estate; and where the record discloses affirmatively that the minor was without estate, the appointment was void, and parents are entitled to a writ of *habeas corpus* to obtain custody of such child: *In re Baier*, 8 O. N. P. 107, 11 O. D. (N.P.) 47.

The probate court can not interfere with the custody of children decreed by the common pleas on rendering a decree for divorce:

Hoffman v. Hoffman, 15 O. S. 427, II Longsdorf's Notes, 738.

The record was silent as to the grounds of appointment; as, however, the court had jurisdiction to appoint, and did appoint, the bond is valid: *King v. Bell*, 36 O. S. 460, III Longsdorf's Notes, 870.

To give the court jurisdiction over a minor, so as to authorize the appointment of a guardian for him, such minor must, at the time of the appointment, have an actual or constructive residence within the county; but the guardian derives his power from the appointment and giving bond and letters of guardianship, need not, in fact, issue: *Mason v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

VI. QUALIFICATIONS AND ELIGIBILITY.

Foreign guardians are only recognized by comity, and if ineligible by our laws, can not act here. Thus, as the remarriage of a mother, who is guardian, would vacate her guardianship in Ohio, the fact that she and the minors are residents of another state, where she was appointed and where remarriage does not annul the guardianship, will not entitle her to collect income here: *Habighurst v. Stevenson*, 10 Dec. Rep. 162, 19 Bull. 106.

An administratrix of an estate in which a minor is interested can not be appointed guardian of the estate of such minor; and the minor having become a resident of another county, the probate court of that county may appoint another guardian, although no order vacating the former appointment has been made: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

A person will be considered not fit, suitable or competent to represent an estate in a fiduciary capacity, when, on hearing exceptions to his inventory and account as guardian of an imbecile, it appears that he has mixed and mingled the funds of said estate with his own, has paid claims without question or investigation, has converted his ward's funds to his own use by buying real estate and taking the title in his own name, etc.: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court, dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

VII. APPOINTMENT.

A. NOTICE.

In an application for the appointment of a guardian for a child who has one or more parents living, notice must be given to the parents of such child: *In re Gerbig*, 11 O.

N. P. (N.S.) 529; *Boescher v. Boescher*, 7 O. N. P. 418, 5 O. D. (N.P.) 184.

Where it appears that a guardian was appointed for a minor, whose parents are living and who were within, and known to be within the jurisdiction of the court at the time, but were not notified of the application, and it further appears that such minor is about to be removed from the county by her guardian, the court of common pleas notwithstanding G. C., § 10492, and G. C., § 10915, giving the probate court exclusive, original jurisdiction over the appointment of guardians, etc., has jurisdiction, by writ of *habeas corpus*, to require such minor to be returned to and to remain in the custody of its parents, it appearing that they are suitable persons to have custody and control of such minor: *Fisher v. Madden*, 12 O. D. (N.P.) 83 [affirmed, without opinion, *Madden v. Fisher*, 68 O. S. 691].

B. ORDER.

The steps necessary for the appointment of a guardian are proceedings *in rem*, and not *inter partes*, or adversary in character; and the order of appointment made in the exercise of such jurisdiction binds the ward, and the ward's presence is not necessary, unless by reason of his right to choose his guardian, or for other cause, the statute so requires: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790.

C. REVIEW.

A motion by an uncle for the removal of a guardian on the ground of lack of jurisdiction to make the appointment sufficiently challenges such jurisdiction, and is a special proceeding, carrying the right of appeal upon the overruling of the motion: *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652 [affirming *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612]. See also APPEALS.

A finding by the probate court on an application for guardianship that due notice has been given, that the ward is a resident of the county and an imbecile, and that it is necessary to appoint a guardian, is not a final order and is not appealable, no guardian having been appointed and no further order made: *In re Breitenstein*, 4 O. N. P. (N.S.) 358, 17 O. D. (N.P.) 71.

An order of the probate court appointing a stranger guardian of a minor child is a final order affecting a substantial right of its father and is reviewable on error. There must be a necessity for the appointment of a guardian: *Hare v. Sears*, 4 O. N. P. (N.S.) 567, 17 O. D. (N.P.) 590.

D. COLLATERAL ATTACK.

An order of the court appointing a guardian, made in the exercise of such jurisdiction can not be collaterally impeached, and when the record shows nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790.

Where the record was silent as to the grounds of appointment and the ward was an infant and of unsound mind it was presumed that the appointment covered both grounds and the validity of the appointment can not be attacked collaterally: *King v. Bell*, 36 O. S. 460, III Longsdorf's Notes, 870.

The appointment prohibited in G. C., § 10917, is regarded as void in a collateral proceeding: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

The minor must reside in the county, actually or constructively, to authorize the court to appoint a guardian. This is jurisdictional, and, accordingly, may be collaterally attacked if the record is silent, as in a controversy over a title derived from guardian's sale: *Maassom v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

The probate court under G. C., § 10492, has exclusive, original jurisdiction to appoint and remove guardians, etc., and the orders of that court in such proceedings are not subject to collateral attack: *Allen v. Lewis*, 12 O. D. (N.P.) 83.

VIII. TERMINATION.

A. AGE OF WARD.

After a ward arrives at majority, the guardianship ceases *ipso facto*, and his further dealings are those of a mere agent and are not covered by the bond: *In re Streit*, 12 O. D. (N.P.) 158.

Before the enactment of the saving provision, it was held that the guardianship of a minor expired by operation of law when the ward arrived at the age designated in G. C., § 10918, and such guardian could not thereafter sell the lands of the ward on petition filed after such time, and a sale, under order of court, upon such petition, was void: *Perry v. Brainard*, 11 O. 442, I Longsdorf's Notes, 580.

When a female ward becomes twelve years old or a male fourteen, the guardianship expires: *Campbell v. English*, W. 119, I Longsdorf's Notes, 10; *Perry v. Brainard*, 11 O. 442, I Longsdorf's Notes, 580.

A guardian can not after the ward has become of age apply for leave to sell the

ward's land, and a sale ordered on such petition is void: *Perry v. Brainard*, 11 O. 442, I Longsdorf's Notes, 580.

Payment to the guardian, after the female ward is twelve years old, is not a valid payment, and the ward's admission, after coming of age, that he was guardian, can not affect her rights: *Campbell v. English*, W. 119, I Longsdorf's Notes, 10.

B. DEATH OF WARD.

Death of the ward terminates the guardianship, and the guardian is then a mere custodian of the property, to hold for the personal representative. The latter's title, when appointed, relates back to the death, and he and not the former guardian is the proper person to list the property for taxation, and if the former guardian lists, then he is not estopped to plead want of authority: *Sommers v. Boyd*, 48 O. S. 648, IV Longsdorf's Notes, 434.

C. REMOVAL OF GUARDIAN FROM STATE.

The powers of a guardian appointed in this state cease *ipso facto* by the removal of the guardian from the state: *Bank v. Shirk*, 5 O. C. C. (N.S.) 569, 17 O. C. D. 125.

Under the act of 1846 (2 Curwen's Stat. 1238), it was questionable whether mere removal from the state would have vacated a guardianship, or constituted a breach of the bond: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

D. REMOVAL OF GUARDIAN BY THE COURT.

1. Jurisdiction.

Exclusive original jurisdiction to remove a guardian being vested in the probate court by G. C., § 10492, the court of common pleas is without original jurisdiction to entertain an application to remove a guardian: *In re Oliver*, 77 O. S. 474, IV Longsdorf's Notes, 1034.

Where an application for removal of a guardian is made in the first instance to the court of common pleas, it is not error for that court to sustain a general demurrer to such application and dismiss the proceeding: *In re Oliver*, 77 O. S. 474, IV Longsdorf's Notes, 1034.

2. Grounds.

A guardian will not be removed merely because his ward has taken a dislike to him and will have no dealings with him: *France v. Frantz*, 4 O. N. P. 278, 6 O. D. (N.P.) 555.

3. Review.

The circuit court may review on error an order of the court of common pleas made on appeal from the probate court, removing a guardian for cause: *North v. Smith*, 73 O. S. 247, IV Longsdorf's Notes, 1002 [reversing *North v. Smith*, 5 O. C. C. (N.S.) 495, 17 O. C. D. 367]. *Contra, Smith v. Bracey*, 13 O. C. C. (N.S.) 529, 22 O. C. D. 383.

A guardian who is removed by the probate court because the court had no jurisdiction to appoint him, can not perfect an appeal to the common pleas court from such order of removal, by merely giving written notice to the probate court, of his intention to appeal. In such a case, he is not "a party in the fiduciary capacity," and does not "appeal in the interest of the trust," and hence is required by this section to file a bond in order to perfect an appeal: *In re Wallace*, 4 O. N. P. (N.S.) 449, 17 O. D. (N.P.) 136.

4. Effect.

The trust of a guardian expires, within the meaning of clause 4 of G. C., § 10933, at the date of his removal, by the probate court, for cause: *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149.

E. MARRIAGE.

Under a former statute marriage terminated the guardianship of a woman: *Habighurst v. Stevenson*, 10 Dec. Rep. 162, 19 Bull. 106.

IX. POWERS AND DUTIES.

A. GENERAL SCOPE.

Where the trustees act within the scope of their authority, and exercise such prudence, care and diligence, as men of ordinary prudence, care and diligence in like matters of their own, they should not be held accountable for losses happening from their management of the trust funds: *Miller v. Proctor*, 20 O. S. 442, II Longsdorf's Notes, 1009.

A trustee is only required to use the common prudence and skill of competent men, and not that of the most cautious and shrewd money makers: *In re Spencer*, 2 Dec. Rep. 510, 3 W. L. M. 408.

A guardian derives his power to act from the appointment and bond. Letters of guardianship need not in fact issue: *Massom v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

Under the Ohio law the rules governing testamentary trusts and trustees are the same as those governing guardians and administration of estates: *Boals v. Olingan*, 6 O. N. P. (N.S.) 609, 16 O. D. (N.P.) 267.

It is the duty of the probate court either with or without complaint being first made, to enforce the performance of the duties required by G. C., § 10933, and all other requirements relating to the duties of guardians to preserve the estate of minors: *In re Strickland*, 7 O. N. P. 233, 1 O. D. (N.P.) 702.

Under G. C., § 10857, any guardian may maintain a civil action asking the direction of the court in any matter respecting the trust: *Wing v. Hibbert*, 7 O. N. P. 124, 8 O. D. (N.P.) 65.

The owner of a freehold may consent as a devisee for life or a dowress to whom a tract has been assigned, or a tenant by the curtesy. But not one having a less estate as a tenant by curtesy initiate, i. e., a husband for his wife. One tenant in common can not, for he owns no part, and consent can not be partitioned. A guardian can not for his ward, nor an executor with power to sell, manage, etc., for he has no ownership: *Rapp v. Railroad Co.*, 9 Dec. Rep. 302, 12 Bull. 119. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

B. TO COLLECT ASSETS.

G. C., § 10941, and the second succeeding section must be complied with in order to receive or recover money belonging to a ward from an executor or administrator, and remove the same to another state: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

A foreign guardian is not entitled to receive or receipt for money due the ward from an executor until he complies with G. C., § 10944, by filing an exemplification of the record, etc., and the probate court may refuse to order the payment of the money if detrimental to the ward. Payment without such order is unauthorized and will not protect the person making it: *Banning v. Gotshall*, 62 O. S. 210, IV Longsdorf's Notes, 831.

A foreign guardian ineligible to appointment as such in Ohio will not be permitted to collect money due the ward in this state: *Habighurst v. Stevenson*, 10 Dec. Rep. 162, 19 Bull. 106.

An heir electing to take in partition gave the guardian of minor heirs their shares in notes, secured by adequate mortgage on other lands instead of on the land sold. It was held that the guardian could legally accept this, since he could have required cash and have at once invested it in such notes and mortgages: *In re Spencer*, 2 Dec. Rep. 510, 3 W. L. M. 408.

C. TO MANAGE ESTATE.

A guardian has no right to despoil the real estate, and if he sells a barn on it and the buyer takes it down and away, the buyer is liable; the guardian is also a cotrespasser. The requirement of the probate court that such sale be put in the guardian's account as an item is no defense. The guardian's removal of the barn from one part of the land to another does not convert it into personality: *Johnson v. Meyer*, 4 Dec. Rep. 383, 2 Clev. L. Rep. 81.

If a road is laid out over real property which belongs to one who is under guardianship, the matter of damages is to be adjusted with the guardian: *State, ex rel., v. Commissioners*, 8 Dec. Rep. 457, 8 Bull. 83.

If it is sought to lay out a road over property owned by a person under guardianship, the notice for laying out such road should be given to the guardian: *State v. Commissioners*, 8 Dec. Rep. 457, 8 Bull. 83.

The guardian of a minor has no power to convey a right of way through the land of his ward. While the guardian has power to represent the ward in petitioning for a road or remonstrating against it, the exercise of such power does not relieve the county from the duty of appropriating such property: *State v. Commissioners*, 39 O. S. 58, III Longsdorf's Notes, 1007.

D. TO LIST FOR TAXATION.

In managing the ward's land, the guardian may do all acts reasonable and proper for the preservation and use of the real estate. He controls it for the purposes of taxation, and is not responsible to the ward for an abuse of that power: *Campbell v. Park*, 32 O. S. 544, III Longsdorf's Notes, 649.

Guardians of minors must list for taxation the personal property of their wards: *Campbell v. Park*, 32 O. S. 544, III Longsdorf's Notes, 649.

In case of the death of the ward, before the time for listing property for taxation, the administrator of such decedent, and not the guardian, should list such property for taxation, when the title of the administrator relates back to the time of the death of the ward: *Sommers v. Boyd*, 48 O. S. 648, IV Longsdorf's Notes, 434.

The fact that the estate is insolvent does not exempt from taxation the funds of such estate in the hands of the administrator: *In re Robb*, 5 O. N. P. 52, 5 O. D. (N.P.) 227, 5 O. D. (N.P.) 381.

E. TO BIND ESTATE BY CONTRACT.

Where a guardian for the purpose of paying for improvements to land in the posses-

sion of or claimed by his ward, gave a lien on the accruing rents, it was held that if the guardian had power to incur the lien, the ward could not overreach the lien by purchasing a paramount and better title than he had when the lien was created, for the contract of the guardian, made within the extent of his power, binds the ward the same as if it were his own: *Este v. Strong*, 2 O. 401, I Longsdorf's Notes, 137.

F. TO REPAIR.

Real estate of the ward should be kept by the guardian in reasonable repair. If he occupies it himself, he is chargeable with a fair rent, but may deduct the cost of such repairs, although a landlord is not bound to repair for any tenant: *In re Connell*, 12 O. N. P. (N.S.) 311.

Repairs should be paid for out of income, or if this is not sufficient, then, on leave of court first had, out of principal: *In re Connell*, 12 O. N. P. (N.S.) 311.

G. TO LEASE REALTY.

A covenant by a guardian to renew a lease for a second term is in excess of the power granted by G. C., § 10961, and is void: *Soap Co. v. Railway*, 6 O. C. C. (N.S.) 496, 17 O. C. D. 759 [affirmed, without opinion, *Railway v. Soap Co.*, 76 O. S. 577].

To bring the lease within the provisions of G. C., § 10962, the petition should contain averments showing requisite conditions and the authority of the court: *Soap Co. v. Railway*, 6 O. C. C. (N.S.) 496, 17 O. C. D. 759 [affirmed, without opinion, *Railway v. Soap Co.*, 76 O. S. 577].

H. TO INVEST FUNDS.

A guardian is chargeable with interest if he fail to invest the funds productively, for that is an object of his appointment: *Armstrong v. Miller*, 6 O. 118, I Longsdorf's Notes, 327.

It is for the guardian to show an excuse for not investing. It is no excuse that the stocks then deemed best are now valueless, and, hence, he might have lost the fund: *Armstrong v. Miller*, W. 562, I Longsdorf's Notes, 44.

A guardian investing in a mortgage security on two-thirds the value of unimproved land prior to the statute fixing half as the limit adjacent to a growing city is not liable for loss from depreciation caused by financial derangement or diminished immigration which could not reasonably be foreseen: *In re Spencer*, 2 Dec. Rep. 510, 3 W. L. M. 408.

The use by a guardian of ward's money in his own business and its loss thereby, to

constitute embezzlement, must be with fraudulent purpose, although the statute is silent as to intent: *State v. Meyer*, 10 Dec. Rep. 746, 23 Bull. 251.

If a guardian convert his ward's land scrip into lands for himself and others, but accounting to the wards for the scrip, with interest from the time of investment, in good faith, he is not chargeable as a trustee of the profits, for he should not invest the ward's property in wild lands producing no income: *Davies v. Lowrey*, 15 O. 655, I Longsdorf's Notes, 737. See also FRAUD AND DECEIT.

The probate court has plenary jurisdiction over executors, administrators, guardians and trustees; and where the interest of the trust estate requires it, said court has authority and power to pass upon all questions of investment and reinvestment: *Guthrie v. Gas Co.*, 2 O. N. P. (N.S.) 117, 15 O. D. (N.P.) 23. See also COURTS.

I. TO SELL PROPERTY OF WARD.

1. *Personalty.*

Where a guardian holding purchase-money notes and a mortgage received on sale of the vendor's land sold them before maturity by representing that the proceeds were to be used to pay debts of the ward, but he appropriated part of the proceeds, it was held that, as to such part, the buyers could not recover on foreclosure: *McFarland v. Harper*, 33 Bull. 87 [without opinion, by the supreme court]. See also TRUSTS.

Where one buys of a guardian notes bearing on their face the marks of a trust fund, he is put upon inquiry; and if he buys under circumstances fairly indicating that they were sold against the interest of the ward, he gets no title from the guardian who misappropriates the proceeds of the sale: *Strong v. Strauss*, 40 O. S. 87, IV Longsdorf's Notes, 6.

A purchaser, dealing fairly, takes good title to personal property belonging to the ward sold by a guardian, though the sale is made without order of the court and the guardian misappropriates the proceeds: *Strong v. Hope*, 7 Dec. Rep. 700, 4 Bull. 1034.

Good faith on the part of one purchasing securities from a guardian, the proceeds from which were misappropriated, is not material in an action against such party for recovery of the amount so lost, where it appears that the guardian was without authority to make the sale: *Bank v. Schirk*, 5 O. C. C. (N.S.) 569, 17 O. C. D. 125.

Where a guardian negotiates what is in form a sale of goods of his ward, but himself assumes the payment of the purchase price in consideration of a conveyance of land by

the purchaser to such guardian personally, the latter will not be permitted to benefit by such transaction, but will be held to have acquired such land in trust for the benefit of his ward: *Ostendorf v. Shale*, 11 O. C. C. (N.S.) 38, 20 O. C. D. 378 [affirmed, without opinion, *Shale v. Ostendorf*, 75 O. S. 581, IV Longsdorf's Notes, 1020].

A letter from the probate judge of the county in which the guardian was appointed, stating she has removed to another state with her wards, and has been reappointed in that state, and that a transfer of the Ohio securities belonging to the wards having become necessary, the sale of the securities to the party to whom the letter is addressed is thereby ratified, merely carries the information that the entire management of the estate of the wards has been transferred to the courts of such other state, and is without significance in so far as the question of authority for the sale and transfer of the securities may be concerned: *Bank v. Schirk*, 5 O. C. C. (N.S.) 569, 17 O. C. D. 125.

2. *Realty.*

(a) *Jurisdiction.*

The court that appointed a guardian may empower him to sell the minor's land situate in another county: *Maasom v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

The only power to authorize a guardian to sell the real estate of his ward, prior to the creation of the probate court, was vested in the court of common pleas of the county in which the guardian was appointed. Now that power is vested in the probate court of the same county: *Foresman v. Haag*, 36 O. S. 102, III Longsdorf's Notes, 834.

The power given the common pleas court under § 36 of the act of 1816 (2 Chase, 935), to appoint guardians for minors and to sell their real estate did not authorize the court to order the sale of the lands of an infant *feme covert*, upon the application of her husband: *Degenhart v. Cracraft*, 36 O. S. 549, III Longsdorf's Notes, 875.

The other conditions of jurisdiction being satisfied, a circuit court of the United States has jurisdiction in equity to set aside a sale of an infant's lands, fraudulently made by his guardian, under authority derived from a probate court, and may give such relief therein as is consistent with equity: *Arrowsmith v. Gleason*, 129 U. S. 86.

(b) *Venue.*

A guardian appointed in Pickaway county in 1853 got an order of sale from the probate court of Cuyahoga county for lands in the latter county. It was held, (1) The act

of 1824, giving the common pleas of the county of the appointment jurisdiction to sell wards' lands was not affected by the act of 1846 requiring guardians to be governed in executing any order of sale by the administration law, for it did not prescribe the court, but the execution of the order. (2) The act of 1853 giving concurrent jurisdiction to probate courts to sell lands on petition of guardian's administrator, etc., gave it only when the common pleas possessed it. (3) Accordingly, the sale was void and no title passed: *Foresman v. Haag*, 36 O. S. 102, III Longsdorf's Notes, 834.

(c) Purpose.

Sale of decedent's real estate made by an administrator upon application with guardian, not to pay debts, but to maintain children, and improve the property, is valid: *Newcomb v. Smith*, 5 O. 447, I Longsdorf's Notes, 299.

A guardian's agreement with the administrator in order to prevent his selling the homestead to pay debts that he will sell land of the ward in another state and pay the proceeds to the administrator is valid, and the administrator can maintain an action against the guardian for the proceeds: *Bradstreet v. Shank*, 8 Dec. Rep. 57, 5 Bull. 382.

(d) What Interest May be Sold.

Guardians making public sale of lands may in their discretion, divide a tract levied upon and appraised entire, and sell in parcels, being responsible for the abuse of that discretion: *Stall v. Macalister*, 9 O. 19, I Longsdorf's Notes, 458.

(e) Parties.

The husband of a wife who is under age can not make application for the sale of such wife's lands; it must be done by guardian: *Dengenhart v. Cracraft*, 36 O. S. 549, III Longsdorf's Notes, 875.

In an action by an administrator to sell real estate to pay debts, heirs who are idiots become parties to the record by the filing of an answer and cross petition by their guardian, wherein the allegations of the petition are admitted, service of summons waived, and the court is asked to grant the prayer of the petition and are bound by the sale: *Segal v. Building Co.*, 11 O. C. C. (N.S.) 481, 21 O. C. D. 519. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

For the general discussion of the subject of parties, see PARTIES.

(f) Pleading.

The guardian's petition for a sale of the ward's land should describe all she has, and will be presumed to do so unless the contrary appears: *Mauarr v. Parrish*, 26 O. S. 636, III Longsdorf's Notes, 335 [reversing *Maurr v. Parrish*, 7 Dec. Rep. 54, 1 Bull. 85].

If the petition describes the lots as No. 73, 74 and 75, but the appraisal and order of sale are lots No. 173, 174 and 175, which is the true description, the presumption is that these are all she had, and that there was a mere mistake in the petition and there is enough in the petition to give jurisdiction, and the ward can not attack the buyer's title: *Mauarr v. Parrish*, 26 O. S. 636, III Longsdorf's Notes, 335 [reversing *Maurr v. Parrish*, 7 Dec. Rep. 54, 1 Bull. 85].

For the general discussion of the subject of pleading, see PLEADINGS.

(g) Additional Bond.

After confirmation of a guardian's sale it will be presumed that he executed a bond if the journal shows the order to do so and approval of securities. The bond need not be carried into the record: *Mawson v. Sawyer*, 12 O. 195, I Longsdorf's Notes, 603.

Where the probate court orders a sale of the land without the giving of the bond required in G. C., § 10950, such order, although erroneous, is not void: *Mauarr v. Parrish*, 26 O. S. 636, III Longsdorf's Notes, 335 [followed and approved, *Arrowsmith v. Harmoning*, 42 O. S. 254, IV Longsdorf's Notes, 109].

A bond under G. C., § 10950, is not liable for funds commingled with the proceeds of real estate: *McWhinny v. Swisher*, 58 O. S. 378, IV Longsdorf's Notes, 742.

For Form and Liability on Bond, see BOND, XII, herein.

(h) Order of Sale.

In this state, a guardian can not sell the land of his ward except by order of the probate court, in a proceeding properly instituted for that purpose; consequently, he has no power to give it away, even for a public use, and perfect the gift by the execution and delivery of a deed: *State, ex rel., v. Commissioners*, 39 O. S. 58, III Longsdorf's Notes, 1007.

An order of the probate court for the sale by a guardian of the real estate of his ward where the bond provided for is not given, although it may be erroneous, is not void: *Arrowsmith v. Harmoning*, 42 O. S. 254, IV Longsdorf's Notes, 109.

(i) *Purchaser.*

(aa) Interest Acquired by Purchaser.

A land warrant issued to the widow and infant child of a deceased soldier under an act of congress, enabling a guardian to sell it on being authorized by the probate court, being assigned by him and the widow without such authority, conveys no title to the buyer. The buyer is presumed to know the statutory limitation of authority, and can not therefore stand as a *bona fide* buyer. Such buyer having located the warrant and got a patent holds the land in trust for the minor. It is not laches in the minor not to have sued until seven years after coming of age, if he only shortly before was apprised of the facts: *Mack v. Brammer*, 28 O. S. 508, III Longsdorf's Notes, 418.

Land scrip issued to A, B and C, minors, and in trust for the other heirs of S, not assignable on their face, were used by the guardian of A, B and C to buy land, taking the title in the name of his partners, who agreed to pay their portions in money. It was held that L, as guardian of A, B and C, could not dispose of the interest of the unnamed heirs. The named heirs held in trust for all the heirs, and could not dispose of the interests of the unnamed heirs. Such interests appearing on the face, there is notice of the rights of the other heirs, and the land procured is chargeable with the trust: *Stoddard v. Smith*, 11 O. S. 581, II Longsdorf's Notes, 534.

Where the tax title of lands of minors is void, and the buyer being indebted to the minors, their guardian attaches the land as if belonging to the buyer, who at the sheriff's sale under the attachment buys it in, pays the guardian, who delivers the surplus money to the mother of the minors, and it is used for their support, and the buyer sells the land to defendants, who put up costly improvements, it was held that *caveat emptor* applies to the tax sale, and the sheriff's sale and the sale to defendants. The guardian's attachment and sale thereunder did not estop the wards, nor did the mother's receipt and use of part of the purchase money for the minors estop them: *Cummings v. Bird*, 33 Bull. 332.

(bb) Liability on Resale.

Where upon a guardian's sale of a ward's property, the purchaser fails to make payments as the terms of the sale requires, necessitating a resale, the guardian or the administrator of the estate may sue for the difference in price realized at the second sale and the costs of such sale: *Clawson v. Beatty*, 36 Bull. 214 [affirmed, without opin-

ion, *Clawson v. Beatty*, 55 O. S. 647]. See also JUDICIAL SALES.

(j) *Terms of Payment.*

A guardian by order of the court sold land, part for cash and part on time. In order to allow the purchaser to borrow money for the cash payment the guardian delivered the deed, but withheld the purchase-money mortgage from the record until the lender's mortgage had been first recorded. The lender had no notice of this. It was urged on the one hand that the order of sale was notice, but on the other hand that the lender would be warranted in believing that the payment was all cash, the confirmation being silent as to the deferred payments. It was held that the lender's mortgage is first: *McFarland v. Harper*, 33 Bull. 87 [without opinion, in the supreme court].

(k) *Return.*

Under the act of February, 1824, in a sale by a guardian under order of court, the guardian's deed conveyed title, without a return of the sale to the court, or an order confirming the sale, and for a deed: *Stall v. Macalester*, 9 O. 19, I Longsdorf's Notes, 458.

Where, in a guardian's proceeding to sell, a mistake occurs in his return of sale by leaving out the name of the subdivision, the description being correct in all prior parts of the proceeding, it is sufficient to divest the wards of their title and vest it in the buyer, and the mistake can be reformed by an independent suit: *Cook v. Prosser*, 14 O. C. C. 137, 7 O. C. D. 619.

(l) *Distribution.*

Where wards own real estate in equal shares, the money realized in an action upon the special bond given on the sale of such real estate, should be equally divided among them, even though the amount due to the several wards by reason of other funds received and appropriated by the guardian may be unequal: *Swisher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872.

Where a minor inherits from her father lands which came to him by deed of gift and the same are sold under the order of the probate court, and the proceeds invested in government bonds and subsequently the bonds are sold and the proceeds invested in a ground rent, and afterwards that ground rent is redeemed and the proceeds invested in another ground rent and the minor dies while the owner thereof intestate and without issue, the estate will descend by virtue of G. C., § 8574, to the next of kin of the

deceased, and not to the heirs at law of the ancestor: *McCammon v. Cooper*, 69 O. S. 366, IV Longsdorf's Notes, 959 [affirming *McCammon v. Cooper*, 1 O. N. P. (N.S.) 154, 12 O. D. (N.P.) 677].

J. SUPPORT.

Although the parent is liable for the maintenance of her minor child, nevertheless, when the estate of the child is sufficient for its support and exceeds that of the parent, the child should be maintained out of its own estate. G. C., § 10935, does not fix the rule that the parent is bound to support the ward absolutely, no matter what the relative size of their respective estates may be: *Wing v. Hibbert*, 20 O. C. C. 404, 11 O. C. D. 192.

Where the income of wards was not sufficient to support and educate them, and the guardian used the principal, such use may be confirmed by the court: *In re Hough*, 2 O. N. P. 382, 1 O. D. (N.P.) 699.

That the guardian of orphan children is their aunt and assumed the position of parent does not show that she intended to pay the expenses of their support and education out of her own means: *In re Hough*, 2 O. N. P. 382, 1 O. D. (N.P.) 699.

The rule which permits a widowed mother, without means or income other than that resulting from her own labor to charge the estate of her child for support and education, is applicable to one who, by her own exertions, supported a step-son until he was sixteen years of age: *Peters v. Scoble*, 7 O. C. C. (N.S.) 417, 18 O. C. D. 541.

The probate court has no authority to appoint a guardian of the person of a minor who is without estate. Such appointment is void. And the law does not impose any peculiar liability upon a guardian to support a ward from his own means: *In re Lillian Baier*, 8 O. N. P. 107, 11 O. D. (N.P.) 47.

It is the general rule of law that no allowance should be made to either father or mother out of the estate of a deceased minor child for past maintenance and support, except in special cases. A special case warranting an exception to this rule is presented, where a mother who has furnished such support had little or no estate or an estate trifling in comparison with that of the minor, and the support was furnished to the minor for the benefit of the minor under conditions which were coercive upon the mother and compelled her to assume a burden which was not naturally and legally hers alone: *Spink v. Spink*, 7 O. C. C. (N.S.) 89, 18 O. C. D. 94 [affirmed, without opinion, *Spink v. Spink*, 78 O. S. 390].

K. REPRESENT WARD IN LITIGATION.

Under the act of 1824, guardians could appear for minors not named in the petition: *Ewing v. Higby*, 7 O. (pt. 1) 198, I Longsdorf's Notes, 370; *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

In proceedings to sell decedent's real estate by executors or administrators it is sufficient if infant heirs appear by their general guardian: *Ewing v. Hollister*, 7 O. (pt. 2) 138, I Longsdorf's Notes, 396.

Under the act of July 1, 1858 (S. & C., §§ 14, 15), the guardian is authorized to appear for an infant to a petition for dower, and where he appears and answers as guardian, and is accepted by the court it is the same as if he had been appointed: *Rankin v. Kemp*, 21 O. S. 651, III Longsdorf's Notes, 49.

An action may be maintained in this state by a minor to recover damages for personal injuries, through his guardian, appointed in Pennsylvania, although such minor lives in such foreign state: *Pennsylvania Co. v. Raub*, 11 O. C. C. (N.S.) 157, 20 O. C. D. 542 [affirmed, without opinion, *Pennsylvania Co. v. Raub*, 79 O. S. 454].

R. S., § 6290 (G. C., § 10955), relative to actions by foreign guardians does not apply alone to the disposition of lands of a minor, but is applicable to all actions by a foreign guardian: *Pennsylvania Co. v. Raub*, 11 O. C. C. (N.S.) 157, 20 O. C. D. 542 [affirmed, without opinion, *Pennsylvania Co. v. Raub*, 79 O. S. 454].

A guardian for minors, when all claim in one right, may institute proceedings for partition without process: *Goudy v. Shank*, 8 O. 415, I Longsdorf's Notes, 448.

A guardian appointed in another state can not as such guardian sue in this state: *Smith v. Madden*, 37 Bull. 291, 9 O. F. D. 320.

Our statutes do not provide for the service of process upon a former guardian in a foreign state in which he resides. G. C., § 11205, providing that the probate court may order notice to be given, when deemed necessary and there is no provision made, applies only to persons within the jurisdiction: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

A guardian can not enter appearance for his ward unless authorized by statute. Summons on the ward can not be waived by the guardian. The minor, on attaining majority, may prosecute error to the judgment for such defects: *Roberts v. Roberts*, 61 O. S. 98, IV Longsdorf's Notes, 802.

If a guardian has attempted to waive issuing and service of summons upon a minor, such judgment is void, but it may be a cloud on the title and the minor may, on attaining majority, prosecute error to the judgment

for such defect: *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802.

Consent of a guardian, if authorized by a statute, is probably not warranted in a proceeding commenced by himself and in his own interest, and where his position is adverse to his ward: *Ream v. Wolls*, 61 O. S. 131, IV Longsdorf's Notes, 803.

In a suit in chancery, where there are infant defendants, process should be served on them, so as to enable those most interested in their welfare to protect their interests: *Masie v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

Under the act of 1831, if all the persons interested in the land had the same guardian, he might appear *ex parte*, and process was unnecessary to give the court jurisdiction: *Bank v. Lane*, 8 O. 415, I Longsdorf's Notes, 448.

The finding of the court that the person assuming to act as guardian in partition proceedings under the act of 1820, is such guardian, imports absolute verity, and is sufficient, *prima facie*, to show that the court had obtained jurisdiction over the ward: *Merritt v. Horne*, 5 O. S. 307, II Longsdorf's Notes, 188.

X. ACCOUNTS.

A. POWER OF COURT TO COMPEL.

Removal of the guardian from the state, thereby terminating the guardianship, does not oust the jurisdiction of the probate court to compel him or his executor to account, but the court may compel the foreign administratrix of such guardian to account, by serving by publication, or by voluntary appearance of such administratrix, and the sureties will be liable for any deficiencies in the accounts of such guardian or his administratrix: *Netting v. Strickland*, 18 O. C. C. 136, 9 O. C. D. 841].

Where a guardian has become a nonresident of the state no provision is made in our statutes for service of notice on him to render an account. G. C., § 11205, providing that the probate court may designate the manner of notice where there is no provision applies only to persons within the jurisdiction: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

If the probate court could compel an accounting without notice, still the jurisdiction would at some time become lost, and when this is so, still an action in equity might be maintained on the bond without that accounting: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

A guardian appointed by another state, if he removes here with assets, may be compelled to account here, and if he dies the

ward can compel his administrator to account in our court. It is not like ancillary administration: *Pedan v. Robb*, 8 O. 227, I Longsdorf's Notes, 429.

The probate court has power to compel a settlement by a nonresident guardian, or on his default to ascertain the amount upon evidence: *Schwab v. Rappold*, 9 Dec. Rep. 340, 12 Bull. 197.

The probate court has exclusive jurisdiction over the settlement of final accounts: *Schroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790; *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

A guardian having neglected to collect a balance due from his predecessor, whereby the money was lost, was cited in the probate court to account, but the probate court adjudged that it had no jurisdiction, whereupon this action on the guardian's bond was begun in the common pleas for the amount of said loss. It was held that the action will not lie; the exclusive probate jurisdiction extends to matters omitted from the account as well as to those included in it: *State v. Beatty*, 33 Bull. 109 [without opinion, in the supreme court].

A suit in equity on a guardian's bond to compel an accounting can not be maintained without a showing that the powers and jurisdiction of the probate court are ineffectual to secure such accounting: *Newman v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981 [approved *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149].

The common pleas court obtains no jurisdiction of an action on a bond of a guardian to compel an accounting and payment of funds belonging to his ward from the fact that the guardian died without filing his account and left no books of account or memoranda from which his indebtedness could be ascertained: *Wegner v. Wiltsie*, 3 O. C. C. (N.S.) 410, 13 O. C. D. 302.

The administrator of a deceased guardian should file the account of the deceased guardian, and turn over the money in his hands to the newly appointed guardian, immediately after his appointment: *In re Bruckmann*, 1 O. N. P. (N.S.) 7, 48 Bull. 637.

Guardians must make final account in the probate court when their wards arrive at full age: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

A referee appointed by the probate court to examine a guardian's accounts has power to examine and report on parts of the account not excepted to, for the court could do so under G. C., § 11202, and the referee stands in its place: *In re Strickland*, 7 O. N. P. 233, 1 O. D. (N.P.) 702. See also REFERENCE—SUBMISSION OF QUESTIONS.

Payment of the balance to the ward after coming of age is not within the jurisdiction of this court to pass on, and an entry of such fact should not have been included in the final account, and is no defense to an action on the bond: *Meier v. Heranocourt*, 6 Dec. Rep. 1164, 11 Am. L. Rec. 46, 8 Bull. 29. See also COURTS.

B. CONTENTS.

1. Debits.

A guardian may, in his account filed for settlement in the probate court, charge all proper debts due from his ward, although accruing prior to guardianship; for he can not bring an action against himself or his ward while the relationship continues. The probate court has no discretion to refuse or settle them, though he should disallow items which are improper charges: *Davis v. Ford*, 7 O. (pt. 2) 104, 1 Longsdorf's Notes, 391.

A guardian is entitled to have the probate court pass upon items in his account due him individually before he was appointed guardian. If the court refuse to do so, error to the common pleas will be dismissed for want of jurisdiction. The remedy is mandamus to compel the probate judge to proceed: *In re Carter*, 2 Dec. Rep. 655, 4 W. L. M. 428.

Board furnished by the guardian to the ward and her husband and children, can not be charged in the account, because her support is her husband's debt: *Dangleheisen, v. Alexander*, 4 Dec. Rep. 532, 2 Clev. L. Rep. 329.

2. Credits.

A mother having placed five thousand dollars in the hands of her children's guardian, "said guardian and trustee" to pay her the interest until the youngest child became of age, and then divide the fund among the children, the guardian holds the interest as trustee for the mother, but holds the children's share as guardian and must account as such: *In re Kaufman*, Goebel, 98; *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308.

Money which the guardian had no right to receive, being paid him by an executor under an order of court without jurisdiction, and belonging in fact to other persons, must be accounted for as assets by him and his sureties, and they are estopped to set up the illegality or the title of others: *In re Cloud*, 10 Dec. Rep. 361, 20 Bull. 455.

Disbursements of funds of ward or loans of such funds to prospective heirs without security will be charged against the guardian on his accounting to the probate court as so much cash on hand with its appropri-

ate interest: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

C. DUTY OF COURT TO EXAMINE.

It is the duty of the probate court (G. C., § 11202) to examine accounts filed in that court, and *sua sponte* or on request of an interested party make such orders as are proper and necessary to secure a faithful and correct administration of the trust: *Jones v. Creamer*, 13 O. C. C. (N.S.) 585, 22 O. C. D. 223.

D. NOTICE OF ACCOUNTING.

Where a former ward, many years after he became of age, asks for an accounting by his former guardian, some legal notice must be given the guardian before the accounting may be had, and where upon an action on the bond the surety alone defends the surety can not be met with the objection that there had been an accounting in the probate court without notice to the former guardian or surety, and almost twenty years after the bond had been given: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

E. EXCEPTIONS.

A long delay on the part of a ward in filing exceptions to his guardian's account, there being no excuse for the delay, is laches, especially where the filing is delayed until after the death of the guardian, thus depriving his sureties of their main witness: *In re Streit*, 12 O. D. (N.P.) 158.

The next friend, though a stranger, may maintain exceptions to inventory and account: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court and dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

If in a former account the guardian charged himself with money he never had, the sureties may become parties to the final account and have the error corrected (G. C., § 11033), and it was error in the probate court to strike their exceptions from the files: *Porter v. Brown*, 9 Dec. Rep. 646, 16 Bull. 69.

Exceptions may be filed to the account, though no statute expressly gives the right. The sureties of the guardian may except to his account, for they have no other remedy in case of mistake: *Porter v. Brown*, 9 Dec. Rep. 646, 16 Bull. 69.

An order of the probate court striking exceptions to the account of a guardian from the files, is a final order, and the time to appeal therefrom can not be prolonged by a

later motion to set aside such order: *In re Streit*, 12 O. D. (N.P.) 158.

F. COST OF REFERENCE.

Where the estate expressly objects to a reference made by the probate court, reference is void under G. C., § 11483, and the property of the estate can not be amerced in any sum whatever by reason of the costs made thereunder: *In re Gorman*, 2 O. N. P. (N.S.) 667, 15 O. D. (N.P.) 204.

G. EFFECT OF ORDER.

1. Conclusive Effect of Order.

Each account of a guardian with his ward, whether intermediate or final, upon confirmation becomes an adjudication of all matters between the said guardian and ward contained in the account, unless an appeal be taken, or a subsequent guardian during the minority of the ward, or the ward within two years after he arrives at full age, file a petition in the common pleas to open up and review the settlement for fraud or manifest mistake: *In re Connell*, 12 O. N. P. (N.S.) 311.

A guardian receiving and finally accounting for personal property as his ward's estate, is estopped from thereafter setting up an adverse claim thereto: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, and affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. —, and *Stevens v. Robinson*, 88 O. S. —].

The guardian's account having been approved by the probate court, exceptions having been filed thereto and dismissed, is conclusive between guardian and ward: *Lynch v. Cogswell*, 18 O. C. C. 641, 7 O. C. D. 12.

Sureties are concluded by settlement in probate court, and will not be heard in absence of fraud and collusion, to question its correctness or demand a rehearing of the accounts: *Braiden v. Mercer*, 44 O. S. 339, IV Longsdorf's Notes, 215.

Approval by the probate court on exceptions by guardian to the allowance and payment by a former guardian of a claim against the ward in favor of an estate in which he was executor, is conclusive against the present guardian suing such executor to get back the money, although the court believes such claim was unfounded: *Lynch v. Cogswell*, 18 O. C. C. 641, 7 O. C. D. 12.

The settlement by the administrator of the deceased guardian is the same in effect as if made by the guardian himself: *Braiden v.*

Mercer, 44 O. S. 345, IV Longsdorf's Notes, 215.

The account required in G. C., § 10933, is a settlement, within the meaning of G. C., § 10954, when rendered and judicially passed upon by the court: *Woodmansie v. Woodmansie*, 32 O. S. 18, III Longsdorf's Notes, 618.

A ward's written settlement with his guardian, made six years after his becoming of age, in which he states that the guardian's account is correct and satisfactory in all respects, and asks the court to confirm same, concludes the ward, in the absence of fraud, in obtaining the settlement: *In re Streit*, 12 O. D. (N.P.) 158.

The finality of a fictitious settlement in the probate court made on the faith of a receipt from the ward of the balance due her, the guardian not actually paying her but agreeing to be responsible for the amount, is not attacked by an action against the guardian personally on such promise, and such action lies: *Lindsay v. Lindsay*, 28 O. S. 157, III Longsdorf's Notes, 396; *Donaldson v. Donaldson*, 31 Bull. 102.

Receipting without a collection for a fund by a guardian to enable the ward's mother as administratrix, in pursuance of a family arrangement, to close up her administration, which arrangement the ward perfected on coming of age by conveyance to his mother of real estate, but now seeks to charge the guardian's bond, it was held not to preclude the guardian from showing that he never received the amount, and it not being lost by his act he is not chargeable with it: *In re Mehner*, Goebel, 212.

The record of settlement with the probate court binds the guardian but not the ward: *Davis v. Ford*, W. 200, I Longsdorf's Notes, 17.

2. Correction of Mistake and Fraud.

Ward may open and review the settlement of guardian, for either manifest mistake or fraud in the court of common pleas by a civil action, and have them reformed: *Milten v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

Where a guardian becomes a nonresident after the approval of his account by probate court, his successor or wards may go into common pleas, and under allegations of fraud or mistake in the account may summon the sureties on the bond and proceed with the accounting, and if something is found to be still due from the former guardian, may proceed upon the bond in that action: *Engelcke v. Engelcke*, 3 O. N. P. (N.S.) 88, 15 O. D. (N.P.) 529.

Matters passed on by the probate court will not be opened up unless it is shown that the judgment was procured by fraud: *Wood-*

ward v. Curtis, 19 O. C. C. 15, 10 O. C. D. 400 [affirmed, without opinion, *Woodward v. Curtis*, 63 O. S. 575].

Original jurisdiction, for fraud in the settlement of the account, is given to the probate court, and appellate jurisdiction only given to the court of common pleas: *Lindsey v. Lindsey*, 28 O. S. 157, III Longsdorf's Notes, 396.

The sureties of a guardian may on their own motion become parties to the settlement of final account for the purpose of correcting errors in that or a former account: *Porter v. Brown*, 9 Dec. Rep. 646, 16 Bull. 69.

The final account of a guardian duly confirmed is unimpeachable for any cause in two years after the minors have become of age: *Lamkin v. Robinson*, 10 O. N. P. (N. S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, and affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. —, and *Stevens v. Robinson*, 88 O. S. —].

3. Review.

Every settlement made in the probate court by a guardian is final between guardian and ward, unless an appeal be taken to the common pleas, or opened and reviewed for fraud or mistake by a civil action in the common pleas, within two years after the ward becomes of age. G. C., § 10954, fixes the limitation and not G. C., § 11224: *Errett v. Howert*, 78 O. S. 100, IV Longsdorf's Notes, 1038.

Inasmuch as the probate court has exclusive jurisdiction to settle accounts of guardians, the common pleas can acquire no jurisdiction on appeal so long as any item of such an account remains undetermined: *Gregg v. Klein*, 12 O. C. C. (N.S.) 264, 22 O. C. D. 698.

G. C., § 10991, giving the right to have the accounts of a guardian opened up within two years after the death of the ward, etc., must be construed to be allowed only on good reason being shown, and the court has no power on mere motion without any charge of fraud, mistake or misconduct, to open the account and compel the guardian to establish each item of debit anew. If any mistake or fraud is shown, the account may be reformed to that extent only: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

On order of the probate court striking exceptions to the account of a guardian from the files, is a final order, and the time to appeal therefrom can not be prolonged by a later motion to set aside such order: *In re Streit*, 12 O. D. (N.P.) 158.

When a guardian closes his account with his ward by filing a final account in the probate court, an amount being due his ward, for which he induces her to sign a receipt as for money paid, he agreeing to be responsible to her for the amount, with interest, an action may be maintained upon such agreement by the ward, and the sum actually due recovered from the guardian without in any way opening or reviewing the accounts which had been settled in the probate court: *Lindsey v. Lindsey*, 28 O. S. 157, III Longsdorf's Notes, 396.

Approval of a partial account not showing that the guardian had received certain money which he had embezzled, and which he charged himself with in a later account, is not a *res judicata* in an action for them against the bond which was in force before the first account was filed: *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130.

Settlement is final unless appealed from, or opened as provided in G. C., § 10954: *Woodmansie v. Woodmansie*, 32 O. S. 18, III Longsdorf's Notes, 618.

The final account of a guardian duly confirmed is unimpeachable for any cause in two years after the minors have become of age: *Lamkin v. Robinson*, 10 O. N. P. (N. S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, and affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. — and *Stevens v. Robinson*, 88 O. S. —].

H. LIABILITY OF GUARDIAN TO PAY BALANCE TO WARD.

The duty of guardian to pay over funds to ward arises expressly by reason of G. C., § 10933, without any order of distribution: *Lamkin v. Robinson*, 10 O. N. P. (N. S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, and affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. — and *Stevens v. Robinson*, 88 O. S. —].

Statute of limitations does not apply where there are special limitations as under G. C., § 10954: *Shierberg v. Shierberg*, 8 Dec. Rep. 115, 5 Bull. 753.

The liability of the guardian to pay the ward the balance shown to be due in his final account, except as to the liability upon his bond, is both statutory and upon an account. As to either six years is a bar to an action for the recovery of such balance: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.)

126, 24 O. C. D. 91; which was affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. — and *Stevens v. Robinson*, 88 O. S. —].

Money in the hands of a guardian may, on the death of the ward, be sued for in chancery by the next of kin, chancery taking jurisdiction over funds received in fiduciary relations: *Armstrong v. Miller*, 6 O. 118, I Longsdorf's Notes, 327. See also ACCOUNTING.

I. LIABILITY OF WARD TO PAY BALANCE TO GUARDIAN.

A claim of a guardian against a ward by virtue of his account as guardian confirmed by the probate court, may be assigned to a creditor of said guardian who loaned him funds which were mingled with the funds of the ward: *Hopple v. Bank*, 1 Hosea, 428.

XI. COMPENSATION.

The claim of a guardian for services as guardian and attorney in litigation to recover an interest of ward's in real estate can not be allowed out of moneys coming into his hands from a former guardian, but will be postponed until such interest is determined and paid over; and if nothing is recovered the claim fails and must be disallowed: *In re Klein*, 5 O. L. R. 471, 52 Bull. 554.

Where the record shows affirmatively that the minor was without estate the appointment of a guardian is void, and there can be no compensation: *In re Baier*, 8 O. N. P. 107, 11 O. D. (N.P.) 47.

Incorrect accounts of a guardian will not necessarily deprive him of compensation: *In re Strickland*, 7 O. N. P. 233, 1 O. D. (N.P.) 702.

A parent can not, in the absence of disparity between the means of the minor and the parent, and where he is earning sufficient to support himself and child, reimburse himself out of the minor's estate: *In re Gould*, 2 O. D. (N.P.) 398.

If the income of the ward's estate be ample for the payment of necessities supplied them, their estate must answer for the payment and discharge of the same: *In re Hough*, 2 O. N. P. 382, 1 O. D. (N.P.) 699.

XII. BOND.

A. NECESSITY.

A guardian has no power to act as such, or to control the property of the ward, until he has given the bond required by statute: *State v. Sloane*, 20 O. 327, I Longsdorf's Notes, 911.

Where a will makes a person both a trustee and executor, each separate from the

other, such person must give separate bonds: *Railway v. Schmidt*, 1 O. D. (N.P.) 639.

B. FORM.

Informality in the bond, which the statute provides shall not avoid it, covers a condition not following the statute. This would be the rule apart from the act, for the bond is to be read as if the guardian's duties were incorporated in it: *Eichelberger v. Gross*, 42 O. S. 549, III Longsdorf's Notes, 130.

C. JOINT BOND.

A single bond by a guardian of each of three wards and not of them jointly is improper, but will not be held invalid: *Cass v. State*, 1 Dec. Rep. 486, 10 W. L. J. 163.

D. SUCCESSIVE BONDS.

The journal entry showing nothing further than a new bond given by order of court, and upon motion of the guardian, the new bond containing only one of the former sureties, it was held to be a new bond and not an additional bond, and where defalcation discovered on final settlement, the presumption is that it occurred during the term of the last bond: *Pummill v. Baumgartner*, 3 O. N. P. 40, 4 O. D. (N.P.) 69.

A new bond given on the old sureties becoming nonresident, is not invalid for want of consideration, and the sureties are liable: *King v. Bell*, 36 O. S. 460, III Longsdorf's Notes, 870.

A second bond could be required of a guardian by the common pleas, though there was no statute, in virtue of its inherent powers: *Cass v. State*, 1 Dec. Rep. 486, 10 W. L. J. 163.

The guardian of an imbecile gave bond as such, and afterwards gave the special bond required on sale of real estate, and afterwards gave a new guardian's bond. It was held that the last bond was liable for the amount due to his successor, though made up in part, or wholly, from the proceeds of said sale: *Tuttle v. Northrop*, 44 O. S. 178, IV Longsdorf's Notes, 202. See also BONDS, SURETY.

E. BREACH.

Failure to settle accounts in the time required by law is a breach of the bond: *Cass v. State*, 1 Dec. Rep. 486, 10 W. L. J. 163.

Failure to pay over the balance found due is a breach of bond: *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149; *Meier v. Herancourt*, 8 Dec. Rep. 456, 8 Bull. 29.

When the ward attains majority it is the duty of the guardian to make final settlement of his accounts in the probate court,

and a failure to pay over the balance then due is a breach of the bond: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

The refusal of guardian to pay over to his ward or attorney money in his hands belonging to such minor, is not a breach of his bond, and such refusal will not give the minor, by his next friend, a right to institute suit on the bond: *Favorite v. Booher*, 17 O. S. 548, II Longsdorf's Notes, 849.

F. SURETIES.

1. Number.

A bond with one freehold surety is sufficient if the surety is good for the amount of the bond: *Arrowsmith v. Gleason*, 129 U. S. 86, 6 O. F. D. 310.

2. Liability.

Sureties are liable for all moneys received, by the guardian, of the ward: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

In the settlement of a guardian's account, he was credited with the payment of moneys for his ward, which in fact had not been paid, and the account was subsequently corrected during the minority of the ward. It was held that in such case the liability of the surety in the guardian's bond is not affected: *Scobey v. Gano*, 35 O. S. 550, III Longsdorf's Notes, 808.

Suit against sureties on a guardian's bond are sustainable without previous liquidation of the amount due from the principal: *State v. Humphries*, 7 O. (pt. 1) 223, I Longsdorf's Notes, 375.

Release of the surety on a guardian's bond and acceptance of a new bond with other surety, will not exonerate the surety in the first bond as to money embezzled by the guardian previous to his release: *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130.

Where a guardian, after converting funds of the estate to his own use, resigned, removed to another state, was reappointed and qualified there, the filing of his final account there, charging himself with the amount due the estate at the time of his resignation, will not exonerate the sureties in the first bond, but they will be liable upon the ground that the guardian failed to faithfully perform his duties. Nor will the fact that before such second appointment he was selected by his ward as her guardian operate to release such sureties: *Penn & Collins v. McBride*, 1 O. C. C. 285, 1 O. C. D. 157.

General payments by the guardian from the commingled fund, are not to be presumed on account of the proceeds of the real estate to exonerate the sureties nor are they to be pro rated between this and the general bond, but the sureties on this bond are liable for the proceeds of the real estate: *McWhinney v. Swisher*, 58 O. S. 378, IV Longsdorf's Notes, 742.

Where a guardian had sold real estate and defaulted as to the proceeds and died, in an action against his bondsmen, interest is to be calculated upon the amount realized on the sale with annual rests to his death, and thereafter with simple interest without such rests to the date of judgment: *Swisher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872.

Where, after a guardian had sold certain real estate of the ward and received the proceeds, one of the sureties on his general bond was released and he gave a new bond, with the other old and one new surety; and later defaulted; it was held, the sureties on the last general bond are liable for the amount due the estate, whether or not the same is partly or entirely the proceeds of the sale of such real estate: *Tuttle v. Northrop*, 44 O. S. 178, IV Longsdorf's Notes, 202.

The language of G. C., § 10933, is very comprehensive and includes whatever may be part of an estate, whether derived from personalty or realty: *Tuttle v. Northrop*, 44 O. S. 178, IV Longsdorf's Notes, 202.

Where a guardian gave a bond with three sureties, under this section, and afterward gave a special bond with two sureties for the sale of land, and died insolvent and a defaulter, the sureties on both bonds were cosureties only to the amount of the proceeds of the sale of realty: *Swisher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872.

A finding by the probate court of the amount due the ward from a nonresident guardian not served within the state does not bind the sureties and is a nullity. The fact that the bond is within the jurisdiction gives no power to render a personal judgment: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58. See also JUDGMENT.

A recital in a guardian's bond of the appointment of the principal estops the sureties to deny it or question its validity: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790. See also ESTOPPEL.

3. Discharge.

Release of one surety releases all: *Dowell v. Guion*, 7 Dec. Rep. 525, 3 Bull. 737.

Mere delay of a ward, on his arriving of age, to compel his guardian to settle his accounts in the probate court, does not discharge the sureties, notwithstanding the guardian may, in the meantime, have become insolvent: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981 [approved, *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149].

Where a guardian, after giving bond, embezzles money of his wards, the subsequent discharge of the surety in the bond, and acceptance, by the court of a bond with other surety, will not exonerate the surety in the first bond with respect to the money so embezzled: *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130.

Receipt by ward on coming of age to the guardian for the balance due, filed in court, but not seen by or influencing the sureties, is no defense for them if it was without consideration or payment: *Meier v. Herancourt*, 8 Dec. Rep. 456, 8 Bull. 29.

The sureties on a guardian's bond are not exonerated by the fact that after actual conversion of funds to his own use he resigned, moved to another state, and was reappointed there, and gave a new bond, without actual proof that he paid over to himself, for after actual conversion he is presumed to hold the amount as an individual, and did not restore it: *Penn v. McBride*, 1 O. C. C. 285, 1 O. C. D. 157.

Where the record shows that a guardian was allowed to give a new bond on his own application, and all the sureties on the latter but one are new, the presumption is that the bond is a new one, under G. C., § 10937, and not an additional one, and that the old sureties except one had requested release. They are therefore released by law from future liability upon approval of the new bond: *Pummill v. Baumgartner*, 3 O. N. P. 40, 4 O. D. (N.P.) 69.

Release of a surety by order of court on an additional bond releases all his cosureties on both bonds: *Pummill v. Baumgartner*, 3 O. N. P. 40, 4 O. D. (N.P.) 69. See also BONDS, SURETY.

4. Rights of Surety.

An indebtedness paid by reason of suretyship on the bond of a guardian relates back to the date of the bond, so as to give sureties the rights of creditors in reference to fraudulent conveyances: *Boies v. Johnson*, 1 O. C. C. (N.S.) 451, 15 O. C. D. 331.

Where sureties were compelled to make good a fraudulent deficiency of a guardian, their right of action as to the fraudulent transfer accrued at the time of the transfer or at the time of their discovery of the

fraud and the statute runs from these dates and not the date of payment made under bond: *Boies v. Johnson*, 1 O. C. C. (N.S.) 451, 15 O. C. D. 331.

The sureties on the special bond are entitled to have any sum realized from an indemnity mortgage given by the guardian to the sureties of both bonds, credited upon the liability in proportion of the liability under the special bond for funds received on sale of real estate to the liability under the general bond for funds not so received: *Swisher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872.

Sureties on a guardian's bond may appeal from the finding of the amount due from him or his executor. They are persons affected under G. C., § 11206: *Netting v. Strickland*, 18 O. C. C. 136, 9 O. C. D. 841.

G. ACTION ON BOND.

1. Right to Action.

An action on the guardian's bond to recover the amount remaining in his hands first accrues when such amount has been ascertained by the probate court on settlement of the final account, unless it be shown that the powers of the probate court are ineffectual to secure such accounting; its jurisdiction to compel an account being exclusive: *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149.

So, though the guardianship is terminated by removal of the guardian, the act requiring him at the expiration of his trust to fully account and pay over applies: *Gorman v. Taylor*, 43 O. S. 86, IV Longsdorf's Notes, 149.

If no accounting can be obtained from the guardian because jurisdiction over him has been lost, as where he has left the state, an action in equity will lie on the bond without an accounting. But laches would be a defense: *Gilbert v. Gilbert*, 13 O. C. C. 29, 7 O. C. D. 58.

Though the guardian is absent from the state and his residence unknown, no action lies on the bond until the probate court attempts to compel him to account or puts him in default by citation. Although the act of 1857 as to citing nonresident guardians is not in the revised statutes, yet citation may be made under G. C., § 11205: *Schwab v. Rappold*, 9 Dec. Rep. 340, 12 Bull. 197.

To maintain an action on a guardian's bond against the sureties for money of the ward not paid over by the guardian, the amount must first be ascertained by the probate court upon settlement of his accounts: *Schwab v. Rappold*, 9 Dec. Rep. 340, 12 Bull. 197.

No cause of action on the bond of a guardian accrues in favor of his ward until the filing of the guardianship account and the settlement of the estate in the probate court: *Wegner v. Wiltsie*, 3 O. C. C. (N.S.) 410, 13 O. C. D. 302.

An action before the amount is liquidated may lie on the bond if an accounting can not be obtained by the probate court on the ward's attaining majority: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

Previous liquidation of the amount due from the principal is not necessary to a suit on the bond. That rule has only been applied to administrators—never to other bonds: *State v. Humphreys*, 7 O. (pt. 1) 223, I Longsdorf's Notes, 375.

2. Limitation.

The four years limitation prescribed by the act for the settlement of estates within which suits are to be commenced against executors and administrators applies to an action on a guardian's bond; and the disability of infancy will not save the plaintiff from the operation of the statute: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

It is the duty of guardians when their wards arrive of age, to make final settlement of their accounts in the probate court, and the right of action on a guardian's bond, to recover from the heirs of the sureties the amount remaining in his hands, first accrues to the ward when such amount is ascertained by the probate court on settlement of final account. Mere delay, upon arriving of age, to compel settlement does not discharge sureties: *Newton v. Hammond*, 38 O. S. 430, III Longsdorf's Notes, 981.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

3. Jurisdiction.

The probate court is given exclusive jurisdiction under G. C., § 10492, to appoint and to remove guardians, to direct and control their conduct and to settle their accounts. Therefore, the common pleas court obtains no jurisdiction of an action on the bond of a guardian to compel an accounting and payment of funds belonging to his ward, from the fact that the guardian died without filing his account and left no books of account or memoranda from which his indebtedness could be ascertained: *Wegner v. Wiltsie*, 3 O. C. C. (N.S.) 410, 13 O. C. D. 302.

4. Parties.

A single bond by the several guardians of each of three wards and not their joint guardian can not be sued on by them jointly, but two names can be stricken out by amendment: *Case v. State*, 1 Dec. Rep. 486, 10 W. L. J. 163.

The sureties, both on the guardian's original and those on his additional bond, may be sued in one action: *Siebern v. Meyer*, 11 Dec. Rep. 344, 26 Bull. 147. See also BONDS, SURETY.

For the general discussion of the subject of parties, see PARTIES.

5. Pleading.

An allegation in a petition in an action on a guardian's bond that "an accounting can not be obtained from or with such guardian in the exercise of the power and jurisdiction of the probate court in respect to said estate and such jurisdiction is ineffectual for such purpose," states a conclusion of law and not of fact to be taken as admitted upon demurrer: *Wegner v. Wiltsie*, 3 O. C. C. (N.S.) 410, 13 O. C. D. 302.

Availing that the guardian converted money to his own use and refused to pay it over, though often requested, is bad, for it shows no breach of the bond, because using the fund himself is no breach, if he is ready to pay over when required, and the words "often requested" are not sufficient when a special demand is necessary. A demand must appear to be made by the one entitled to receive the money and the time and place stated: *Case v. State*, 1 Dec. Rep. 486, 10 W. L. J. 163.

Availing a failure of the guardian to pay over to the ward, being still a minor, or to his attorney, states no breach of the condition of his bond. Neither is authorized to settle: *Favorite v. Booker*, 17 O. S. 548, II Longsdorf's Notes, 849.

If liquidation of the amount is not alleged in the petition, but this is not objected to until after the evidence is closed, and the answers and proof showed such account and balance, the defect will be disregarded: *Meier v. Herancourt*, 8 Dec. Rep. 456, 8 Bull. 29.

In suit on a guardian's bond in the common pleas court to recover the amount of a judgment rendered against the guardian upon the settlement of his account, the defendant surety interposed an answer and cross-petition averring that the judgment was for a greater amount than was actually due, and was obtained by the fraud of the guardian. It was held that the fact that the pleading fails to deny the amount so adjudged due in its entirety does not de-

prive the court of power to grant relief if the facts are found to be true: *Gantz v. Gease*, 82 O. S. 34.

For the general discussion of the subject of pleading, see PLEADINGS.

6. Review.

There is a right of appeal in an action brought in the probate court by a guardian against the sureties on the bond of a former guardian: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790.

The issue of fraud in obtaining judgment is triable to the court, and not to a jury. And from the judgment rendered either party may appeal to the circuit court: *Gantz v. Gease*, 82 O. S. 34.

Approval of a partial account not showing that the guardian had received certain money which he had embezzled, and which he charged himself with in a later account, is not a *res adjudicata* in an action for them against the bond which was in force before the first account was filed: *Eichelberger v. Gross*, 42 O. S. 549, IV Longsdorf's Notes, 130.

XIII. TRANSACTIONS BETWEEN GUARDIAN AND WARD.

A conveyance by a minor to his guardian on the day he comes of age, can only be upheld in a court of equity by clear proof, that under all circumstances, it is just and equitable: *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631.

If the settlement relied on, to uphold a conveyance from a minor to guardian upon ward's arrival of age, embraces distinct and several claims of two or more who hold trust relations to the child, such conveyance may be sustained as to one and set aside as to the others according as the equity of the case will warrant: *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631.

Transactions between persons between whom there is a continuance of an influence of a formerly existing fiduciary relation of guardianship and ward, unless resulting in benefit to the ward, will be examined with the closest scrutiny, and unless shown to have been had under conditions of strict justice and unquestionable fairness and with contemplative benefit to the ward, will be set aside as far as the former guardian has derived any unjust benefit therefrom: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91].

A trustee having also an individual interest may buy at a sale instituted by a third person. Thus, a defendant parcener in

a partition case, who is also guardian of other parceners may be purchaser: *Glemsor v. Glemsor*, 5 O. N. P. 170, 5 O. D. (N.P.) 267. See also FRAUD AND DECEIT.

XIV. ACTION BY AND AGAINST GUARDIAN.

A. NATURE OF ACTION.

A guardian can not be sued at law to bind the ward's estate. The judgment would bind him personally: *Weigand v. Kylius*, 6 Dec. Rep. 781, 8 Am. L. Rec. 100.

A guardian can not be sued in equity on a contract made with a preceeding guardian, though for necessities (board), after he had paid over to the ward all the funds, by draft mailed a few days before the ward came of age, and has no assets in his hands: *Weigand v. Kylius*, 6 Dec. Rep. 781, 8 Am. L. Rec. 100.

Where one as guardian, employed counsel to bring suit against a railroad for wrongful death, a suit for fees against the guardian in his representative capacity can not be maintained: *Hurd v. Railway Co.*, 4 O. N. P. 404, 6 O. D. (N.P.) 545.

Where a guardian surrendered possession of his ward's estate by operation of law and without opportunity to make himself whole, an equitable action may be maintained in his favor against the ward's general estate for indemnification: *Bank v. Hopple*, 8 O. N. P. 473, 11 O. D. (N.P.) 483.

Where an action is prosecuted by A, guardian for B, on an instrument payable to A, guardian of B, the fact that the ward becomes of age, pending the suit, affords no grounds to abate it: *Gard v. Neff*, 39 O. S. 607, III Longsdorf's Notes, 1052.

A guardian can not sustain an action against his ward while the relation of guardian and ward, subsists, for advances made to his ward, as evidenced by a balance due to him on settlement with the court: *Davis v. Ford*, 7 O. (pt. 2) 104, I Longsdorf's Notes, 391.

Doubted if he can sue the ward's administrator for such balance: *Davis v. Ford*, W. 200, I Longsdorf's Notes, 17.

The statute of limitations does not begin to run before termination of the wardship: *Davis v. Ford*, 7 O. (pt. 2) 104, I Longsdorf's Notes, 391.

Where a guardian appointed in Pennsylvania, received the assets of the ward, and then removed with his ward to Ohio, and died without settlement with his ward, it was held the ward could maintain an action against the personal representative of the guardian's estate: *Pedan v. Robb*, 8 O. 227, I Longsdorf's Notes, 429.

Possession of a guardian is possession of the wards, so as to sustain an action of trespass by the wards by next friend for a trespass committed under an unlawful permission by the guardian: *Johnson v. Meyer*, 4 Dec. Rep. 383, 2 Clev. L. Rep. 81.

When a guardian is superseded, and another appointed in his stead, proceedings in an action against the former, as such, after he has been superseded, will not operate against or bind the ward or the succeeding guardian: *Este v. Strong*, 2 O. 401, 1 Longsdorf's Notes, 137.

An equitable action against the ward's general estate will lie for the subjection of a specific piece of property in which the money of both guardian and ward were invested: *Bank v. Hopple*, 8 O. N. P. 473, 11 O. D. (N.P.) 483.

Funds in the hands of a guardian may be reached. He is "any person" under G. C., § 11828, as where a minor charged in bastardy has absconded: *Arbaugh v. Myers*, 8 Dec. Rep. 617, 9 Bull. 64. See also ATTACHMENT.

A guardian may maintain a suit, under G. C., § 10857, to obtain the instruction of the court as to whether a claim made upon the ward's estate is legal: *Wing v. Hibbert*, 7 O. N. P. 124, 8 O. D. (N.P.) 65.

B. JURISDICTION.

An executor, guardian, trustee, etc., may be sued either where he resides or was appointed, or can be served personally: *Osborn v. Lidy*, 51 O. S. 90, IV Longsdorf's Notes, 531; see also *Stanton v. Sylvester*, 7 O. N. P. 589, 9 O. D. (N.P.) 801.

An administrator or guardian in one state can not sue in the courts of another state without authority from the latter: *Smith v. Madden*, 9 O. F. D. 320, 37 Bull. 291.

Money in the hands of a guardian may, on the death of the ward, be sued for in chancery by the next of kin, chancery taking jurisdiction over funds received in fiduciary relations: *Armstrong v. Miller*, 6 O. 118, I Longsdorf's Notes, 327.

A guardian appointed in another state having sold lands there which had descended to his wards, the ancestor's administrator appointed here and claiming the lands were necessary to pay debts can not sue the guardian here for the proceeds, for the guardian is responsible to the court that appointed him and the proceeds are substantially in the jurisdiction that the land was in: *Donley v. Shields*, 14 O. 359, I Longsdorf's Notes, 675.

C. PARTIES.

A qualified guardian may be substituted for a disqualified guardian as a party to a

suit: *Weiland v. Muntz*, 2 O. C. C. (N.S.) 71, 15 O. C. D. 185. See also PARTIES.

Judgment having been rendered in favor of the guardian of an imbecile in an action against the latter, the guardian is a necessary party to a proceeding to reverse the judgment, and where the time has passed in which such proceeding to reverse can be prosecuted, the proceeding can not be brought against the administrator of such ward upon his decease: *Bradstreet v. Mettler*, 12 O. C. D. 808. See also ERROR.

For the general discussion of the subject of parties, see PARTIES.

D. PLEADING.

A petition against a guardian, averring his appointment, is not demurrable for failure to add that he has qualified and given bond: *Weldy v. Beehley*, 1 Dayton Term Rep. (Iddings) 84.

A demurrer will lie against a court in a suit for recovery from a ward of money advanced by her guardian, if there is no averment of an express promise to pay: *Bank v. Hopple*, 8 O. N. P. 473, 11 O. D. (N.P.) 483.

In a suit to establish the validity of a lease executed by a guardian, the petition should show by what authority the guardian acted, and that the persons for whom he acted were disqualified by infancy, imbecility or otherwise: *Soap Co. v. Railway*, 6 O. C. C. (N.S.) 496, 17 O. C. D. 759 [affirmed, without opinion, *Railway v. Soap Co.*, 76 O. S. 577].

A pleading sufficiently avers title as against a demurrer where it avers that plaintiff was a guardian and his wards owned certain timber land in fee simple and a trespasser cut the timber and sold it to defendant. The ownership of the severed timber follows from the ownership in the land: *Railroad Co. v. Hutchins*, 37 O. S. 282, III Longsdorf's Notes, 912. See also CONVERSION.

For the general discussion of the subject of pleading, see PLEADINGS.

E. PROCEDURE.

In suit upon guardian's bond to recover a judgment of probate court against the guardian, and an answer and cross-petition by defendant surety, averring that the judgment is in excess of amount due from guardian, and that it was obtained by concealment and fraud by the guardian, the issue is triable of right by the court and not to a jury: *Gantz v. Gease*, 82 O. S. 34.

F. REVIEW.

The time for appeal having passed, action against the guardian's estate will not lie: *Lynch v. Cogswell*, 18 O. C. C. 641, 7 O. C. D. 12.

An appeal lies from the allowance or disallowance of costs for or against a guardian or his ward: *In re Gorman*, 2 O. N. P. (N. S.) 667, 15 O. D. (N.P.) 204. See also **APPEALS**.

XV. GUARDIANS FOR IMBECILES.

A. APPOINTMENT.

1. In General.

Appointment may be made either for person or estate: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

A guardian may be appointed for the estate of a lunatic without appointment for person: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

2. When Proper.

Before the probate court can appoint guardians for imbeciles the judge must be satisfied that the subject is an imbecile and a resident of this county: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

Upon proper application and hearing, the probate court may appoint a guardian, notwithstanding that prior to the application the idiot, imbecile or lunatic was admitted into an infirmary and his property taken possession of by the institution: *Kissel v. Gram*, 4 O. N. P. 333, 7 O. D. (N.P.) 233.

A person may be an imbecile, though able to govern himself so as not to need a guardian for his person. Therefore, where a person has become so infirm mentally that he can not manage his affairs with sufficient capacity to preserve his property, a guardian may be appointed: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

The mere fact that an aged woman shows infirmities of age, or peculiar conduct is not sufficient to authorize the appointment of a guardian: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

One who for some years has been wasting his property, making disadvantageous contracts, spending large sums of money in which he had only a life estate, for property which was not worth, when the money was invested, half the sum expended for it, is an imbecile within the meaning of the statute: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

3. Jurisdiction.

Legal residence means continuous residence for twelve months: *In re Canady*, 4 O. N. P. 403, 7 O. D. (N.P.) 285.

The idiot must have resided within the county continuously for a period of at least twelve months, or come into the county with his father or someone having legal control over him, with the intention of making this his residence before a guardian can be appointed for him by the probate court: *In re Canady*, 4 O. N. P. 403, 7 O. D. (N.P.) 285.

4. Notice.

Before the amendment of 1889, a guardian for an insane wife could be appointed at any time without notice to the husband: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

Before the amendment of G. C., § 10989, no notice was required on application for appointment of guardian for imbecile: *In re Dickson*, 10 Dec. Rep. 6, 18 Bull. 37.

In hearing the application for appointment of guardian, failure to give notice to the alleged imbecile is an irregularity which can be complained of only in a direct proceeding to set aside the appointment in probate court or reverse it on error: *Jordan v. Dickson*, 10 Dec. Rep. 332, 20 Bull. 360.

B. ACCOUNTS.

A receipt or voucher signed by a minor can be received in settlement of his guardian's accounts, but it is otherwise as to a lunatic or idiot by reason of G. C., § 10992: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

After the account of a guardian of an imbecile has been duly passed upon, the court has no power later, upon mere motion or request of the heirs, to open up the account and make the guardian establish by evidence every item of debts contained therein. This can only be done where mistake or fraud is shown: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

A guardian is liable for the support of ward in an infirmary: *Infirmary v. Merkle*, 3 O. N. P. 169, 4 O. D. (N.P.) 190.

C. BOND.

A substituted surety is liable for the proceeds of real estate sold by the guardian before the new bond was given: *Tuttle v. Northrop*, 44 O. S. 178, IV Longsdorf's Notes, 202.

D. ACTIONS.

An action against an insane defendant to recover damages for wrongful death may be brought in the county where the insane de-

fendant has his legal residence; and his legally appointed guardian may be joined with him as a party defendant. Where the guardian waived the issue and service of process and entered his appearance, and summons was issued to another county for the insane defendant and the same was personally served upon him by the sheriff of such county, and subsequently the plaintiff dismissed the action as to the guardian only, it is error for the court to quash the service on the insane defendant and to dismiss the action for want of jurisdiction over his person: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

Action to recover property must be by the guardian and not by next friend: *Row v. Row*, 53 O. S. 249, IV Longsdorf's Notes, 598.

A party to a suit is incompetent to testify as a witness when the opposite party is the guardian of an imbecile: *Ross v. Todd*, 4 O. C. C. 1, 2 O. C. D. 385.

A judgment against an imbecile and his guardian is not a lien on his land, and can not be recognized as such by his administrator to pay debts: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

Judgment against an adjudged imbecile is binding and can not be collaterally impeached: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

The collection from the guardian of an imbecile of a fee of \$5,000 for services which resulted in a compromise whereby a large amount of cash and securities were turned over to the guardian, \$2,000 of which fee was paid to another attorney for services in the same behalf, is not rendered an act of moral turpitude by the fact that these services were subsequently regarded as unnecessary and a finding to that effect was made in the common pleas court: *In re McCray*, 1 O. C. C. A. 177.

E. EFFECT OF APPOINTMENT OF GUARDIAN.

By the proviso of the act of 1872 (69 v. 174), the appointment of a guardian for an imbecile is to be regarded only as *prima facie* evidence of imbecility. The fact as to such imbecility may be inquired into by the alleged imbecile in an action brought by him, to enjoin the guardian from interfering with the control and management of his property. In the revision of this statute (75 v. 927, § 49), this provision was omitted. It was held that the omission did not give an appointment made under the original act a more conclusive effect than it had under the original act: *Messenger v. Bliss*, 35 O. S. 587, III Longsdorf's Notes, 811.

Appointment of guardian is conclusive evidence of ward's incapacity to make or ratify

a contract, pending the guardianship; as to ward's capacity to marry, to make a will or commit a crime, it is only *prima facie* evidence of incompetency: *Jordon v. Dickson*, 10 Dec. Rep. 147, 19 Bull. 64.

A will made by the ward shortly afterwards and during the guardianship is not necessarily void: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

G. C., § 11008, seems to preclude the idea that there could be any preferences among creditors of the idiot, imbecile or lunatic, at least after the appointment of his guardian: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

Under the act of January 29, 1834, county can not be charged with the maintenance of an idiot, lunatic or insane person until after the appointment of a guardian by the court of common pleas: *Trustees v. Commissioners*, 10 O. 283, I Longsdorf's Notes, 511.

The liability of a husband for necessities or care furnished to his wife is not affected by the fact that he is insane or mentally incompetent to transact business, and an action for recovery for services or necessities so furnished may be maintained against the administrator of such husband notwithstanding the indebtedness was incurred during the lifetime of the husband and was not approved by his guardian: *Badger v. Orr*, 1 O. C. C. A. 49.

F. TERMINATION.

In a proceeding to terminate a guardianship over an imbecile, the sole question is whether the ward was properly declared to be an imbecile at the time the appointment was made, or whether since the making of the appointment he has been restored to reason: *In re Kramer*, 8 O. N. P. (N.S.) 217, 19 O. D. (N.P.) 444.

While the order of termination *ipso facto* disposes of the guardian, it is not an order based upon the qualification of the guardian, as in the case of the guardian of a minor ward, but of capacity of ward: *In re Kramer*, 8 O. N. P. (N.S.) 217, 19 O. D. (N.P.) 444.

There is no appeal from the overruling, by the probate court, of a motion made by a lunatic to have his guardian's letters revoked, on the ground that they had been improperly issued: *Messenger v. Bliss*, 35 O. S. 587, III Longsdorf's Notes, 811.

An appeal will lie from an order of a probate court overruling a motion of an imbecile ward to terminate the guardianship upon the grounds: (1) that the letters of guardianship were in the first instance improperly issued, and (2) that if he was an imbecile at time such letters were issued he has since been fully restored to reason: *Hiett v. Nebergall*,

45 O. S. 702, IV Longsdorf's Notes, 305. See also INSANE, IMBECILES AND IDIOTS.

XVI. GUARDIAN FOR DRUNKARD.

G. C., § 11012, does not prohibit the drunkard from buying necessities after service of notice: *Brockway v. Jewell*, 52 O. S. 187, IV Longsdorf's Notes, 569.

Under a prior statute (68 v. 6) the court of common pleas could appoint a guardian: *Hagany v. Cohnen*, 29 O. S. 82, III Longsdorf's Notes, 441.

The fact that no provision is made for a trial by jury does not render a statute for the appointment of a guardian invalid. Art. I, § 5, of the Ohio constitution, does not apply: *Hagany v. Cohnen*, 29 O. S. 82, III Longsdorf's Notes, 441.

Such guardianship is not conclusive evidence of want of capacity to form a valid marriage: *McCleary v. Barcalone*, 6 O. C. C. 481, 3 O. C. D. 548. See also HABITUAL DRUNKARDS.

XVII. GUARDIAN FOR DEAF AND DUMB PERSONS.

Under former legislation, the probate courts of this state have power to appoint guardians for deaf and dumb persons of full age, whom they find to be incapable of managing their affairs, without submitting the question of incapacity to a jury of any kind: *Shroyer v. Richmond*, 16 O. S. 455, II Longsdorf's Notes, 790.

GUARDING MACHINERY.

See MASTER AND SERVANT; NEGLIGENCE.

GUESSING CONTESTS.

A contract by which the subscribers to a newspaper pay a certain sum in addition to the subscription price for the privilege of making a guess concerning the total vote cast for secretary of state at the next election; the fund thus created to be divided among those whose guesses come the nearest to the actual vote, is a wager. A subscriber may recover in an action at law the total amount paid in by him, but he can not have a receiver appointed to take charge of such fund and to distribute it: *Stevens v. Times-Star Co.*, 72 O. S. 112, IV Longsdorf's Notes, 988 [for opinion below, see *Stevens v. Enquirer Co.*, 13 O. D. (N.P.) 235].

The plaintiff in a guessing contest is not entitled to recover the fifty cents paid in for the privilege of taking part in such contest, in an action brought in the court of common pleas, because the common pleas court has no

jurisdiction in suits for that amount, although under G. C., § 5966, the loser may recover money lost on account of a wager: *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704.

An alleged profit sharing contest, gotten up by a newspaper, wherein ten thousand dollars is offered as a prize to the person who can estimate the exact vote which will be cast for the secretary of state at the election, November 1, 1902, for the privilege of making which estimate the person pays fifty cents, is only a wager between the newspaper and the other party, and is in violation of G. C., § 5965: *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704.

A petition alleging that the plaintiff paid his fifty cents to the newspaper under such an arrangement, and made the correct estimate and is therefore entitled to the prize of ten thousand dollars, is demurrable, because the transaction was a bet: *Hobing v. Enquirer Co.*, 2 O. N. P. (N.S.) 205, 14 O. D. (N.P.) 704. See also GAMBLING.

GUILTY.

For guilt, see also ARRAIGNMENT; INDICTMENT.

For the right to inquire into the question of guilt, in extradition proceedings, see EXTRADITION.

A plea of guilty conclusively establishes every essential fact in the case, and leaves open only the question as to the degree of the crime: *Conrad v. State*, 75 O. S. 52, IV Longsdorf's Notes, 1013.

A mayor having complete jurisdiction in cases of misdemeanor, a plea of guilty entered before him is to be given the same effect as in the courts of higher jurisdiction: *Billier v. State*, 5 O. C. C. (N.S.) 245, 16 O. C. D. 777. See also MUNICIPAL CORPORATIONS.

Where two persons are charged with indecent conduct and one of them enters a plea of guilty, it is error to bring that fact to the attention of the jury, impaneled to try the other party under his plea of not guilty: *King v. New London*, 8 O. N. P. (N.S.) 34, 19 O. D. (N.P.) 411. See also INDECENT CONDUCT.

A defendant can not waive a jury trial in any other way than by a plea of guilty: *Horn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

The refusal of the court to allow the defendant to withdraw his plea of "guilty," and enter a plea of "not guilty," rests in the sound discretion of the court and is not reviewable: *Lee v. State*, 32 O. S. 113, III Longsdorf's Notes, 622.

The provisions of G. C., § 13692, that if the accused confessed to murder in open court, and the court shall determine the degree of

the crime, are constitutional and valid: *Craig v. State*, 49 O. S. 415, IV Longsdorf's Notes, 462; *Donaldson v. State*, 10 O. C. C. 613, 5 O. C. D. 98.

GUILTY KNOWLEDGE.

See FRAUD AND DECEIT.

For guilty knowledge in criminal law, see specific crimes by name.

GUNPOWDER.

See EXPLOSIVES.

GUNS.

See WEAPONS.

GUTTERS, CURBING, ETC.

See ASSESSMENTS; SIDEWALKS; STREETS.

GYMNASIUM.

For questions of taxation, see ATHLETIC CLUB; TAXATION.

No public gymnasium or athletic club, whether it has been organized *bona fide* or is a sham, can exhibit a boxing match or sparring contest for a prize under any circumstances whatever: *State v. Hobart*, 8 O. N. P. 246, 11 O. D. (N.P.) 166. See also PRIZE FIGHT.

GYMNAST.

For evidence of damage to gymnast by personal injury, see ACROBAT; EVIDENCE.

H

HABEAS CORPUS.

Scope Note.—Includes definition, jurisdiction, grounds for issuing writ, application, hearing, evidence, custody, *res adjudicata*, reapplication, review. Excludes conflict of jurisdiction.

Cross References.

For questions of arrest, see ARREST.

For questions of false imprisonment, see FALSE IMPRISONMENT.

For *habeas corpus* as the means of testing the admissibility of evidence sought in depositions, see DEPOSITIONS.

For *habeas corpus* as a means of testing the right to the custody of a child, see also PARENT AND CHILD; DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

For the right to *habeas corpus* where a minor is committed to an institution without notice to the county visitors, see CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

For *habeas corpus* in extradition, see also EXTRADITION.

For questions of sentence, see SENTENCE.

For *habeas corpus* as a means of reviewing orders of court martial, see also MILITIA.

For collateral attack upon the title of judges and officers, see COURTS; OFFICE.

For questions on conflict of jurisdiction, see CONFLICT OF JURISDICTION.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 8433.
- II. Jurisdiction, 8434.
- III. Grounds for Issuing Writ, 8435.
 - A. *Illegal imprisonment*, 8435.
 1. Lack of jurisdiction, 8435.
 2. Contempt, 8436.
 3. Invalid law or ordinance, 8438.
 4. Void commitment, 8438.
 5. Irregular arrest, 8440.
 6. Non-payment of fine and costs, 8440.
 7. Failure to bring to trial, 8442.
 8. Void sentence, 8442.
 9. Erroneous sentence, 8443.
 10. Pardon, 8444.

- B. *Illegal restraint of children*, 8444.
 - 1. Custody as between parents, 8444.
 - 2. After commitment, 8447.
 - 3. Enlistment of minor, 8447.
- C. *Extradition*, 8447.
- D. *Commitment to asylum*, 8449.
- E. *Title to office*, 8449.
- F. *Possibility of injustice*, 8449.
- IV. *Application*, 8449.
- V. *Writ*, 8450.
 - A. *Right to writ*, 8450.
 - B. *Contents*, 8450.
 - C. *Execution and return*, 8450.
- VI. *Hearing*, 8451.
- VII. *Evidence*, 8452.
- VIII. *Custody*, 8454.
- IX. *Res Adjudicata*, 8454.
- X. *Reapplication*, 8455.
- XI. *Review*, 8455.

I. DEFINITION AND NATURE.

The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty: *Henderson v. James*, 52 O. S. 242, IV Longsdorf's Notes, 571.

Inasmuch as one arrested for maintaining a bakery in a basement or cellar has a complete defense, if the statute (G. C., § 1012) be construed so as to except bakeries located in basements and cellars when the original statute took effect, *habeas corpus* will not lie to secure his release. *Habeas corpus* is available only where the court has no jurisdiction to cause the arrest and detention, and is not the form of action in which to try the guilt or innocence of the party: *Bernhardt v. Wise*, 15 O. C. C. (N.S.) 158, 24 O. C. D. 114 [for opinion below, see *Bernhardt v. Wise*, 12 O. N. P. (N.S.) 545, 23 O. D. (N. P.) 230].

If a court has jurisdiction and power to convict and sentence, the writ of *habeas corpus* can not issue to correct a mere error: *In re Schooler*, 7 O. N. P. (N.S.) 276, 19 O. D. (N.P.) 465.

The sufficiency of an indictment can not be questioned by *habeas corpus*: *In re McKnight*, 3 O. N. P. 255, 4 O. D. (N.P.) 284; *In re Bushnell*, 9 O. S. 77, II Longsdorf's Notes, 377.

The fact that an indictment charges no crime known to the law is not triable on *habeas corpus* from the circuit court, for a demurrer to an indictment would raise the question and the decision is reviewable in

the circuit court: *Hatch v. St. Clair*, 2 O. C. C. 163, 1 O. C. D. 421.

II. JURISDICTION.

The supreme court will act only in exceptional cases: *In re Shean*, 25 O. S. 440, III Longsdorf's Notes, 251; *In re Shaw*, 7 O. S. 81, II Longsdorf's Notes, 271.

The supreme court will act when the question is of the authority of the lower court to hold a term at a certain time: *In re Shean*, 25 O. S. 440, III Longsdorf's Notes, 251.

The circuit court has jurisdiction in *habeas corpus* in the case of one committed for contempt by a common pleas judge who was without jurisdiction in the premises: *In re Morris*, 8 O. C. C. (N.S.) 212, 18 O. C. D. 611 [affirmed, without opinion, *Jones v. Morris*, 77 O. S. 598].

The provision of G. C., § 12162, which gives to probate courts general jurisdiction is, with regard to the extradition of fugitives from justice, in conflict with G. C., §§ 113 to 115, and is *pro tanto* repealed and superseded by the latter: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000.

The superior court of Cincinnati will not revise by *habeas corpus* a commitment for contempt by the probate court, though the proper revising court, the common pleas, has no judge then in the county: *Butterfield v. O'Connor*, 3 Dec. Rep. 14, 2 Gaz. 177.

The state courts have jurisdiction in all cases of imprisonment: *In re Collier*, 6 O. S. 55, II Longsdorf's Notes, 217.

It is questionable whether a statute can restrict the power of the court to inquire into the legality of a detention: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

A court having obtained jurisdiction of a case, as divorce, involving the custody of a child, may send its process in *habeas corpus* into any county to which the child has been taken from this jurisdiction since the suit began: *In re Talbot*, 8 Dec. Rep. 744, 9 Bull. 271.

Although *habeas corpus* must be brought where the defendant resides, yet if the court in a divorce case awards the custody of children to one of the parties and such children are not within the jurisdiction, the court may issue such writ to any county as an ancillary proceeding to enforce its judgment: *State, ex rel., v. Speidel*, 1 Dayton Term Rep. (Iddings) 17; *In re Talbot*, 8 Dec. Rep. 744, 9 Bull. 271.

If the detention were here and a writ be awarded, the removal of the party can not avoid its effect, and it could perhaps be directed to the sheriffs of the several counties. But if the allegation be of detention in another jurisdiction, the writ will not be issued: *In re Everts*, 13 Dec. Rep. 21, 3 Dec. Rep. 72, 2 D. 33, 2 Gaz. 408.

III. GROUNDS FOR ISSUING WRIT.

A. ILLEGAL IMPRISONMENT.

1. Lack of Jurisdiction.

Evidence *dehors* the record may be given to show the want of jurisdiction to make the order: *In re George*, 5 O. C. C. 207, 3 O. C. D. 104; *Lillibridge v. State, ex rel.*, 7 O. C. C. (N.S.) 452, 18 O. C. D. 481.

Where a justice of the peace has committed to jail a parent charged with non-support of his child to await the action of the grand jury, on *habeas corpus* by such parent, evidence *dehors* the record may be heard to show the want of jurisdiction in said justice to make such an order: *In re Wyant*, 8 O. N. P. (N.S.) 207, 54 Bull. 233.

By the provisions of G. C., § 12165, the inquiry in *habeas corpus* cases, like the one at bar, is limited to the question of jurisdiction: *In re Wyant*, 8 O. N. P. (N.S.) 207, 54 Bull. 233.

The rule that in *habeas corpus* proceedings evidence may be heard *dehors* the record applies only to evidence relating to the jurisdiction of the court and to the extent of establishing such jurisdiction: *Lillibridge v. State, ex rel.*, 7 O. C. C. (N.S.) 452, 18 O. C. D. 481.

While errors of the trial court can not be properly brought before a reviewing court

by *habeas corpus*, a petitioner for a writ of *habeas corpus* who attacks the jurisdiction of the trial court will be heard: *In re Bahtel*, 11 O. C. C. (N.S.) 537, 21 O. C. D. 159.

When the court in which a person is detained under a criminal charge has a general jurisdiction subject to certain exception, a co-ordinate court will probably not on *habeas corpus* decide whether this was an excepted case. The question is cognizable by the former court: *In re Wagener*, 12 Dec. Rep. 454, 1 D. 10; *Butterfield v. O'Connor*, 3 Dec. Rep. 23, 2 Gaz. 184.

While the writ of *habeas corpus* can not properly be employed to review and correct errors committed by courts when acting within the sphere of their authority, it is the appropriate remedy to obtain discharge from imprisonment under an order or process of a court, which it was without jurisdiction to make or issue: *In re McKnight*, 48 O. S. 588, IV Longsdorf's Notes, 431.

The proceedings of a military court can not be reviewed upon *habeas corpus*, when it appears that the military tribunal has jurisdiction over the offense charged and that the offender is a person who is amenable to its jurisdiction: *McGorray v. Murphy*, 80 O. S. 413, IV Longsdorf's Notes, 1052.

A civil court may, in any case, inquire by what right a person is restrained of his liberty; but if it appear, upon such inquiry, that the person is held under color of military authority, and that the person restrained is amenable to the jurisdiction of the military court, the application should be denied: *In re Johnson*, 12 O. N. P. (N.S.) 566, 22 O. D. (N.P.) 292.

2. Contempt.

Habeas corpus lies to discharge one who has been committed for contempt if the order of commitment was in excess of the jurisdiction of the tribunal which made it: *In re Stein*, 19 O. D. (N.P.) 367.

Employees of a corporation who are arrested for contempt of court for the violation of an order against the corporation, where the court has no jurisdiction to make the order, may be released on *habeas corpus*: *In re George*, 5 O. C. C. 207, 3 O. C. D. 104.

The writ will lie where a party was committed for contempt for refusing to answer an irrelevant question under G. C., § 11497: *Jones v. Goode*, 7 O. C. C. (N.S.) 589, 18 O. C. D. 475 [affirming *In re Goode*, 16 O. D. (N.P.) 404, 3 O. L. R. 401].

The commitment of a witness by a notary public for contempt for refusing to answer certain questions, and the return in the case at bar, are sufficient in law without showing on their face the relevancy of the questions

propounded and refused: *In re Reilly*, 7 O. L. R. 334, 54 Bull. 382.

In case of a witness refusing to answer questions before a notary, evidence as to the relevancy of the questions may be introduced: *In re Goode*, 16 O. D. (N.P.) 404, 3 O. L. R. 401 [affirmed, *Jones v. Goode*, 7 O. C. C. (N.S.) 589, 18 O. C. D. 475].

Where a witness who has refused to answer on the ground that he might thereby incriminate himself, is committed as contumacious, the burden is upon the sheriff to show that the commitment was legal: *In re Lowe*, 3 O. N. P. (N.S.) 641, 16 O. D. (N. P.) 254.

Inasmuch as the witness and not the court, is the judge as to whether the answer to a question would incriminate him, the court is without jurisdiction to commit him for contempt in refusing to answer; but a witness who does not act in good faith in giving such a reason for refusing to answer may be subjected to the penalties for perjury: *In re Sutter*, 13 O. C. C. (N.S.) 69 [affirmed, without opinion, *In re Sutter*, 80 O. S. 711].

When a witness who has refused to answer a question on his examination and has been committed to jail for contempt therefor, she can not obtain her release by proceedings in *habeas corpus* unless it is found as a matter of fact, that the committing court was without jurisdiction to make the order: *In re Sutter*, 13 O. C. C. (N.S.) 69 [affirmed, without opinion, *In re Sutter*, 80 O. S. 711].

A resort to a suit in *habeas corpus* by a witness who has been committed to jail by order of the court of common pleas for refusing to testify is a collateral attack upon the order of commitment, and the plaintiff assumes the burden of showing that it is void: *McGorray v. Sutter*, 80 O. S. 400, IV Longsdorf's Notes, 1052.

The circuit court has jurisdiction in *habeas corpus* in the case of one committed for contempt by a common pleas judge who was without jurisdiction in the premises: *In re Morris*, 8 O. C. C. (N.S.) 212, 18 O. C. D. 611.

The probate judge found that A held money of the judgment debtor by fraudulent conveyance and ordered him to pay it to a receiver to be applied on the judgment. A, claiming it as a gift, refused to obey. It was held that the probate judge had no power to imprison A for contempt, but the receiver might resort to an action: *White v. Gates*, 42 O. S. 109, IV Longsdorf's Notes, 95. See also PROCEEDINGS IN AID OF EXECUTION.

3. Invalid Law or Ordinance.

A federal court having a person in custody under an act of congress claimed to be unconstitutional, must first decide on its own jurisdiction, and the state courts will not by *habeas corpus* take away the prisoner while the case is pending: *In re Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369.

Habeas corpus lies to test the validity of a statute when it is the sole cause of imprisonment: *In re Kline*, 6 O. C. C. 215, 3 O. C. D. 422.

R. S., § 1024 (repealed 96 v. 96, § 231), for punishing the possession of burglar's tools within a city, must be accompanied with an unlawful intent to use the same to constitute the offense, but such intent will be deemed proved on *habeas corpus*: *In re Wiggins*, 7 Dec. Rep. 708, 4 Bull. 1069. See also BURGLARY AND OTHER BREAKINGS.

If a city ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on *habeas corpus*: *In re Clamp*, 9 Dec. Rep. 672, 16 Bull. 220.

Where a prisoner arrested by a member of the national guard has been turned over to the civil authorities, the jurisdiction of the military commander ceases; and the validity of an ordinance under which he is subsequently arraigned and tried by the civil authorities may be tested by *habeas corpus*: *In re Smith*, 14 O. N. P. (N.S.) 497, 23 O. D. (N.P.) 667.

Repugnancy of a state statute to the constitution of the state does not afford ground for the granting of a writ of *habeas corpus* by a federal court upon application of one convicted thereunder, unless the petitioner is in custody by virtue of such statute and the statute is in conflict with the constitution of the United States: *In re Januszewski*, 10 O. L. R. 151.

4. Void Commitment.

The writ is to be allowed in cases of void commitments: *In re George*, 5 O. C. C. 207, 3 O. C. D. 104; *In re Kruse*, 13 Dec. Rep. 775, 2 C. S. C. R. 71.

The writ extends to inquiries as to cause of detention in a house of refuge: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

Under G. C., § 2107, declaring the proceedings necessary for the commitment of a girl to the Girls' Industrial Home and requiring notice in writing thereof, to be given to the father where he resides in the county, the notice is a jurisdictional fact as to the father, the failure to give which, notwithstanding the proceedings are conclusive upon the minor unless reversed on error, will render the order of commitment invalid as to

him, and *habeas corpus* will lie upon his application: *State, ex rel., v. Stiles*, 12 O. D. (N.P.) 338 [distinguishing *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905. See also GIRLS' INDUSTRIAL HOME.

Questions concerning privileged matter being irrelevant in an examination under G. C., § 11497, the refusal of the witness to answer them must be sustained, and application for release from custody on *habeas corpus* was properly granted: *Jones v. Goode*, 7 O. C. C. (N.S.) 589, 18 O. C. D. 475 [affirming *In re Goode*, 16 O. D. (N.P.) 404, 3 O. L. R. 401; affirmed, without opinion, *Jones v. Goode*, 78 O. S. 421]. See also TRADE SECRETS.

A resort to a suit in *habeas corpus* by a witness who has been committed to jail by order of the court of common pleas for refusing to testify is a collateral attack upon the order of commitment, and the plaintiff assumes the burden of showing that it is void: *McGorray v. Sutter*, 80 O. S. 400, IV Longsdorf's Notes, 1052.

Were it true that the authority of a police court to commit to the workhouse upon conviction of a misdemeanor does not exist, *habeas corpus* will not lie because of error in committing the accused to the workhouse instead of the county jail: *In re Schooler*, 7 O. N. P. (N.S.) 276, 19 O. D. (N.P.) 465. See also SENTENCE.

Failure to provide in a commitment that the accused may secure the fine and costs as provided in G. C., § 4559, is only an irregularity, which may be corrected by proceedings in error but not by *habeas corpus*: *In re Stanfeal*, 9 O. C. C. (N.S.) 553, 19 O. C. D. 664 [affirmed, *Stanfeal v. State*, 78 O. S. 24, IV Longsdorf's Notes, 1037]. See also MUTILATION.

The transfer of a prisoner who is an escaped convict from the workhouse to the custody of the chief of police, as the first step in his return to the penitentiary, will be presumed to have been accomplished by legal process, and upon his return to the workhouse after completing his term in the penitentiary, *habeas corpus* will not lie for his release, at least until the time his workhouse sentence would have expired had there been no interruption by transferring him to the penitentiary: *Harrington v. Bader*, 12 O. C. C. (N.S.) 257, 22 O. C. D. 493, 6 O. L. R. 170.

If certain persons accused of murder have been brought before a mayor upon such charge and have been placed in the custody of the sheriff in the county jail, and the mayor has then ordered the chief of police to take such persons from the county jail and bring them before the mayor for hearing, and the sheriff refuses to surrender

them to the chief of police, and the mayor thereupon gives a verbal order to the sheriff to surrender them, and upon his refusal the mayor commits the sheriff for contempt without making any charge of contempt either oral or written, such order is in excess of the jurisdiction of the mayor and the sheriff will be released on *habeas corpus*: *In re Stein*, 19 O. D. (N.P.) 367.

Where a witness or a party testifying is obviously testifying to that which is untrue, it is the province of the trial court to use every honorable and fair means to prevent such false testimony and to ascertain the truth in the case, and if in so doing the trial judge commits one of the parties to jail, and he is soon after released on *habeas corpus* by the circuit court, the incident will be construed as favorable rather than prejudicial to that side of the case for the reason that if the jury were influenced thereby it must have been in favor of that side because of the sympathy which such action is likely to arouse: *Morrison v. Hazen*, 10 O. N. P. (N.S.) 353 [for later opinion, see *Hazen v. Morrison*, 14 O. C. C. (N.S.) 483, 23 O. C. D. 512].

5. Irregular Arrest.

If it appear that the court issuing the process had jurisdiction to do so, the writ ought not to be allowed, even if there be informality or defect in the proper judgment or order: *Hatch v. St. Clair*, 2 O. C. C. 163, 1 O. C. D. 421.

If the court had jurisdiction, a defect in the process will not authorize a discharge, but error would be the proper remedy: *In re Mosler*, 8 O. C. C. 324, 4 O. C. D. 82.

Habeas corpus for a person held by the police, no warrant for the arrest having been sworn out until after this application, will be determined on the facts existing at the hearing and not at the application; and the writ will be refused: *In re Healy*, 8 O. D. (N.P.) 692, 38 Bull. 250.

After a person has been arrested and has waived examination and been bound over, no illegality or irregularity in or about his arrest or the proceedings before commitment will avail him on *habeas corpus*: *Newberry v. State*, 15 O. C. C. 208, 7 O. C. D. 622.

6. Non-payment of Fine and Costs.

The county auditor has jurisdiction (G. C., § 2576) to release an indigent prisoner sentenced to a workhouse in another county after serving his term, it being shown that his fine and costs can not be collected by further imprisonment, and on the auditor's refusal the prisoner will be discharged on *habeas corpus*. Mandamus will not lie as

the section is not mandatory: *State, ex rel., v. Martin*, 1 Dayton Term Rep. (Iddings) 16.

G. C., § 2576, which provides that the auditor may release a prisoner held for a fine, if it appear to him that the fine can not be collected by imprisonment is not mandatory. Accordingly, *habeas corpus* and not *mandamus* is the remedy to secure discharge: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575.

Where an indigent convict is sentenced to remain in the county jail until his fine and costs are paid, the refusal of the auditor to release does not give legal ground for *habeas corpus*: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780; *In re Mullaney*, 8 O. N. P. 40, 10 O. D. (N.P.) 419.

Where the law provides for a sentence of imprisonment and fine, with a further order to remain confined until the fine and costs "are paid or secured to be paid" (G. C., § 13718), a sentence of imprisonment, fine and costs, and commitment until fine and costs are paid, is illegal; and after the imprisonment is served out, and reversal would, therefore, not restore the prisoner, *habeas corpus* will lie: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575. See also FINES.

Where the sentence under G. C., § 13717, omits the clause "or is secured to be paid," such omission does not render such sentence void. If such omission is material, it is only an irregularity or informality, and furnishes no valid ground for a discharge upon *habeas corpus*: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780. See also SENTENCE.

The fact that the offense was not properly described, nor that it was willfully committed, in the mittimus under which a convict is held in custody until the fine and costs are paid does not make the imprisonment illegal: *State, ex rel., v. Hamilton*, 3 O. C. C. 10, 2 O. C. D. 6. See also ARREST.

Mandamus and not *habeas corpus* is the remedy for refusal to take a prisoner for nonpayment of fine before commissioner of insolvents: *In re Scott*, 19 O. S. 581, II Longsdorf's Notes, 972.

A was tried and convicted by the mayor of an incorporated village, who had jurisdiction over the offenses for violating G. C., § 13047, which prohibits the business of barbering on Sunday. He was sentenced to pay a fine of fifteen dollars and the costs of prosecution, and upon his refusal to pay the same, the mayor issued to the marshal of said village a mittimus, therein commanding that the prisoner be committed to the county jail until said fine and costs be paid, without including the words, "or secured to be paid," as provided in G. C., § 4559. Thereupon A applied to a judge of the court of

common pleas of the proper county for a writ of *habeas corpus*, and one was issued. As the authority for holding A the said mittimus was submitted to the judge, who, being of opinion that the mittimus was defective because of the absence of said words, on application for that purpose, gave leave to the mayor to amend the writ so as to include said omitted words. The amendment was made accordingly, whereupon the petition for the writ of *habeas corpus* was dismissed. It was held that it was not error to permit the amendment. G. C., § 13047, is not in conflict with any provision of the constitution of this state: *Stanfeal v. State*, 78 O. S. 24, IV Longsdorf's Notes, 1037 [affirming *In re Stanfeal*, 9 O. C. C. (N.S.) 553, 19 O. C. D. 664].

It is the duty of a constable holding a writ of execution for the collection of a judgment for a fine and the costs of prosecution, rendered by a magistrate for the violation of a state law, but which judgment makes no provision for imprisonment in case of default in the payment of said fine and costs, to take the body of the offender and commit him to the county jail, in case he fails to pay said fine and costs and there is no property out of which to satisfy said judgment. Where, under such circumstances, a constable has taken possession of the body of the defendant, *habeas corpus* will not lie against the constable for the release of the defendant, at least until the constable has had a reasonable time in which to convey him to the county jail: *Young v. State*, 11 O. C. C. (N.S.) 466, 21 O. C. D. 1.

7. Failure to Bring to Trial.

A release by the probate court on *habeas corpus* because one had remained in jail more than two terms without a trial, does not prevent a second prosecution: *In re McKnight*, 3 O. N. P. 255, 4 O. D. (N.P.) 284.

An erroneous refusal to discharge the accused because he was not brought to trial within the statutory time (G. C., § 13686) is valid until reversed, and not reviewable on *habeas corpus*: *In re McGehan*, 22 O. S. 442, III Longsdorf's Notes, 91.

8. Void Sentence.

Imprisonment is not unlawful unless the sentence is a nullity and then the writ lies, but if voidable only, error is the remedy: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780; *Hatch v. St. Clair*, 2 O. C. C. 163, 1 O. C. D. 421; *Madden v. Smeltz*, 2 O. C. C. 168, 1 O. C. D. 424.

The writ extends to where a prisoner has served his time, and is now held only for

the fine and costs, and the sentence is illegal as to the term of such part of the imprisonment: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575.

The proceedings of a military court can not be reviewed upon *habeas corpus*, when it appears that the military tribunal has jurisdiction over the offense charged and that the offender is a person who is amenable to its jurisdiction: *McGorray v. Murphy*, 80 O. S. 413, IV Longsdorf's Notes, 1052.

A statute authorizing the court to commit a minor to the house of refuge or reform farm, if the grand jury recommended it instead of indicting him on evidence seeming sufficient to put him on trial, is not contrary to the fifth amendment of the constitution of the United States, for that does not limit the power of a state, or to Art. I, §§ 5 or 10 of the Ohio constitution, guaranteeing a jury trial, for this is not a crime or common law proceeding nor a punishment, but a guardianship: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938. See also HOUSE OF REFUGE.

9. Erroneous Sentence.

Errors and irregularities in a sentence can not be revised by *habeas corpus*. Imprisonment is not unlawful unless the sentence is a nullity, and then the writ lies; but if voidable only, error is the remedy: *In re Shaw*, 7 O. S. 81, II Longsdorf's Notes, 271; *In re Van Hagan*, 25 O. S. 426, III Longsdorf's Notes, 249; *In re Bushnell*, 9 O. S. 77, II Longsdorf's Notes, 377; *Newberry v. State*, 15 O. C. C. 208, 7 O. C. D. 625.

If a court has jurisdiction and power to convict and sentence, the writ of *habeas corpus* can not issue to correct a mere error: *In re Schooler*, 7 O. N. P. (N.S.) 276, 19 O. D. (N.P.) 465.

If the court having jurisdiction of a cause proceeds in an irregular or erroneous manner, the remedy is not in *habeas corpus*, but in the prosecution of error, and in such case the record imports absolute verity until it is corrected in a proper proceeding for that purpose: *Lillibridge v. State, ex rel.*, 7 O. C. (N.S.) 452, 18 O. C. D. 481.

The court will inquire whether the detaining court had jurisdiction, but will not allow the writ to be used as a writ of error to correct irregularities: *In re Wagener*, 12 Dec. Rep. 454, 1 D. 10; *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780; *In re Shaw*, 7 O. S. 81, II Longsdorf's Notes, 271; *In re Van Hagan*, 25 O. S. 426, III Longsdorf's Notes, 249.

Denial of a jury on trial for violating a city ordinance does not give a right to *habeas corpus*, for the sentence is not void but void-

able: *Madden v. Smeltz*, 2 O. C. C. 168, 1 O. C. D. 424.

Where a person is tried, convicted, and sentenced for an offense before a court of competent jurisdiction, *habeas corpus* is not the proper remedy by which errors occurring on the trial can be reviewed: *Madden v. Smeltz*, 2 O. C. C. 168, 1 O. C. D. 424; *Newberry v. State*, 15 O. C. C. 208, 7 O. C. D. 625.

If the court had jurisdiction to render the judgment and issue the process, the fact that the mittimus does not properly describe the offense, or allege that the act was willfully done, will not authorize the court to discharge the relator: *State, ex rel., v. Hamilton*, 3 O. C. C. 10, 2 O. C. D. 6.

Where a magistrate had a right to render the judgment and also a right to issue a writ of execution for collection of the judgment and costs, the fact that he erred in ordering the defendant committed to a workhouse, instead of the county jail, in default of payment of the judgment and costs, renders the writ nugatory as to the commitment feature only, and *habeas corpus* does not lie; but a new writ should be issued ordering that the commitment be to the county jail: *Young v. State*, 11 O. C. C. (N.S.) 466, 20 O. C. D. 1.

10. Pardon.

An unconditional pardon is irrevocable, though obtained by fraud, and on *habeas corpus* for a discharge under it the fact that it was given on a physician's certificate, obtained by fraud, that the convict was in imminent danger of death, is no defense. The invalidity of the revocation can be shown on *habeas corpus*: *Knapp v. Thomas*, 39 O. S. 377, III Longsdorf's Notes, 1037. See also PARDON.

B. ILLEGAL RESTRAINT OF CHILDREN.

1. Custody as Between Parents.

Habeas corpus lies by a mother against the father for the custody of a child: *State, ex rel., v. Niles*, 11 Dec. Rep. 248, 25 Bull. 327.

Where it appears that a guardian was appointed for a minor, whose parents are living and who were within and known to be within the jurisdiction of the court at the time, but were not notified of the application, and it further appears that such minor is about to be removed from the county by her guardian, the court of common pleas notwithstanding G. C., §§ 10492 and 10915, giving the probate court exclusive, original jurisdiction over the appointment of guardians, etc., has jurisdiction, by writ of *habeas corpus*, to require such minor to be

returned to and to remain in the custody of its parents, it appearing that they are suitable persons to have custody and control of such minor: *State, ex rel., v. Madden*, 12 O. D. (N.P.) 83. See also GUARDIAN AND WARD.

In *habeas corpus* proceedings, where the right to the custody of a minor child is involved, the welfare and best interests of the child are the chief objects to be obtained; and the parents, if suitable persons, are entitled to the custody of the child as against its statutory guardian, provided the best interests and welfare of the child are thereby obtained: *State, ex rel., v. Madden*, 12 O. D. (N.P.) 83 [affirmed, without opinion, *Madden v. State, ex rel.*, 68 O. S. 691]. See also PARENT AND CHILD.

The order of the court must have sole reference to the best interests of the child and neither parent has any rights in conflict with its welfare: *Gishweiler v. Dodez*, 4 O. S. 615, II Longsdorf's Notes, 141; *In re Barnes*, 11 Dec. Rep. 848, 30 Bull. 164.

A judgment determining the custody of a child will not prevent a different judgment on *habeas corpus* on a material change of circumstances since its rendition: *In re Barnes*, 11 Dec. Rep. 848, 30 Bull. 164.

If a wife separated from her husband voluntarily, relinquished to him the custody of a child of tender years, the court will not restore it to her unless the good of the child requires it: *State, ex rel., v. Nishwitz*, 1 Dec. Rep. 370, 8 W. L. J. 396.

If a wife leaves her husband and takes her child, she can not retain it as against the husband without showing that she did not desert him without grave cause, if he is a fit person to have it: *State, ex rel., v. Nishwitz*, 1 Dec. Rep. 370, 8 W. L. J. 396.

Children under ten years of age are to be awarded to the mother unless particular unfitness is shown. Children over ten electing the father as custodian will be awarded to him unless the mother proves his unsuitableness. Where there is intense feeling between the parties the court will not find that unsuitableness is proven without evidence of specific acts: *Vincent v. Vincent*, 6 O. N. P. 474, 8 O. D. (N.P.) 160.

The custody of young children, other things being equal, will be awarded the mother subject to revocation, if she puts them in any institution or other charge: *State, ex rel., v. Niles*, 11 Dec. Rep. 248, 25 Bull. 327.

Ill treatment by a stepmother is not sufficient ground to deprive a father of the custody of his child unless he countenanced the same: *In re Muench*, 20 O. C. C. 350, 11 O. C. D. 124.

A father who has joined the Shakers will not be given the possession of his young children, as against their maternal grandmother, in order to put them in the Shaker community: *State, ex rel., v. Hand*, 1 Dec. Rep. 238, 5 W. L. J. 361.

Where the court of common pleas on rendering a decree of divorce further decreed the custody of the children to one of the parties, a probate court while the decree is in force, can not interfere by *habeas corpus* or by letters of guardianship: *Hoffman v. Hoffman*, 15 O. S. 427, II Longsdorf's Notes, 738.

As against any one whose rights do not arise out of an order in a divorce proceeding giving control of the minor child to the mother until the further order of that court, *e. g.*, against a guardian, the father need not seek modification of the order, but may resort to *habeas corpus*, and subject to the welfare of the child his rights are superior to all others: *In re Coons*, 20 O. C. C. 47. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

An award of the custody of the child in a divorce case to the mother is no bar to *habeas corpus* by the father against others than the mother: *In re Coons*, 20 O. C. C. 47, 11 O. C. D. 208.

The full faith and credit clause of the constitution when applied to a case involving the custody of a child will not prevent the courts of another state making a different order on later facts: *In re Barnes*, 11 Dec. Rep. 848, 30 Bull. 164.

The court first acquiring jurisdiction in a divorce case can alone decree as to custody of the child. Thus, if a mother bring suit for divorce and custody, and the first summons was not served, but the attempt was followed by service of an *alias* summons (G. C., § 11230), before which, however, the father brought suit in another county for divorce and custody, and got a decree for custody, the mother not appearing, the latter court had no jurisdiction, and its decree is void, and *habeas corpus* lies to determine which custody is best for the child: *In re Talbot*, 8 Dec. Rep. 744, 9 Bull. 271. See also CONFLICT OF JURISDICTION.

G. C., §§ 8032 to 8035, as to the care and custody of children when the parents are living separate, may be enforced in a *habeas corpus* proceeding, but the statute can not be extended to cases outside its terms; accordingly, an order to pay for the support of children in a *habeas corpus* case is void if one of the parents is dead: *In re Ramsey*, 9 O. L. R. 231.

2. After Commitment.

Habeas corpus lies when a minor is committed without notice to county visitors: *Girls' Industrial Home v. Steffen*, 7 O. N. P. 409, 9 O. D. (N.P.) 696.

Habeas corpus lies when a minor is committed without notice to parents: *State, ex rel., v. Stiles*, 12 O. D. (N.P.) 338.

Where a minor child has been taken from its parents and committed to a children's home in a regular and legal manner by the probate court under G. C., § 8031, such court can not vacate or modify its judgment regularly entered therein except on an application made and rehearing granted after the term under G. C., §§ 11631 to 11643, and an order, based upon an application and rehearing before the expiration of the term, as designated in G. C., § 11643, suspending the former judgment regularly entered and directing the return of the child to its parents, is void, and a writ of *habeas corpus* to regain possession of the child under such order will be refused: *In re Blake*, 14 O. D. (N.P.) 89. See also JUDGMENT.

3. Enlistment of Minor.

The claim of the government overrides that of the parent as in the case of a minor over eighteen enlisting in the United States army: *In re Disinger*, 12 O. S. 256, II Longsdorf's Notes, 560.

The application for a writ of *habeas corpus* by a parent claiming the exclusive custody and control of a minor who has enlisted in the Ohio National Guard will be refused, notwithstanding his minority and the fact that the parent did not give his written consent to such enlistment, where said minor is under arrest on charges over which the military court has jurisdiction: *In re Kuchta*, 8 O. N. P. (N.S.) 613, 19 O. D. (N.P.) 749 [affirmed, without opinion, *In re Kuchta*, 81 O. S. 508]. See also MILITIA.

C. EXTRADITION.

On *habeas corpus* for an absconder from another state held for extradition by the United States marshal, it was held that the privileges of *habeas corpus* are secured to every citizen by the national and state constitutions, and the state courts and judges can determine all questions of imprisonment without regard to the power or process imposing it: *In re Collier*, 6 O. S. 55, II Longsdorf's Notes, 217.

Where a court tries an extradited person for an offense other than that for which he was surrendered, *habeas corpus* lies: *In re McKnight*, 48 O. S. 588, IV Longsdorf's Notes, 431.

A common pleas judge before whom an extradition warrant has been returned having found the proof sufficient, no other judge can on *habeas corpus* hear the same or new evidence, and thereby review such finding: *Milford v. Perry*, 18 O. C. C. 76, 9 O. C. D. 492.

A release on *habeas corpus* because not extradited, to be tried for the offense charged, is no bar to a second prosecution: *In re McKnight*, 3 O. N. P. 255, 4 O. D. (N.P.) 284.

The provision of the act of February 25, 1852, which gives to the probate court general jurisdiction to allow a writ of *habeas corpus* (now incorporated in G. C., § 12162) is, with respect to the extradition of fugitives from justice, in conflict with the act of March 23, 1875 (now G. C., § 113), and is *pro tanto* repealed and superseded by the later act, the same being a special provision relating to a particular subject: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000.

Where a sheriff receives from the governor a warrant issued to him under favor of G. C., § 113, it is his imperative duty to arrest the person named therein as a fugitive from justice, if found within his county, and taken before a judge of the supreme court, or of the circuit court, or of the common pleas court of the district, to be examined on the charge named in the warrant; and the probate court is without power, by virtue of its general jurisdiction in *habeas corpus*, or otherwise, to order a discharge of the prisoner: *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000.

A finding by the governor of the state that a crime is sufficiently charged in the information and affidavit accompanying a requisition for an alleged fugitive from justice is not conclusive upon the court, but may be reviewed in *habeas corpus* proceeding: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [reversed on the ground that the probate court had no jurisdiction, *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000]. See also EXTRADITION.

Where it appears from the papers embodied in a bill of exceptions that the governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the governor, it will be presumed that a warrant of extradition was granted and that the prisoner is held by virtue of such warrant, and refusal of a writ of *habeas corpus* under such circumstances is not erroneous: *Craig v. Hamann*, 11 O. C. C. (N.S.) 457, 21 O. C. D. 108. See also EXTRADITION.

D. COMMITMENT TO ASYLUM.

An insane person in any asylum is entitled to *habeas corpus* under G. C., § 1976, to test the question of sanity, and the court must allow the writ to issue, and hear the question thereon, and should not hear it upon the application for the writ: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443. See also *INSANE ASYLUMS*.

E. TITLE TO OFFICE.

The right or title of a *de facto* officer can not be drawn in question collaterally in *habeas corpus*: *In re Strang*, 21 O. S. 610, III Longsdorf's Notes, 46.

F. POSSIBILITY OF INJUSTICE.

Where a convict is lawfully imprisoned, such convict can not be discharged on *habeas corpus* on the ground that some supposed oppression or injustice will result from said imprisonment: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780 [*In re Moore*, 14 O. C. C. 237, 7 O. C. D. 576, not followed].

IV. APPLICATION.

In cases other than those of controverted custody, the allegation of unlawful "restraint of liberty," or words of precisely the same import, is essential in the application to give the court jurisdiction. The defect is not cured by amendment, nor waived by appearance of respondent and a trial: *In re Curd*, 9 Dec. Rep. 182, 11 Bull. 186.

In *habeas corpus* for a child, if the relator does not claim the right of custody, but merely acts on its behalf, an averment that it is illegally restrained and possessed by respondent is fatally defective even after trial, for as a child must be in some one's custody, want of liberty is not necessarily alleged: *In re Curd*, 9 Dec. Rep. 182, 11 Bull. 186.

It is not necessary in a petition for a writ of *habeas corpus* to set out fully the facts and circumstances of the imprisonment or restraint constituting the ground for the relief asked: *State v. Mullaney*, 8 O. N. P. 165, 11 O. D. (N.P.) 120.

Where a person is imprisoned for failure to pay a fine, in a petition duly verified for a writ of *habeas corpus*, states that such fine has been paid, when in fact such fine has not been paid, perjury can not be predicated on such false statement, as such averment is of a fact not required to be stated in the petition: *State v. Mullaney*, 8 O. N. P. 165, 11 O. D. (N.P.) 120.

It is only necessary, in a petition for a writ of *habeas corpus*, to allege that the petitioner is unlawfully restrained of his liberty, and the facts and reasons why such

restraint is unlawful need not be alleged: *State v. Mullaney*, 8 O. N. P. 165, 11 O. D. (N.P.) 120.

If, on preliminary application, it appears that the person, if brought in, would, after hearing, be remanded, the application will be refused, for bringing him in would be a useless formality: *In re Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369.

If the allegations in a petition in a proceeding in *habeas corpus* would constitute a complete and perfect defense to the indictment described in the return and answer thereto, the plaintiff is not entitled to discharge on the writ of *habeas corpus*, but he must make his proper defense in the court having jurisdiction of the offense charged: *Burns v. Tarbox*, 76 O. S. 520, IV Longsdorf's Notes, 1027; *In re Poage*, 87 O. S. 72.

Perjury can not be predicated on an untrue fact sworn to in a petition for a writ of *habeas corpus*, which is not material to the issue. In other words, a false verification of an immaterial allegation in a pleading is not perjury: *State v. Mullaney*, 8 O. N. P. 165, 11 O. D. (N.P.) 120. See also *PERJURY*.

V. WRIT.

A. RIGHT TO WRIT.

The writ issues as of course in Ohio except where a person is committed on final conviction or for treason, or a capital offense, and the merits are tried on the return and not on the application: *In re Early*, 2 Dec. Rep. 56, 1 W. L. M. 264, 3 Dec. Rep. 105, 3 Gaz. 234.

Upon application for writ of *habeas corpus* the judge to whom such application is made must grant the same forthwith: *In re Morris*, 10 O. N. P. (N.S.) 56, 21 O. D. (N.P.) 104.

Habeas corpus is not applicable to relieve from lawful imprisonment: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780.

B. CONTENTS.

A writ of *habeas corpus* should not command the sheriff to whom it is directed to produce the body of the person unlawfully detained, but to make a return showing proper service on the officer detaining the accused, whereupon the latter officer must produce the prisoner as directed by the writ: *In re Morris*, 10 O. N. P. (N.S.) 56, 21 O. D. (N.P.) 104.

C. EXECUTION AND RETURN.

The neglect to obey or make a return to a writ of *habeas corpus* is punishable as a contempt, although the *habeas corpus* act af-

fords a penalty: *George Neuman's case*, 1 Dec. Rep. 22, 1 W. L. J. 168.

Although it is doubtful whether the return to a writ of *habeas corpus* is subject to demurrer, yet upon demurrer to such a return by the petitioner, the court may treat the facts stated therein as an agreed statement of facts and consider the case as submitted for determination: *In re Clayton*, 13 O. D. (N.P.) 546.

In an action of *habeas corpus*, the petition and return, if they raise a material issue of fact, are such pleadings that such issue may be determined in that action: *Ammon v. Johnson*, 3 O. C. C. 263, 2 O. C. D. 149.

A return to a writ directed to a United States marshal, that he holds the party by virtue of a warrant from a United States commissioner is conclusive on a state court: *In re Early*, 2 Dec. Rep. 56, 3 Dec. Rep. 105, 3 Gaz. 234, 1 W. L. M. 264.

G. C., § 12169, does not contemplate the giving up of possession of the prisoner by one officer to another, but rather that the officer who is charged with wrongfully detaining the prisoner shall bring him before the court: *In re Morris*, 10 O. N. P. (N.S.) 56, 21 O. D. (N.P.) 104.

If personal liberty is involved, facts which would generally amount to a waiver of an improper service of summons, as where the parties were served while attending court here and without moving to dismiss agreed on an extension of time to answer, will not have that effect: *In re Everts*, 3 Dec. Rep. 72, 2 Gaz. 408, 13 Dec. Rep. 21, 2 D. 33.

VI. HEARING.

The trial may be had before another judge than the one to whom the writ was returnable as other civil actions: *Morganfield v. Archibald*, 10 O. C. C. 40, 6 O. C. D. 391.

A return by the respondent, that she has not had the custody or control of the body sought, thereby denying the allegations of the petition, raises such an issue: *Ammon v. Johnson*, 3 O. C. C. 263, 2 O. C. D. 149.

The hearing in such a case is not defeated by the fact that the person whose body is sought to be obtained is not found by the sheriff: *Ammon v. Johnson*, 3 O. C. C. 263, 2 O. C. D. 149.

An affidavit filed with the mayor of the city of Xenia, Greene county, who has criminal jurisdiction, charged B with a violation of G. C., § 12970, in that he unlawfully, willfully and negligently failed to furnish necessary and proper food, clothing and shelter for certain of his minor children under sixteen years of age. The affidavit is sufficient in form and substance and alleges that the accused committed said offense in said city

and in Greene county between the first day of January, 1906, and the twenty-first day of June of the same year. The mayor issued a warrant on said affidavit, which warrant is sufficient in form and substance, directed to the sheriff of Greene county, commanding the arrest of B, and he was arrested and taken into custody in Cincinnati, Hamilton county, in pursuance of said warrant. Thereupon B instituted proceedings in *habeas corpus* before one of the judges of the court of common pleas of Hamilton county, and on hearing of the petition and the return thereto, as the only ground for discharge from custody, B offered evidence to prove that he had not been in Xenia or Greene county for many years preceding his arrest, and that he has been a resident of Cincinnati, Hamilton county, for a great many years, and that at no time during the period laid in the affidavit was he in Xenia or Greene county, or a resident thereof; and, further, that if he committed the crime charged, it was committed in Cincinnati, Hamilton county, and not in Greene county. The judge refused to hear or consider said evidence, dismissed the petition and remanded the prisoner to the custody of the sheriff of Greene county. It was held that the evidence offered was not competent to work the discharge of B, on *habeas corpus*, the same being competent and appropriate as a part of his defense to the charge before said mayor: *Burns v. Tarboe*, 76 O. S. 520, IV Longsdorf's Notes, 1027.

Where it appears upon the hearing of a petition for writ of *habeas corpus* that an affidavit has been filed and indictment returned in a court having jurisdiction charging the petitioner with an offense against the law of this state, the court upon such hearing will not inquire into the guilt or innocence of the accused, but if it appear that the court issuing the *capias* or order of arrest has jurisdiction of the offense charged it will remand him to the custody of the officer of that court: *In re Poage*, 87 O. S. 72.

VII. EVIDENCE.

In a proceeding to determine the legality of a detention the facts found in the record are only *prima facie* evidence, whereas on error they would be taken as true: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

Where a justice of the peace has committed to jail a parent charged with nonsupport of his child to await action of the grand jury, on *habeas corpus* by such parent, evidence *dehors* the record may be heard to show want of jurisdiction in said justice to make such order: *In re Wyant*, 8 O. N. P. (N.S.) 207, 54 Bull. 233.

The rule that in *habeas corpus* proceedings evidence may be heard *dehors* the record, applies only to evidence relating to the jurisdiction of the court, and to the extent of establishing such jurisdiction: *Lillibridge v. State, ex rel.*, 7 O. C. C. (N.S.) 452, 18 O. C. D. 481.

At the hearing on a petition for a writ of *habeas corpus* for release of a witness who has been committed by a notary for contempt in refusing to answer questions, testimony may be introduced by the petitioner as to the relevancy of the questions asked, the notary, under the laws of Ohio, not being competent to pass thereon, and being able only constructively to commit the witness to jail, leaving the decision as to the competency of the questions to the trial court: *In re Goode*, 16 O. D. (N.P.) 404, 3 O. L. R. 401 [affirmed, *Jones v. Goode*, 7 O. C. C. (N.S.) 589, 18 O. C. D. 475]. See also DEPOSITIONS.

A citizen and elector of the state of Kentucky was indicted in Lawrence county, Ohio, for failure to provide for his minor child then being in such county. In a petition filed by him in the supreme court for a writ of *habeas corpus* he avers that he now is, and always has been a citizen of the state of Kentucky; that he was married in that state and established a home for himself and his family in the city of Ashland, Kentucky, where he has ever since resided and where the minor child named in the indictment was born; that without any just cause therefor and without his knowledge or consent and against his wishes and desire his wife abandoned their home, taking their minor child with her and came into this state, where she has remained and has ever since refused to return or to permit such minor child to return to him, although he has at all times maintained in Kentucky a home for her and said child and has at all times been ready and willing to receive them and provide them food, shelter and clothing. It was held that where it appears that such child is receiving its support from the mother, or from any other person at her request, the mere failure and neglect of the defendant to assert his legal right to the custody and control of his minor child does not bring him within the operation of the laws of this state relating to the duties of parents to their minor children: *In re Poage*, 87 O. S. 72.

A resort to a suit in *habeas corpus* by a witness who has been committed to jail by order of the court of common pleas for refusing to testify is a collateral attack upon the order of commitment, and the plaintiff assumes the burden of showing that it is void: *McGorray v. Sutter*, 80 O. S. 400, IV Longsdorf's Notes, 1052.

Where a witness who has refused to answer on the ground that he might thereby incriminate himself, is committed as contumacious, the burden is upon the sheriff to show that the commitment was legal: *In re Lowe*, 3 O. N. P. (N.S.) 641, 16 O. D. (N.P.) 254.

VIII. CUSTODY.

The transfer of a prisoner from the workhouse to the custody of the chief of police, as the first step to the penitentiary from which he escaped, will be presumed to have been accomplished by legal process, and upon his return to the workhouse after completion of his penitentiary sentence *habeas corpus* will not lie for his release, at least until the time his workhouse sentence would have expired had there been no interruption by transferring him to the penitentiary: *Harrington v. Bader*, 12 O. C. C. (N.S.) 257, 22 O. C. D. 493.

It appearing that troops had been paraded by authority of a specific order from the war department, that they might be inspected by officers of the United States army to determine their efficiency, the state courts will not assume jurisdiction of an application for a writ of *habeas corpus* to release a soldier, so ordered, from custody of the military authorities: *In re Johnson*, 12 O. N. P. (N.S.) 566, 22 O. D. (N.P.) 292.

If a court of general jurisdiction has taken jurisdiction no other court will interfere while the case is undetermined. Accordingly, if a federal court has a person in custody under an act of congress claimed to be unconstitutional, it must first decide on its own jurisdiction, and the state courts will not by *habeas corpus* take away the prisoner while the case is pending: *Ex parte Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369. See also CONFLICT OF JURISDICTION.

IX. RES ADJUDICATA.

The judgment of foreign court is not deemed *res adjudicata* and may bind the parties but not conclude the court: *In re Barnes*, 11 Dec. Rep. 848, 30 Bull. 164.

The discharge in one proceeding is no bar to a judgment in another where the prisoner is held on a different warrant for a different purpose: *Morganfield v. Archibald*, 10 O. C. C. 40, 6 O. C. D. 391.

The refusal of a court or judge of an application for the writ of *habeas corpus*, is not a bar to another application to another court based on the same facts, nor does it afford the latter court just grounds for refusing to act: *In re Lueteler v. Perry*, 18 O. C. C. 826, 9 O. C. D. 778.

X. REAPPLICATION.

The refusal of a court or judge of an application for the writ of *habeas corpus* is not a bar to another application to another court based on the same facts, nor does it afford the latter court just grounds for refusing to act: *In re Mullaney*, 8 O. N. P. 49, 10 O. D. (N.P.) 419; *In re Smith v. Perry*, 18 O. C. C. 826, 9 O. C. D. 778.

XI. REVIEW.

Habeas corpus is not a civil action, but a special proceeding, and hence is not appealable: *In re Miller*, 19 O. C. C. 544, 10 O. C. D. 760.

A common pleas judge before whom an extradition warrant is returned having found the proof sufficient, no other judge or court can on *habeas corpus* hear the same or new evidence, and thereby review such finding: *Milford v. Perry*, 18 O. C. C. 76, 9 O. C. D. 492. See also EXTRADITION.

A final order of discharge on *habeas corpus* may be reviewed and reversed on error; for it is essentially a civil and not a criminal proceeding: *In re Collier*, 6 O. S. 55, II Longsdorf's Notes, 217; *Henderson v. James*, 52 O. S. 242, IV Longsdorf's Notes, 571.

And in such case the order of discharge may be stayed by the higher court, under G. C., § 12278, without fixing any terms: *Henderson v. James*, 52 O. S. 242, IV Longsdorf's Notes, 571.

Habeas corpus, though to obtain release from custody on a criminal charge, is a civil proceeding, and a discharge of the prisoner is not a finality, but is reviewable on error: *Henderson v. James*, 52 O. S. 242, IV Longsdorf's Notes, 571.

Proceedings to review the discharge of a prisoner on *habeas corpus* is a civil proceeding, and must be by petition in error and not by *certiorari*. G. C. § 604, providing that the code shall not affect proceedings in *habeas corpus* applies only to the trial and not to the review: *In re Collier*, 6 O. S. 55, II Longsdorf's Notes, 217.

A proceeding in error is the only remedy against excessive punishment: *In re Van Hagan*, 25 O. S. 426, III Longsdorf's Notes, 249.

A refusal to issue the writ is not reviewable, for G. C., § 12187, only provides for error to proceedings if a writ is granted: *In re Luetzler*, 18 O. C. C. 826, 9 O. C. D. 778.

The refusal of a circuit judge to release a prisoner on *habeas corpus* is not reviewable by the supreme court: *Ex parte Morrow*, 28 Bull. 197. See also ERROR.

An order of discharge in a *habeas corpus* case is such a judgment or final order as may be stayed by a higher court upon the authority of G. C., 12278, and under the rule that courts of original jurisdiction have inherent power to stay any judgment over which they have control, an appellate court may stay the judgment of the original court discharging an alleged fugitive from justice pending an application to a higher court, where it appears that if such stay is not granted the judgment of the higher court, should it reverse the judgment of the appellate and original courts, might be rendered nugatory: *Thomas v. Evans*, 14 O. D. (N.P.) 336 [reversed on the ground that the probate court had no jurisdiction, *Thomas v. Evans*, 73 O. S. 140, IV Longsdorf's Notes, 1000]. See also ERROR.

HABENDUM CLAUSE.

An estate in lands created by will or deed which, by the granting clause, would be an estate in fee simple may be limited by the *habendum* clause to an estate tail: *Darling v. Hippel*, 12 O. C. D. 754 [affirmed, *Hippel v. Darling*, 60 O. S. 591]. See also FEE TAIL.

HABERE FACIAS.

See EXECUTION; EJECTMENT.

HABITATION.

See DOMICILE; LANDLORD AND TENANT.

HABITS.

See EVIDENCE.

It is competent to prove that a dog had acquired a habit of attacking sheep in support of a disputed allegation that he attacked and injured sheep on a particular occasion: *Rumbaugh v. McCormick*, 80 O. S. 211, IV Longsdorf's Notes, 1051. See also ANIMALS.

HABITS OF INSURED.

See INSURANCE.

HABITUAL CRIMINAL.

Scope Note.—Includes former and present statutes relating to habitual criminals. Excludes crimes and criminals in general.

ANALYTICAL OUTLINE.

I. Under Former Statutes.

II. Under Present Statutes.

I. UNDER FORMER STATUTES.

The habitual criminal act, R. S., § 7388-11, which provided that upon the third conviction and sentence to the penitentiary the prisoner should be sentenced for life, was repealed in 1902 (95 v. 410).

For constitutionality, sufficiency of indictment, and form of sentence under the former habitual criminal act, see *Blackburn v. State*, 50 O. S. 428, IV Longsdorf's Notes, 505.

The habitual criminal statute (82 v. 237, repealed 95 v. 410) did not attempt to confer judicial or executive powers upon the managers of the penitentiary, nor to provide for further punishment of offenses committed before its passage, nor to place the accused more than once in jeopardy for the same offense committed thereafter: *In re Kline*, 6 O. C. C. 215, 3 O. C. D. 422; *In re Kline*, 70 O. S. 25, IV Longsdorf's Notes, 967.

If imprisonment for a felony was terminated by an unconditional pardon it was not regarded as one of the two former imprisonments for felony required by the habitual criminal act: *State v. Martin*, 59 O. S. 212, IV Longsdorf's Notes, 763.

One who is serving a sentence in the penitentiary under the habitual criminal act is not entitled since its repeal to be released on a writ of *habeas corpus*: *In re Kline*, 70 O. S. 25, IV Longsdorf's Notes, 967.

II. UNDER PRESENT STATUTES.

A prisoner is an habitual offender under G. C., § 13740, providing for cumulative sentences to the workhouse, even though he was paroled for one of his three former offenses, and although his former imprisonment was due to his inability to pay fines: (Editorial) 39 Bull. 177.

Parole from a workhouse does not obliterate a conviction under the habitual criminal statute: *Anonymous*, 8 O. D. (N.P.) 704, 39 Bull. 177; *State v. Williams*, 7 O. N. P. 562, 5 O. D. (N.P.) 545.

A person fined over the workhouse limit (\$10) three different times, even though able to pay the fine and be released, is liable under the habitual criminal act: *Anonymous*, 8 O. D. (N.P.) 704, 39 Bull. 177.

Where a greater punishment may be inflicted on a conviction for a second or subsequent violation of a criminal law, than for the first, the fact that the offense charged is a second or subsequent offense must be averred in the indictment or information, in order to justify the increased punishment: *Larney v. Cleveland*, 34 O. S. 599, II Longsdorf's Notes, 741.

A prisoner can not be tried for any other crime than for which he was arrested; thus, if arrested for drunkenness he can not be sentenced under the habitual criminal act: *Anonymous*, 7 O. N. P. 604, 5 O. D. (N.P.) 571.

HABITUAL CRIMINAL ACT.

For habitual criminal act, see HABITUAL CRIMINAL.

HABITUAL DRUNKARDS.

For habitual drunkards, see also INTOXICATION.

An habitual drunkard is sufficiently defined as one who formed and indulged in the habit of drinking to excess and becoming intoxicated, whether daily and continuously or periodically, with sober intervals of greater or less length: *Miller v. Gleason*, 18 O. C. C. 374, 10 O. C. D. 20.

The common pleas court could formerly appoint a guardian for an habitual drunkard, but there was no right to a trial by jury: *Hagany v. Cohnen*, 29 O. S. 82, III Longsdorf's Notes, 441.

Such guardianship is not conclusive evidence of want of capacity to form a valid marriage: *McCleary v. Barcalow*, 6 O. C. C. 481, 3 O. C. D. 548.

G. C., § 11012, providing that from the service of notice as provided for in G. C., § 11011, until the hearing, no sale, etc., as to persons having notice shall be valid, does not prohibit the drunkard from buying necessities after service of notice: *Brockway v. Jewell*, 52 O. S. 187, IV Longsdorf's Notes, 569.

G. C., § 11012, as to sales, gifts, conveyances, incumbrances, etc., of property of in-

temperate persons after notice of hearing for appointment of guardians does not prohibit such drunkard from purchasing and paying for necessities, and such payments may be made in money or personal property when made and accepted in good faith: *Brockway v. Jewell*, 52 O. S. 187, IV Longsdorf's Notes, 569.

The court has no right to designate any one but the guardian to carry on the inebriate's business. If the wife is the most desirable person, the guardian can employ her: *Hageny v. Cohnen*, 7 Dec. Rep. 79, 1 Bull. 104 [affirmed on other grounds, *Hageny v. Cohnen*, 29 O. S. 82, III Longsdorf's Notes, 441].

Where one in a drunken fit of sickness, requiring a nurse and attendant, requests a person to nurse and take care of him and promises a set of harness as compensation, the delivery of the harness is a payment for such services and not a sale, and a guardian subsequently appointed can not recover it by virtue of the provision of G. C., § 11012: *Brockway v. Jewell*, 52 O. S. 187, IV Longsdorf's Notes, 569.

HABITUAL OFFENDER.

For habitual offender, see HABITUAL CRIMINAL.

HACKS, HACKMEN, HACKSTAND, ETC.

A city, under the general power to regulate hacks (§ 1692, par. 10, repealed 96 v. 96; for analogous statute, see G. C., § 3632), has power to prohibit hackmen soliciting patronage at railroad depots. Such ordinance is reasonable. Reasonableness is a question for the court, but is presumed, and unreasonableness must appear clearly: *Moerder v. Fremont*, 19 O. C. C. 394, 10 O. C. D. 501.

A passenger in a public hack, the driver of which is visibly under the influence of intoxicating liquor to such an extent as to render him incompetent and careless, and who takes no precaution for his own safety, but relies upon the hack driver, is chargeable with the negligence of such driver: *Cain v. Traction Co.*, 13 O. D. (N.P.) 591.

Where hackman visibly under the influence of liquor to an extent rendering him incompetent, drives his vehicle upon a street railway crossing, directly in front of a moving car approaching in plain view, where he can, without substantial inconvenience, avoid the car, he is guilty of contributory negligence, and such negligence is chargeable to the passenger: *Cain v. Traction Co.*, 13 O. D. (N.P.) 591. See also NEGLIGENCE.

A municipal corporation has the right to regulate hackney coaches and other carriages

kept for hire, but it can not appropriate the easement of an adjacent owner to a mere private use, and it can not grant the right to use the street for a hack stand so as to obstruct the premises of the adjoining owners and their right of access to the street: *Branahan v. Hotel Co.*, 39 O. S. 333, II Longsdorf's Notes, 1031.

G. C., § 3635, is to be construed strictly in favor of the property owners: *Hotel Co. v. Branahan*, 7 Bull. 57. [This case was decided in the common pleas court. Perpetual injunction was granted in the circuit court; a motion for leave to file a petition in error was overruled in *Branahan v. Hotel Co.*, 39 O. S. 333, III Longsdorf's Notes, 1031].

G. C., § 3632, which gives to a municipal corporation the power to regulate the use of its streets, and G. C., § 3635, which gives to a municipal corporation power to establish stands for hackney coaches are exclusive, and they form exceptions to a general provision which requires a municipal corporation to keep its streets free from nuisance: *Columbus v. Barr*, 10 O. N. P. (N.S.) 379, 21 O. D. (N.P.) 165.

Injunction will not lie to restrain the publication of an ordinance establishing a stand for hackney coaches, where the ordinance and the facts alleged do not show that it will result in a nuisance: *Columbus v. Barr*, 10 O. N. P. (N.S.) 379, 21 O. D. (N.P.) 165.

HALF-BLOOD.

See DESCENT AND DISTRIBUTION.

HALLUCINATION.

See INSANE, IMBECILES AND IDIOTS.

HAMILTON COUNTY.

The subject of roads and bridge approaches is a matter of a general nature and the act of 94 v. 725, for the purpose of improvement and repair of levees or bridge approaches in counties containing a city of the first grade, first class (Hamilton county), is unconstitutional because lacking uniform operation: *State v. Hamilton County*, 20 O. C. C. 659, 11 O. C. D. 317 [following *Hison v. Burson*, 54 O. S. 470, IV Longsdorf's Notes, 643; *State v. Davis*, 55 O. S. 15, IV Longsdorf's Notes, 652; *Mott v. Hubbard*, 59 O. S. 199, IV Longsdorf's Notes, 762]. See also BRIDGES.

The effect of the proviso in § 2 (96 v. 13), relative to state supervisors of elections in Hamilton county is to increase the salary attached to a public office, and in so far as it affects the salary of an incumbent during the

term he was serving when the statute was enacted, is unconstitutional: *State v. Lewis*, 3 O. L. R. 122. See also ELECTIONS, POLITICAL.

The proviso in § 2 of the act of 96 v. 13, excepting R. S., § 2966-4c (repealed 97 v. 238), from repeal by implication by reason of the enactment of § 1 (2966-4g, repealed 97 v. 238), of said act must be construed as excluding deputy state supervisors of elections in Hamilton county from the operation of said R. S., § 2966-4g (repealed, 97 v. 238): *State v. Lewis*, 3 O. L. R. 122.

HAMLET.

For hamlet, see also MUNICIPAL CORPORATIONS.

The terms "villages" and "hamlets" under of territory within township without reference to its being divided into lots, streets, alleys, etc., does not necessarily imply a nucleus or collection of houses, nor require that the territory be embodied in a compact municipality. A territory situated on a body of water, extending completely across a township, approximately five miles in length and a mile in width, containing picnic grounds, largely covered with woods, with a collection of permanent residences in opposite ends, and summer homes on the lake, is not unreasonably large under such statute, especially, where no resident or property owner therein objects to its incorporation: *Hall v. Siegrist*, 13 O. D. (N.P.) 1.

The repeal of R. S., §§ 1550 and 1552 (repealed 96 v. 96), prevents the creation of additional hamlets, but does not destroy those already in existence: *North Bend v. Railway Co.*, 1 O. C. C. (N.S.) 301, 15 O. C. D. 268 [reversing *North Bend v. Railway Co.*, 13 O. D. (N.P. 587; affirmed, *Railroad Co. v. North Bend*, 70 O. S. 46, IV Longsdorf's Notes, 968].

The statutes pertaining to hamlets prior to the enactment of the present Municipal Code evince no purpose of preventing others from entering that class, and are therefore not within the inhibition as to special legislation: *North Bend v. Railway Co.*, 1 O. C. C. (N.S.) 301, 15 O. C. D. 268 [distinguishing *State v. Jones*, 66 O. S. 453, IV Longsdorf's Notes, 912]. See also CONSTITUTIONAL LAW.

G. C., §§ 6127 and 6130, which provide for an election in any municipality to determine whether or not the sale of intoxicating liquors as a beverage within the limits of such municipality shall be prohibited, and prescribed punishment for violations of said act where such sales are so prohibited, apply to hamlets

as the same existed in this state prior to the adoption of the Municipal Code, October 22, 1902: *Oarey v. State*, 70 O. S. 121, IV Longsdorf's Notes, 969. See also INTOXICATING LIQUOR.

Indecent behavior, etc., in streets or public places may be made penal by a hamlet, under R. S., § 1653 (repealed, 96 v. 106): *Billington v. Hoverman*, 18 O. C. C. 637, 7 O. C. D. 358.

A street railway company is without authority to construct its road on the streets or roads of a hamlet existing at the time of the new Municipal Code without its consent: *Railway Co. v. North Bend*, 70 O. S. 46, IV Longsdorf's Notes, 968. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

The ownership by a railway company of the land abutting on both sides of a street does not divest the trustees of a hamlet of control over the entire street: *North Bend v. Railway Co.*, 1 O. C. C. (N.S.) 301, 15 O. C. D. 268. See also STREETS.

"Council" does not include trustees of a hamlet except where such construction is necessary. Hence, R. S., § 1717 (repealed, 96 v. 96) does not render a trustee of a hamlet ineligible to be a member of the board of education. A person has the right to hold the office to which he is elected, unless the statute forbids: *State v. Wagar*, 19 O. C. C. 149, 10 O. C. D. 160.

HAND OF ANOTHER.

For signature of instruments by another, see AGENCY; DEEDS; WILLS, LEGACIES AND DEVISES.

HANDWRITING.

For handwriting, see also EVIDENCE.

Where a number of standards of handwriting have been admitted in evidence for the purpose of proving the genuineness of a signature, it is an abuse of discretion on the part of the trial judge amounting to prejudicial error to refuse to permit the jury to take to their room all the standards so introduced as exhibits: *Marshall v. Thomas*, 12 O. C. C. (N.S.) 353, 21 O. C. D. 363. See also TRIAL.

An expert witness on handwriting should be confined to matters apparent on the face of the writing. He can not be permitted by argument or inference to draw conclusions as to matters not appearing on the face of the writing, and the value of his opinion will depend upon the clearness with which he demonstrates its correctness: *Marshall v. Thomas*, 12 O. C. C. (N.S.) 353, 21 O. C. D. 363. See also EVIDENCE.

HARBORING CRIMINALS.

See HARBORING THIEF.

HARBORING THIEF.

The harboring and concealing of a thief who has stolen goods and chattels of less value than thirty-five dollars is not punishable under G. C., § 12841, as any other interpretation would place a greater punishment upon one harboring a thief than upon the thief himself: *Hallett v. State*, 29 O. S. 168.

In order to sustain an indictment charging A with harboring B, a thief, it must be proved that A did harbor and conceal B, that B was at that time liable to arrest, indictment and punishment for the crime of larceny, that A knew these facts and harbored B for the purpose of preventing his arrest and prosecution: *State v. Douglass*, 3 Dec. Rep. 540.

HARBORING WIFE.

For harboring wife, see HUSBAND AND WIFE.

HARD BARGAINS.

See CONTRACTS; FRAUD AND DECEIT; UN-DUE INFLUENCE.

HARD LABOR.

See SENTENCE.

HARMLESS ERROR.

See ERROR.

HARVEST HOME FESTIVAL.

For harvest home festival, see AGRICULTURAL SOCIETIES.

HAWKERS AND PEDDLERS.

The term "hawker" does not include a farmer who is marketing his own products, or a manufacturer who is marketing his own work: *Toledo v. Brown*, 14 O. C. C. (N.S.) 165, 22 O. C. D. 357 [affirmed, without opinion, *Brown v. Toledo*, 83 O. S. 491].

The term "peddler" means a person who travels from place to place selling goods, and not a merchant who has a fixed and permanent location; and the council of a municipal

corporation can not modify such meaning by ordinance: *Cigar Stores Co. v. Von Bargaen*, 7 O. N. P. (N.S.) 420, 19 O. D. (N.P.) 120, 53 Bull. 399.

A nonresident tailor who takes orders from samples displayed by him is not a peddler or hawker: *Radebaugh v. Plain City*, 11 Dec. Rep. 612, 28 Bull. 107.

Persons selling the products of their own raising and manufacture designated in the proviso of G. C., § 3672, are not peddlers or hawkers against whom fees for licenses may be imposed: *Toledo v. Brown*, 14 O. C. C. (N.S.) 165, 22 O. C. D. 357 [affirmed, without opinion, *Brown v. Toledo*, 83 O. S. 491].

Hawking and peddling are proper subjects for supervision by the police power, and they may be licensed, if this is done in a fair way, without unjust discrimination and if a reasonable license fee is charged: *Mays v. Cincinnati*, 1 O. S. 288, 1 Longsdorf's Notes, 973; *Brunner v. Harrison*, 8 O. N. P. 303, 11 O. D. (N.P.) 446 [reversed, *Brunner v. Harrison*, 1 O. C. C. (N.S.) 111, 15 O. C. D. 247].

Under guise of licensing a peddler, a municipal corporation can not authorize him to occupy a portion of the inside of a sidewalk by a structure which is built against the wall of a building, and which is used by him for the purpose of selling his wares: *Cigar Stores Co. v. Von Bargaen*, 7 O. N. P. (N.S.) 420, 19 O. D. (N.P.) 120.

An ordinance fixing a license fee for street peddlers, which imposes a higher fee on those who use vehicles drawn or propelled by any power except by hand, than upon those which are propelled by hand, is not rendered invalid by such discrimination: *Murphy v. Columbus*, 2 O. N. P. (N.S.) 484, 15 O. D. (N.P.) 60.

HAWKING.

For hawking, see HAWKERS AND PEDDLERS.

HAY, STRAW, ETC.

While it is a common practice in leasing farms to treat hay and straw as manure is treated at common law—that is, as a fixture of the farm—and such a provision was incorporated in the lease to the defendant, yet in construing a subsequent contract terminating the lease, the provision thereof that the defendant was to harvest his crops and remove them by December 1st, must be construed as giving him the right to remove the straw: *Garrett v. Brant*, 6 O. C. C. (N.S.) 509, 17 O. C. D. 493. See also LANDLORD AND TENANT.

The Pennsylvania Co., being engaged in the construction of certain sidetracks, switches

and other improvements, caused to be posted near the place where said work was being done, written notices that it would "protect all claims for materials, labor and board." It was held that the claim of M for hay, grain, straw and feed furnished by him to a contractor, for teams employed on said work, was not a claim for either material, labor or board within the language and meaning of said notice, and was not a claim which the Pennsylvania Company, by the posting of said notices, thereby assumed, or obligated itself to protect and pay: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018.

G. C., § 8351, while it in terms extends the provisions of G. C., § 8345, to such persons as furnished hay, grain, etc., on the order of a contractor or subcontractor for their use or the use of the persons employed by them or either of them while furnishing material or labor for or in the construction of such railroad does not extend or enlarge the meaning of the word "materials;" nor does it impose upon the railroad company a personal liability for the articles thus furnished if no lien therefor be taken and perfected: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018.

The term "materials" as used in G. C., § 8345, providing for a lien against railroads,

comprehends and includes such articles only as are furnished for and to be used in the construction of such railroad. A person who furnishes hay, grain, straw and feed to a contractor or subcontractor for the teams employed on said railroad is not furnishing materials within the purview and meaning of the section: *Pennsylvania Co. v. Mehaffey*, 75 O. S. 432, IV Longsdorf's Notes, 1018. See also RAILROADS.

HAZARD.

See GAMBLING.

HAZARDOUS OCCUPATION.

See MASTER AND SERVANT; NEGLIGENCE.

HAZARDOUS RISKS.

See INSURANCE.

HEAD OF FAMILY.

For question of exemptions, see EXECUTION.

For liability for support, see HUSBAND AND WIFE; PARENT AND CHILD.

HEALTH.

Scope Note.—Includes definition; power of legislature to protect health; state, township and municipal boards of health, their organization and powers; health as it affects insurance policies and discharge of a contract; and power of board of education. Excludes physicians, adulteration of food and hospitals.

Cross References.

For pure food laws, see FOODS AND DRUGS.

For the power of municipal corporations to protect health, see MUNICIPAL CORPORATIONS.

For physicians, see PHYSICIANS AND SURGEONS.

For hospitals, see HOSPITAL.

ANALYTICAL OUTLINE.

- I. Definition, 8467.
- II. Power of Legislature to Protect Health, 8467.
- III. State Board of Health, 8468.
- IV. Township Board of Health, 8469.
 - A. Nature and organization, 8469.
 - B. Powers, 8469.
- V. Power of Municipal Corporation to Protect Health, 8469.
 - A. To establish boards of health, 8469.
 - B. Regulation of sewers, 8470.
 - C. Vaults, 8971.

- D. *Disposal of dead bodies*, 8472.
- E. *Regulation of milk traffic*, 8472.
- F. *Power to declare a thing a nuisance*, 8472.

VI. Municipal Board of Health, 8474.

- A. *Power and duty of council*, 8474.
- B. *Nature and organization*, 8475.
- C. *Employees*, 8475.
- D. *Powers*, 8476.
 1. *Orders and regulations*, 8476.
 2. *Abatement of nuisances*, 8479.
 3. *Contagious diseases*, 8479.
 4. *Food*, 8480.

VII. Power of Board of Education to Protect Health, 8480.

VIII. Health as Condition in Policy of Insurance, 8480.

IX. Sickness as Discharge of Contract, 8481.

X. Evidence, 8481.

I. DEFINITION.

By the expression "good health" is not meant that she should be entirely and absolutely free from all bodily infirmities, or all tendency to disease, but that she was in a reasonably good state of health and free from any disease or illness that tended seriously or materially to weaken or undermine her constitution: *Hess v. Maccabees*, 4 O. L. R. 30.

In life insurance "sound health" means that state of health which is free from disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition: *Insurance Co. v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

II. POWER OF LEGISLATURE TO PROTECT HEALTH.

The statutes which authorize boards of health to make local regulations are not invalid as a delegation by the general assembly of its legislative power contrary to Art. II, § 26, of the constitution of Ohio: *Staas v. State*, 15 O. C. C. (N.S.) 189, 23 O. C. D. 159 [affirmed, without opinion, *Staas v. State*, 81 O. S. 497, IV Longsdorf's Notes, 1058].

The legislature has power to determine what laws and regulations are needed to protect public health and to secure public safety. If its measures are calculated, intended, convenient and appropriate to accomplish this end, the exercise of its discretion can not be reviewed by the courts; but under the guise of police regulations, personal rights and private property can not be affected arbitrarily, and the determination of the legislature upon these questions is not final: *Bernhardt v. Wise*, 12 O. N. P. (N.S.) 545, 23 O. D. (N.P.) 230 [affirmed, on other grounds,

Bernhardt v. Wise, 15 O. C. C. (N.S.) 158, 24 O. C. D. 114].

The legislature may empower the state board of health to require municipal corporations to make adequate provision for the disposal of sewage: *Board of Health v. Greenville*, 86 O. S. 1 [reversing *Greenville v. Demorest*, 14 O. C. C. (N.S.) 113, 22 O. C. D. 544].

The legislature has not the power to require physicians and midwives to file certificates of birth, giving certain information to the bureau of vital statistics, which information is not necessarily within the professional knowledge of such physician or midwife; such as the information required by G. C., §§ 218, 219, 220 and 223: *State v. Boone*, 84 O. S. 346 [on rehearing, *State v. Boone*, 85 O. S. 313].

For special unconstitutional legislation authorizing the issue of bonds to extend and repair the Commercial Hospital of Cincinnati, see *Cincinnati v. Hospital Trustees*, 66 O. S. 440, IV Longsdorf's Notes, 911.

III. STATE BOARD OF HEALTH.

Art. I, § 5, of the Ohio constitution which provides that the right of trial by jury shall be inviolate does not prevent the legislature from withdrawing certain matters concerning sewage and drainage from the power of municipal corporations and transferring them to the state board of health: *State Board of Health v. Greenville*, 86 O. S. 1 [reversing *Greenville v. Demorest*, 14 O. C. C. (N.S.) 113, 22 O. C. D. 544].

If the state board of health has made an order requiring a sewage disposal plant and the municipal corporation has not taken an appeal from such order as provided for by G. C., § 1257, such municipal corporation

can not resort to equity to enjoin the board of health from enforcing its orders: *Board of Health v. Greenville*, 86 O. S. 1 [reversing *Greenville v. Demorest*, 14 O. C. C. (N.S.) 113, 22 O. C. D. 544].

IV. TOWNSHIP BOARD OF HEALTH.

A. NATURE AND ORGANIZATION.

Township boards of health and township trustees are separate and distinct bodies, and neither has any control over the affairs of the other, although by G. C., § 3391, the township trustees constitute the township board of health: *Trustees v. Columbus*, 12 O. D. (N.P.) 553.

B. POWERS.

Boards of health are not bodies corporate, and are not authorized to sue and be sued; and such power does not belong to them as incident to the statutes which prescribe their duties: *Trustees v. Columbus*, 12 O. D. (N.P.) 553.

G. C., §§ 3278 and 3279, which authorize and require the township trustees to prevent the spread of certain diseases, does not authorize them to bring an action, as trustees acting as a board of health, to prevent a municipal corporation from discharging its sewage into a stream which runs through such township, and from polluting such stream thereby: *Trustees v. Columbus*, 12 O. D. (N.P.) 553.

A petition which pleads an oral contract with a board of health for the furnishing of necessities to a family quarantined on account of smallpox under G. C., § 4436, is good as against a general demurrer: *Meily v. Columbus*, 6 O. C. C. (N.S.) 398, 17 O. C. D. 822.

Boards of health are invested with legislative, quasi judicial and executive or governmental powers, in the exercise of which proceedings of a most summary character are permitted, but they are not liable for negligence in the discharge of their official functions, nor can any cause of action accrue in their favor in the absence of a statute providing therefor: *Trustees v. Columbus*, 12 O. D. (N.P.) 553.

V. POWER OF MUNICIPAL CORPORATION TO PROTECT HEALTH.

A. TO ESTABLISH BOARDS OF HEALTH.

An elector and taxpayer can not sue in mandamus to compel the council, under G. C., § 4404, to establish a board of health: *State, ex rel., v. Orr*, 15 O. C. C. (N.S.) 59.

The requirements that the council shall establish a board of health, or in villages a

health officer, if it prefers, is mandatory: *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

A municipal corporation is not liable for the negligence of its board of health or of its health officer: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

A petition filed by an elector, citizen and taxpayer of a city, who is also the mayor thereof, and the owner of real property therein, in which it is alleged that the defendants are the city council, that no board of health exists in said city, and that the council refused to establish a board of health therein, does not state a cause of action in a proceeding in mandamus to compel such city council to establish such board of health: *State, ex rel., v. Orr*, 15 O. C. C. (N.S.) 59.

B. REGULATION OF SEWERS.

Under G. C., § 3647, municipal corporations have power to build sewers, and the construction of sewers in public streets, if done in a lawful manner, is a use by such municipal corporation of such street which is authorized by law: *Cincinnati v. Penny*, 21 O. S. 499, III Longsdorf's Notes, 39; *Elster v. Springfield*, 49 O. S. 82, IV Longsdorf's Notes, 442.

Under a section analogous to G. C., § 3647, it was held that the council of a municipal corporation might construct a sewer before a system of sewerage had been declared necessary, and that such council is not restricted by sections such as G. C., §§ 3871, *et seq.*, which provide for the construction of sewers after a system of sewerage has been declared to be necessary: *Hartwell v. Railroad*, 40 O. S. 155, IV Longsdorf's Notes, 15.

A property owner who is injured by the failure of a municipal corporation to provide adequate drainage for surface water has no right of action against such municipal corporation for such omission: *Springfield v. Spence*, 39 O. S. 665, III Longsdorf's Notes, 1060.

A reasonable exercise of discretion is conferred upon municipalities by G. C., § 3650, to determine what is offensive, dangerous or unwholesome, and whether it is or may become an injury or annoyance to the public, and to prohibit it in so far as is reasonable and necessary to prevent injury or annoyance: *Schreier v. St. Bernard*, 19 O. D. (N.P.) 476, 6 O. L. R. 598.

The fact that a sewer collapses during a time of extraordinary flood, and that by reason of such collapse filled ground is washed away, does not give a cause of action to the owners of ground upon which such filling had been made against the municipal

corporation: *McWilliams v. Cincinnati*, 7 O. L. R. 88.

A resolution of the council of a municipal corporation, under a similar statute, directing lot owners "to fill and drain their lots in such a manner as shall be necessary to remove all stagnant water," requires, by reasonable construction, not only the removal of such water as then may be on such lots, but also that the work is to be done in such a way as to prevent the recurrence of stagnant water from the same cause: *Bliss v. Kraus*, 16 O. S. 54, II Longsdorf's Notes, 758.

In *Pleasant Hill v. Commissioners*, 71 O. S. 133, IV Longsdorf's Notes, 980, it was said that the manner in which drainage should be accomplished within a municipal corporation was a matter primarily and peculiarly within the discretion and control of the municipality in itself, by and through its legally constituted authority and that except as expressly provided by statute, county commissioners have no authority or jurisdiction to locate and construct a county ditch within the corporate limits of a municipality. This case is, however, overruled in effect by *Greek v. Joy*, 81 O. S. 315, in which it was held that, although there is no specific statutory authority therefor, township trustees have jurisdiction to locate and construct a ditch within the township where it commences on farm lands without the limits of the incorporated limits and extends into or through such village to an outlet.

The council of a municipal corporation has a wide discretion in determining what is a sufficient outlet for a sewer, and the fact that such sewer is made to empty into a small creek which "is mostly stagnant during the larger part of the dry or summer season, and in which at no time is the volume of water or the current sufficient to carry off the sewage," is not ground for enjoining an assessment for such sewers: *Cleneay v. Norwood*, 137 Fed. 962, 14 O. F. D. 469.

C. VAULTS.

A charge which is made to cover the expense of disinfecting the privy vault an expense which should fall on the owner or occupier of the premises, or the municipal corporation, can not be imposed upon the person who performs a part of the duty of removing the contents and cleaning up the premises: *Toledo v. Buechele*, 21 O. C. C. 429, 11 O. C. D. 479.

While an ordinance providing a reasonable charge for supervising the work of removing contents of privy vaults and for removing the bad effects thereof, for which the person cleaning is primarily responsible, and cover-

ing the costs of issuing permits to do the work, and of collection, is legal: *Toledo v. Buechele*, 21 O. C. C. 429, 11 O. C. D. 479.

D. DISPOSAL OF DEAD BODIES.

Under G. C., § 3649, a municipal corporation may grant a monopoly to transport and utilize the carcasses of dead animals, which have not been slaughtered for food, and which are found within the limits of such municipal corporation: *Stadler v. Cleveland*, 4 O. N. P. (N.S.) 649, 17 O. D. (N.P.) 340.

That an ordinance which forbids the transportation of any dead animals, fish or garbage, including condemned food, through the streets of a municipal corporation by any person except the city contractor or his agent, is invalid, as in violation of the fourteenth amendment of the constitution of the United States: *Bauer v. Casey*, 6 O. C. (N.S.) 69, 16 O. C. D. 598.

E. REGULATION OF MILK TRAFFIC.

An ordinance for the preservation of public health, which provides for the inspection of dairies and the cattle therein, and which provides that a fee of one dollar must be paid for each wagon used within the municipal corporation for the purpose of selling milk, and that a tag must be attached to every such wagon before the permit will be granted, does not impose a license within the meaning of G. C., § 3672, and is valid: *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547 [affirmed, without opinion, *Walton v. Toledo*, 69 O. S. 548].

An ordinance forbidding the sale of milk at retail unless contained in sealed glass bottles is not unreasonable in its general operation, and a conviction of violating such an ordinance will not be set aside on the ground that some other regulation might better serve the public welfare: *Staas v. State*, 15 O. C. C. (N.S.) 189, 23 O. C. D. 159 [affirmed, without opinion, *Staas v. State*, 81 O. S. 497, IV Longsdorf's Notes, 1058].

F. POWER TO DECLARE A THING A NUISANCE.

A nuisance in the form of a noisy factory established in a residence neighborhood and throwing off such quantities of dust as to be a menace to health may be enjoined: *Amlung v. Lang*, 22 O. D. (N.P.) 61, 8 O. L. R. 286.

Neither the legislature nor the city council can make a stream of water a nuisance by a declaration to that effect, but its character in that respect can be established only by legal proceeding. If, in fact, a stream is not a nuisance, an arbitrary order or ordi-

nance declaring it to be a nuisance, does not authorize its diversion: *Deming v. Cleveland*, 22 O. C. C. 1, 12 O. C. D. 198.

Where such view is taken, dense smoke is a nuisance only if it is injurious to health, damaging to property or annoying the inhabitants of that locality: *Cleveland v. Malm*, 5 O. N. P. 203, 7 O. D. (N.P.) 124; *Sigler v. Cleveland*, 3 O. N. P. 119, 4 O. D. (N. P.) 166.

An ordinance prohibiting and regulating anything as dangerous, offensive or unwholesome, must expressly or by necessary implication be limited not only to things dangerous, offensive or unwholesome, but to those the prohibition or regulation of which will tend to prevent injury or annoyance to the public: *Kaiser v. Walsh*, 4 O. N. P. (N. S.) 507, 17 O. D. (N.P.) 324.

Under evidence which tends to show that an odor is offensive, that it reached and permeated the village council chamber some one thousand feet distant from the origin of the odor, that it reached the public school building, where the village board of education was in session, was noticeable on the village streets and reached and permeated homes in the village, such odor can be held to be a public nuisance: *Brown v. St. Bernard*, 9 O. N. P. (N.S.) 296, 20 O. D. (N. P.) 422 [affirmed, *Brown v. St. Bernard*, 13 O. C. C. (N.S.) 216, 22 O. C. D. 178].

The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and the municipality is not liable for damages from a private nuisance resulting from its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by a failure of its officers to enforce resolutions or ordinances adopted in the exercise of that power: *Mansfield v. Bristor*, 76 O. S. 270, IV Longsdorf's Notes, 1024.

A municipal corporation may forbid the manufacture or production, within its limits, of fertilizer or other products from which offensive or unwholesome odors are given off: *Brown v. St. Bernard*, 9 O. N. P. (N.S.) 296, 20 O. D. (N.P.) 422; *Schreier v. St. Bernard*, 19 O. D. (N.P.) 476, 6 O. L. R. 598 [affirmed, *Brown v. St. Bernard*, 13 O. C. C. (N.S.) 216, 22 O. C. D. 178].

A smallpox hospital which was established by a municipal corporation outside its limits and at a distance of two hundred and fifty feet from a public highway, and which has been thus maintained for twenty-five years, will not be abated as a nuisance, although since it was erected a large township schoolhouse has been built adjoining the highway and across from such hospital, and buildings

have been erected nearby; but such municipal corporation will be enjoined from erecting additional buildings directly opposite the schoolhouse and within fifty feet of such highway. Such acts as throwing refuse from the table and kitchen of a hospital where dogs and cats of the neighborhood could reach it, and permitting nurses and convalescents to promenade upon such highway may be restrained by injunction, but do not of themselves justify the abatement of such pesthouse as a nuisance: *Trustees v. Youngstown*, 6 O. C. C. (N.S.) 498, 15 O. C. D. 518.

Whether a pesthouse is a nuisance depends upon the manner in which it is occupied and its location; and if it is located in a thickly populated community near residences and schoolhouses, it is a nuisance if persons who are infected with malignant and contagious diseases are kept there: *Rolling v. Lorain*, 13 O. D. (N.P.) 87 [reversed, *Lorain v. Rolling*, 3 O. C. C. (N.S.) 660, 14 O. C. D. 82].

VI. MUNICIPAL BOARD OF HEALTH.

A. POWER AND DUTY OF COUNCIL.

G. C., § 4404, gives to the council full legislative power over the entire subject matter: *Reynolds v. Schweinefus*, 27 O. S. 311, III Longsdorf's Notes, 358.

Although an ordinance which established a board of health was defectively enacted, because it was not read on three distinct occasions, such board was nevertheless held to be at least a *de facto* board; its acts were accordingly held to be valid as against collateral attack: *Smith v. Lynch*, 29 O. S. 261, III Longsdorf's Notes, 464.

Under a former section analogous to G. C., § 4207, it was held that a member of the council was not eligible to the office of a member of the board of health, and that an appointment to such office is therefore a nullity: *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

It is mandatory upon council to create a board of health, and it is mandatory upon a board of health to appoint a health officer and fix his salary, and the necessary appropriation to meet the expense must be made: *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

A member of the board of health of a municipal corporation is an officer of such corporation and ineligible under G. C., § 12912, to the appointment of district physician during the term for which he was appointed or for one year thereafter, and can not recover compensation for services rendered: *State, ex rel., v. Wichgar*, 3 O. L. R. 178, 3 O. L. R. 534, 17 O. C. D. 743.

Although R. S., § 1693 (repealed 96 v. 96, § 231; for analogous section, see G. C., § 4224), requires a majority of the members of a city council to pass a resolution or ordinance, a majority of a quorum at a regular or regularly called meeting of a board of health, is all that is necessary to transact business, especially when a majority of the entire board vote for a motion in affirmance of a resolution so passed: *State, ex rel., v. Massillon*, 13 O. D. (N.P.) 292 [affirmed, on other grounds, *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249].

B. NATURE AND ORGANIZATION.

Boards of health have powers of a legislative, executive and quasi judicial character; and these powers may in some cases be exercised in a summary manner: *Board of Health v. Columbus*, 12 O. D. (N.P.) 553.

A board of health and the health officer of such board have power to make contracts for erecting temporary hospitals, and for nursing and caring for the sick: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

In the absence of specific statutory authority, a majority of such board, a quorum, is competent to transact business: *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

A municipal corporation is not liable for the negligence of its board of health or of its health officer: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

A board of health is not a public corporation, and in the absence of specific statutory authority, it can not sue or be sued, and, accordingly, it can not maintain an action to prevent the pollution of a stream: *Board of Health v. Columbus*, 12 O. D. (N.P.) 553.

Since the duties of a commission or board involve the exercise of judgment and discretion, a meeting is necessary at which all members shall be actually or constructively present in order that there may be full consultation and discussion after which each member is to exercise his judgment before acting: *Merchant v. North*, 10 O. S. 251, II Longsdorf's Notes, 432; *State, ex rel., v. Trustees*, 20 O. S. 238, II Longsdorf's Notes, 995; *McCortle v. Bates*, 29 O. S. 419, III Longsdorf's Notes, 483; *State, ex rel., v. Edmondson*, 12 O. N. P. (N.S.) 577, 23 O. D. (N.P.) 85.

C. EMPLOYEES.

The provision that the board of health shall appoint a health officer is mandatory: *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

It is not necessary that a certificate showing that there is money in the treasury suffi-

cient to pay the compensation of a health officer prior to his appointment. This case is one of the exceptions to G. C., § 3806 (see G. C., § 3809): *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

A health officer is a servant or employee rather than an officer, and the provisions of G. C., § 4213, which forbid the salary of an officer, clerk or employee to be increased or diminished during the term for which he was elected or appointed, is said not to apply in *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249. Furthermore, such officer is not appointed for any definite term; see *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

A health officer was held not to be an employee within the meaning of § 189 (see G. C., § 4408), of the municipal code, which provided for the continuance of former employees in office: *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

Where the appointment to an office is a nullity, for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made, without first ousting such first appointee by proceedings in *quo warranto*: *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

A board of health having appointed a new health officer, thereby indicated its pleasure that it no longer desired the services of the previous health officer: *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

A board of health and the health officer of such board have power to make contracts for erecting temporary hospitals and for nursing and caring for the sick: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

A member of a board of health can not be appointed as district physician by reason of G. C., § 12912, for one year after the expiration of his term: *State, ex rel., v. Wichgar*, 17 O. C. D. 743, 3 O. L. R. 178, 3 O. L. R. 534.

Mandamus will lie to compel an appropriation for the salary and expenses of a health officer: *State, ex rel., v. Massillon*, 2 O. C. C. (N.S.) 167, 14 O. C. D. 249.

D. POWERS.

1. Orders and Regulations.

A board of health and the health officer of such board have power to make contracts for erecting temporary hospitals, and for nursing and caring for the sick: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

Boards of health have powers of a legislative, executive and quasi judicial character; and these powers may in some cases be

exercised in a summary manner: *Board of Health v. Columbus*, 12 O. D. (N.P.) 553.

If orders of a board of health are violated, prosecution may be instituted before a justice of the peace: *Board of Health v. Columbus*, 12 O. D. (N.P.) 553.

A municipal corporation acting through its board of health in fumigating premises acts in a governmental capacity: *West v. Mt. Washington*, 9 O. N. P. (N.S.) 250, 20 O. D. (N.P.) 125.

A resolution of the board of health when properly adopted has the effect of an ordinance: *Kaiser v. Walsh*, 4 O. N. P. (N.S.) 507, 17 O. D. (N.P.) 324.

The appointment of a new health officer under provisions of a new municipal code is an indication of pleasure of board: *State, ex rel., v. Craig*, 69 O. S. 236, IV Longsdorf's Notes, 957.

Whether a board of health can make a rule that all pupils must be vaccinated before attending school was questioned but not decided in *Carr v. Board of Education*, 1 O. N. P. (N.S.) 602, 13 O. D. (N.P.) 430. (In this case it was held that probably the board of education alone has such power; since it was improbable that the legislature having given such power to boards of education by G. C., § 7686, would have given the same discretionary power to the board of health as well. If, however, the board of health has made such an order and the board of education has adopted it, such order, if justified by public necessity and by the prevalence of smallpox in the community, is valid.)

A board of health may require all physicians to register; but the board can not require the approval of such board, or an officer thereof, as a condition precedent to admission to registration: *State, ex rel., v. Prendergast*, 8 O. C. C. 401, 6 O. C. D. 807.

A board of health may require all known prostitutes to submit to a physical examination each week to determine whether they are affected with any venereal disease, and may require them to display in their rooms certificates of freedom from such disease if granted, and may charge a reasonable fee therefor: *Cincinnati v. Allison*, 12 O. D. (N.P.) 376.

It will be against public policy and not a reasonable exercise of sanitary or police regulation to have fees for such examinations paid to the examining physicians direct; the money should be paid into the city treasury: *Cincinnati v. Allison*, 12 O. D. (N.P.) 376.

A permit, for which a fee of one dollar is charged, is not a license, and, therefore, not in violation of G. C., § 3672, which exempts vendors of their own products from payment for a license: *Walton v. Toledo*, 3 O. C. C.

(N.S.) 295, 13 O. C. D. 547 [affirmed, without opinion, *Walton v. Toledo*, 69 O. S. 548].

A resolution adopted by a board of health which provides for confiscating milk which is found to be above a prescribed temperature is valid, at least if the temperature thus fixed is one at which milk is likely to become unfit for human food: *Kaiser v. Walsh*, 4 O. N. P. (N.S.) 507, 17 O. D. (N.P.) 324.

Injunction against boards of health interfering with the marketing of milk from cows fed on distillery waste will not lie: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

A health ordinance which provides that milk can not be sold within the municipal corporation until a permit has been obtained from the board of health, and which provides for an examination and inspection of the milk sold and of the dairies where the cows are kept is enforceable: *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547 [affirmed, without opinion, *Walton v. Toledo*, 69 O. S. 548].

A board of health may regulate the sale of milk, and may require it to be furnished in tightly capped bottles; although it exempts sale by wholesale dealers in large quantities: *Klopper v. Board of Health*, 9 O. N. P. (N.S.) 33, 20 O. D. (N.P.) 384.

A board of health is a board exercising governmental functions and is engaged in the performance of a public service from which the village receives no pecuniary or special advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare: *West v. Mt. Washington*, 9 O. N. P. (N.S.) 250, 20 O. D. (N.P.) 125.

A municipal corporation acting through a board of health is not liable in an action for damages, for negligence of the board of health and its agents, whereby property was destroyed through the careless use of fumigating apparatus while disinfecting premises wherein a person had been sick with a contagious disease: *West v. Mt. Washington*, 9 O. N. P. (N.S.) 250, 20 O. D. (N.P.) 125.

The board of health of a village, as a preamble to an order directing the conduct of physicians and surgeons in the treatment of obstetrical cases, passed and published the following: "Whereas, the board of health of the village of Delphos, Allen and Van Wert counties, Ohio, after careful consideration, has become satisfied that in said village a number of deaths have recently resulted from the carelessness and negligence of the physician attending the patients in childbirth, soon after attending and handling the patients affected by blood poison

and other infectious diseases, and that from the same cause others in said village have barely escaped death." The preamble construed in connection with the order and pleadings was libelous *per se*, and the publication of it was not privileged: *Mauk v. Brundage*, 68 O. S. 89, IV Longsdorf's Notes, 939.

2. Abatement of Nuisances.

A board of health may abate a nuisance; and shall then certify the cost thereof to the auditor to be collected as taxes are collected: *Board of Health v. Columbus*, 12 O. D. (N. P.) 553.

3. Contagious Diseases.

Under G. C., § 4429, a board of health, if acting in good faith, may quarantine a house; and the owner thereof can not recover damages for any injury which he may suffer thereby. If, however, such board of health is acting in bad faith and out of malice, such owner may recover damages: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

A board of health has power to make contracts for the care of persons who are quarantined; and the municipal corporation is liable upon such contract: *Turner v. Toledo*, 15 O. C. C. 627, 8 O. C. D. 196.

A petition which pleads an oral contract with a board of health for the furnishing of necessities to a family quarantined on account of smallpox is good under G. C., §§ 4432, *et seq.*, against a general demurrer: *Meily v. Columbus*, 6 O. C. C. (N.S.) 398, 17 O. C. D. 822.

If a physician fails to report a contagious disease, it is said that the proper procedure is a civil action in the name of the state to recover the penalty; and not a warrant for his arrest: *State v. Chandler*, 8 Dec. Rep. 322, 7 Bull. 97.

Whether a board of health has power under G. C., § 4436, to order a board of education to exclude from school all children who have not been successfully vaccinated, is a question which was raised but not decided in *Carr v. Board of Education*, 1 O. N. P. (N.S.) 602, 13 O. D. (N.P.) 430; since in this case the board of education adopted such order of the board of health; and such order was held accordingly to be valid, it being shown that smallpox was prevalent in such community.

A municipal corporation may construct a pest house outside of its limits and in the township, without first obtaining the consent of the authorities of such township: *Lorain v. Rolling*, 3 O. C. C. (N.S.) 660, 14 O. C. D.

82 [reversing *Rolling v. Lorain*, 13 O. D. (N.P.) 87].

A municipal corporation acting through a board of health, which within the scope of its statutory powers fumigates premises wherein a person has been sick with a contagious disease, acts in a governmental capacity: *West v. Mt. Washington*, 9 O. N. P. (N.S.) 250, 20 O. D. (N.P.) 125.

4. Food.

The board of health may make unlawful the sale of milk which possibly might carry disease: *Klopper v. Board of Health*, 9 O. N. P. (N.S.) 33, 20 O. D. (N.P.) 384.

An ordinance passed by a municipal board of health, which forbids the sale of milk at retail except in sealed glass bottles, is valid: *Staas v. State*, 15 O. C. C. (N.S.) 189, 23 O. C. D. 159 [affirmed, without opinion, *Staas v. State*, 81 O. S. 497].

VII. POWER OF BOARD OF EDUCATION TO PROTECT HEALTH.

G. C., § 7686, confers authority on the board of education to make and enforce rules to secure vaccination to prevent the spread of smallpox: *State, ex rel., v. Barberton*, 19 O. C. D. 375; *Carr v. Board of Education*, 1 O. N. P. (N.S.) 602, 13 O. D. (N.P.) 430.

G. C., § 7686, authorizing and empowering the board of education of each school district to make and enforce such rules and regulations to secure the vaccination of and to prevent the spread of smallpox among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public require, is constitutional: *State, ex rel., v. Board of Education*, 76 O. S. 297, IV Longsdorf's Notes, 1025.

A parent who sends his child to a public school and is willing to continue so to do, but the child is excluded for failure to comply with a rule of the board of education requiring vaccination, is not liable to conviction under the compulsory education act: *State v. Turney*, 12 O. C. C. (N.S.) 33, 21 O. C. D. 222.

The fact that it is the policy of the state to encourage education, and to enforce attendance at school (see G. C., § 7762, *et seq.*) does not render invalid a rule which required vaccination for smallpox as a condition of admission to the public schools: *State, ex rel., v. Board of Education*, 7 O. C. C. (N.S.) 608, 19 O. C. D. 375.

VIII. HEALTH AS CONDITION IN POLICY OF INSURANCE.

See INSURANCE.

IX. SICKNESS AS DISCHARGE OF CONTRACT.

If the contract be for the entire school year, it may be discharged by the son becoming disabled by illness from attending the full year. Both parties must be deemed to have acted on the assumption that, if such an event intervened, the agreement for the full school year would be discharged: *Groff v. Hertenstein*, 12 O. C. C. (N.S.) 515, 21 O. C. D. 633.

X. EVIDENCE.

A nonexpert medical witness may testify as to apparent suffering and pain as complained of by a party while under his observation, but is not competent to give the cause or character of the disease nor evidence as to what pain was suffered: *Railway Co. v. Beckwith*, 12 O. C. D. 559; *Railway v. Stephenson*, 12 O. C. D. 631.

Where the state of health of the person is in question, and one side introduces evidence showing that such person could and did, about the time in question, walk about the house and on the streets and in other places, it is competent for the other side to prove that about the same time the person in question walked but little: *Insurance Co. v. Howle*, 68 O. S. 614, IV Longsdorf's Notes, 949.

For the general discussion of the subject of evidence, see EVIDENCE.

HEALTH BOARD.

See HEALTH.

HEALTH INSURANCE.

See INSURANCE.

HEALTH OFFICER.

See HEALTH.

HEALTH, STATE BOARD OF.

See HEALTH.

HEARINGS.

For judicial hearings, see TRIAL and cross references thereunder.

When a public officer may be removed for specified causes, such facts must be stated as in judgment of law constitute the cause relied on, and an opportunity afforded the officer to be heard, before he can legally be removed: *State v. Hoggan*, 64 O. S. 532, IV Longsdorf's Notes, 877. See also OFFICE.

A magistrate hears a case within the contemplation of a statute where there is a plea of guilty: *State v. Borham*, 72 O. S. 358, IV Longsdorf's Notes, 991.

An adjournment of the hearing of a motion for a new trial beyond the time limited by G. C., § 10352, has the effect of discontinuing the action unless it appears of record that the parties consented to such adjournment: *Thompson v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456. See also COURTS.

G. C., § 11410, fixes the time of hearing within one year from the time in which it could first have been made. A right to revivor is a matter of right only under the conditions and within the time limited by statute: *Spaeth v. Sells*, 8 O. L. R. 439.

G. C., § 11403, contemplates a hearing to be had within a specified time, and if sufficient cause be not shown against a revivor, the conditional order is then made final and the action stands revived: *Spaeth v. Sells*, 176 Fed. 797, 16 O. F. D. 416, 8 O. L. R. 439.

HEARSAY.

See EVIDENCE.

HEAT AND POWER.

The curative provisions of R. S., § 1536-100, paragraph 18 (see G. C., § 3644) validating ordinances theretofore enacted granting franchises to lay pipes for a heating system, are general in form, and will, in the absence of proof that they apply to one city only, be presumed to have a uniform operation throughout the state: *Columbus v. Heating & L. Co.*, 16 O. D. (N.P.) 311.

The curative provisions of R. S., § 1536-100, paragraph 18 (see G. C., § 3644) are not invalid on the ground of their unequal operation as to all corporations of the same class, merely because this section establishes twenty-five years as the maximum period for which certain franchises may thereafter be granted, and the curative provisions might operate to validate previous ordinances granting like franchises for a longer period: *Columbus v. Heating & L. Co.*, 16 O. D. (N.P.) 311.

An ordinance granting to a corporation the right to the use of the streets for pipes or conduits for the purpose of supplying compressed air, to transmit packages of the various individuals who may apply and pay for such service, is not within R. S., § 2651-17 (repealed, 96 v. 96; for analogous section, see G. C., § 3644), authorizing franchises for the transmission of heat and power. Such ordinance does not authorize the conveyance of compressed air as a power for the benefit of the inhabitants of the municipality, as re-

quired by the terms of that section: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805. See also PNEUMATIC TUBES.

HEAT OF PASSION.

See HOMICIDE.

HEIGHT OF FENCE.

See EASEMENT.

HEIR-AT-LAW.

See HEIRS.

HEIRLOOMS, ETC.

The rule that an injunction will not be granted against an action at law, where full defense may be made in such action is general but not universal. A distinctly marked exception to this rule is where a pledge is a subject of controversy and is a family relic, ornament or heirloom having a special value to the owner, and for the loss of which damages in money would not be an adequate compensation: *Sloane v. Clauss*, 64 O. S. 125, IV Longsdorf's Notes, 868. See also INJUNCTION.

HEIRS.

Scope Note.—Includes in general the meaning and use of the word "heirs"; the rights, powers and duties of heirs, and incidents thereto. Excludes descent and distribution of estates of deceased persons; future estates; wills, etc.

Cross References.

For heirs, see also DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Meaning and Use of Word "Heirs."
- III. Adopted Heirs.
- IV. Property-rights.
- V. Powers and Duties.
- VI. Parties.
- VII. Limitations.
- VIII. Jurisdiction.
- IX. Pleading.
- X. Evidence.

I. DEFINITION.

At common law an "heir" is defined to be "one who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements or hereditaments, immediately upon the death of the ancestor": *Association v. Pollard*, 3 O. C. C. 577, 2 O. C. D. 333.

An heir at common law is one who, after his ancestor's death, has a right to inherit all the intestate estate: *Ober v. Hickox*, 19 O. C. C. 42, 10 O. C. D. 128.

II. MEANING AND USE OF WORD "HEIRS."

The words "heirs at law" in their strictly technical import, mean "the person or persons appointed by law to succeed to the estate in case of intestacy": *Miller v. Miller*,

9 O. C. C. (N.S.) 242, 19 O. C. D. 451 [affirmed, without opinion, *Miller v. Miller*, 77 O. S. 643].

The word "heirs" in its ordinary sense is a word of limitation and not of purchase: *McDaniel v. Hays*, 6 O. N. P. (N.S.) 435, 15 O. D. (N.P.) 661 [affirmed, *McDaniel v. Hays*, 6 O. C. C. (N.S.) 257; *McDaniel v. Hays*, 74 O. S. 515, IV Longsdorf's Notes, 1012].

"Heirs" is a technical legal term, and in its primary use and meaning is a word of limitation defining an estate of inheritance, and not a word of purchase, designating a person or class of persons upon whom an estate shall devolve by force of the instrument in which it is used: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504.

The expressed intention of the testator will fix the meaning of the word "heir":

Kiersted v. Smith, 8 O. N. P. 378, 10 O. D. (N.P.) 279. See also WILLS, LEGACIES AND DEVISES.

While the word "heirs" may be construed as a word of purchase, and to mean "children," this meaning can not be assigned unless it very clearly appears that it was used in that sense by the testator. Conjecture will not suffice: *McDaniel v. Hays*, 6 O. N. P. (N.S.) 435, 15 O. D. (N.P.) 661 [affirmed, without opinion, *McDaniel v. Hays*, 74 O. S. 515, IV Longsdorf's Notes, 1012, 6 O. C. C. (N.S.) 257].

The word "heirs" in a will providing that "if either of my said sons should die before the decease of my said wife, then the share of said deceased son shall go to his heirs," is not a word of limitation: *McDaniel v. Hays*, 6 O. C. C. (N.S.) 257 [affirming *McDaniel v. Hays*, 6 O. N. P. (N.S.) 435, 15 O. D. (N.P.) 661; affirmed, without opinion, *McDaniel v. Hays*, 74 O. S. 515, IV Longsdorf's Notes, 1012].

While the use of the word "heirs" in wills is flexible, it is to be given its strict technical meaning therein unless from the context or other aids of construction it appears clearly that it was not so intended: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504.

A testator may use the word "heir" without its usual legal sense, or if the plain intention manifested in the will shows that it was not employed in its usual legal sense, but with words of explanation showing the manifest intent of the testator, it can be made a word of purchase: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279.

The word "heir or creditor" in G. C., § 10724, may be construed to mean devisees and legatees or any person whomsoever, whose property is or may be affected by the recovery of the judgment, and as such they have the right to file in the probate court a written requisition on the executor to disallow and reject any claim presented for allowance; and such devisees and legatees are proper parties in any action brought upon a claim rejected under such requisition and have the right to defend: *Todd v. Todd*, 6 O. C. C. (N.S.) 105, 17 O. C. D. 224. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

At common law, the use of the word "heirs" is essential to the conveyance of an estate in fee simple; this rule is still in force in Ohio: *Sheets v. Mouat*, 5 O. N. P. (N.S.) 22, 18 O. D. (N.P.) 121. See also DEEDS.

In Ohio it is necessary, as a general rule, to use the word "heirs" in a deed to convey an estate of inheritance: *Lee v. Scott*, 5 O. C. C. (N.S.) 369, 16 O. C. D. 799.

A deed upon an adequate valuable consideration to grantee, "to her and her children and assigns forever," with warranty "to her and her children, heirs and assigns," conveys an estate in common in fee simple to grantee and her children living at the time of the conveyance: *Sheets v. Mouat*, 5 O. N. P. (N.S.) 22, 18 O. D. (N.P.) 121.

The word "heirs" in a will disposing of property in case of the death of a devisee "without heirs," must be taken in its technical legal sense unless sufficient showing be made that the testator intended otherwise. When the language of the will and the circumstances surrounding the testator at the time of its execution create a doubt as to whether the testator intended to use the word "heirs" in the sense of "children," that doubt is sufficient to prevent the word "heirs" from being construed in any other than its usual technical sense: *St. Marks Lodge v. Darrow*, 16 O. D. (N.P.) 120.

"Heirs" as beneficiaries in a mutual assessment policy payable to the executor for the benefit of my legal heirs means distributees under the statute of descents as here brothers and sisters: *In re Estate of Andress*, 5 O. N. P. 253, 6 O. D. (N.P.) 174. See also INSURANCE.

The following language in the will in this case "shall descend and fall to her legal heirs" indicates that the testator used the words "legal heirs" in their strict technical sense, and meant thereby to indicate the person or persons appointed by law to succeed to the estate: *Reif v. Ulmer*, 9 O. N. P. (N.S.) 234, 20 O. D. (N.P.) 342 [case affirmed, see 9 O. N. P. (N.S.) 234, 20 O. D. (N.P.) 342].

Where a testator devises real estate to his son for life with remainder to his lawful heirs, and the son marries after the death of the testator, the wife upon the death of the son takes as heir where there is nothing in the will tending to show that the testator used the words "lawful heirs" in a different sense from their strict technical import: *Miller v. Miller*, 9 O. C. C. (N.S.) 242, 19 O. C. D. 451 [affirmed, without opinion, *Miller v. Miller*, 77 O. S. 643].

In a will the term "lawful heirs" refers to those who answered that description at the time of the testator's death, rather than those falling within that class at the time of the contingency provided for in the will, and the distribution should be made *per stirpes*, representatives taking the share which would have gone to the ancestor if living, except where the will provides otherwise: *Miller v. Miller*, 15 O. C. C. (N.S.) 481, 24 O. C. D. 43 [affirming *Miller v. Miller*, 13 O. N. P. (N.S.) 1].

III. ADOPTED HEIRS.

One, not of the blood of the testator who has been designated an heir under favor of G. C., § 8598, is not issue of the body of such testator within the meaning of G. C., § 10504. Hence, bequests in the will to benevolent, religious, educational or charitable purposes, are not rendered invalid, as respects such heir, by reason of the fact that the will was executed within one year of the decease of the testator: *Theobald v. Fugmann*, 64 O. S. 473, IV Longsdorf's Notes, 876 [reversing *Fugmann v. Theobald*, 12 O. C. D. 720]. See also CHARITIES.

A person adopted and designated as an heir under G. C., §§ 8030 and 8598, can not be regarded as issue and take under a devise to his adopter and to the issue of her body in fee, with reversion in her surviving brothers: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367. See also WILLS, LEGACIES AND DEVISES.

There can be no heirship by an adoption in fact, as where the child is given the name of the adoptive parents and called their child and taught to believe she is such, see *Shahan v. Swan*, 48 O. S. 25, IV Longsdorf's Notes, 400. There can be no heirship by treating an illegitimate child as legitimate: *Kendall v. Kendall*, 8 Dec. Rep. 428, 8 Bull. 1. See also ADOPTION.

The probate judge may take the declaration of a person designating an heir under G. C., § 8598, at other places in the county than in court, for the proceeding is *ex parte*, affects no vested rights, is made by a judge and not by a court, and the entry is not a judgment: *Bird v. Young*, 56 O. S. 210, IV Longsdorf's Notes, 688. See also COURTS.

An entry of the fact that a person appeared and declared that another should be his heir under G. C., § 8598, is not a judgment: *Bird v. Young*, 56 O. S. 210, IV Longsdorf's Notes, 688. See also JUDGMENT.

IV. PROPERTY-RIGHTS.

G. C., §§ 10561, 10563, are independent but not inconsistent provisions; each covers a case not covered by the other: *Insurance Co. v. Lushey*, 66 O. S. 233, IV Longsdorf's Notes, 904. See also DESCENT AND DISTRIBUTION.

Heirs presumptive or apparent, although they have no vested interest in trust property, have rights that should be protected by the courts, and they can be heard as exceptors to the proposed termination of the trust if their rights under the will are thereby affected: *Kiersted v. Smith*, 8 O. N. P. 378, 10 O. D. (N.P.) 279. See also TRUSTS.

G. C., §§ 8030 and 8598, permitting the adoption of children and designation of heirs, confer the right and power upon an adopter

to prescribe who shall be heir to himself, but do not extend the power so that he may designate who may take the property of some one else, nor give him the right to change without the consent of the donor of an estate tail, or those in privity with him, the course of succession prescribed by the donor, so as to divest him or his heirs of vested rights: *Richardson v. Stock Yards Co.*, 8 O. N. P. 213, 11 O. D. (N.P.) 367.

Where a testatrix having a child living, devises all her estate to a third person (in this case her husband), without making provision in her will for an after-born child, such after-born child, if it survive the testatrix, by virtue of the provision of G. C., § 10563, will inherit from the mother, as her heir at law, as if she died intestate, notwithstanding that by clear and explicit language in the will, such testatrix undertakes to disinherit such after-born child: *Insurance Co. v. Lushey*, 66 O. S. 233, IV Longsdorf's Notes, 904.

Under a devise "to my said son" of the undivided one-half of certain real estate, "to have and to hold the said property for his life, and the remainder over at his death to the heirs of his body, their heirs and assigns forever share and share alike," the children of the said son of the testatrix are seized with a fee simple title: *Poor v. Hart*, 11 O. N. P. (N.S.) 49, 21 O. D. (N.P.) 260 [affirmed, without opinion, *Hart v. Poor*, 84 O. S. 489].

The right of an administrator to subject the lands of his intestate to the payment of the debts of the estate is superior to the right of the heirs at law to have partition of such lands, and when the administrator finds the personal estate to be insufficient for the payment of debts, it is his duty to apply to the probate or common pleas court forthwith for authority to sell real estate: *Stout v. Stout*, 82 O. S. 358.

The personal property of a deceased person does not vest in his heirs, but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 1002.

No right of action on a promissory note belonging to a deceased person is shown by a party by proof of possession, and that he is the sole heir of the decedent: *McBride v. Vance*, 73 O. S. 258, IV Longsdorf's Notes, 1002.

G. C., § 10581, provides against the lapse of a devise to "any child or other relative" of the testator who dies leaving issue. A devise to one whom the testator's daughter had adopted under G. C., § 8030, and also had designated as heir under G. C., § 8598, thus standing like a grandchild to the testator, does not lapse by the death, leaving

issue, of such person before testator: *White v. Agnew*, 38 Bull. 47 [without opinion by supreme court]. See also WILLS, LEGACIES AND DEVISES.

An equity suit—as a creditor's bill—lies to reach an heir's interest in an executor's hands, for this court can mould its decrees so as not to interfere with the exclusive jurisdiction of the probate court: *Boswell v. Hall*, 6 O. N. P. 497, 8 O. D. (N.P.) 590. See also CREDITOR'S BILL.

Under a devise of nonancestral property to a daughter for life and at her death to her legal heirs, the legal heirs are to be determined under the provisions of G. C., § 8574, and will descend to a half sister of the life tenant in preference to brothers and sisters of the testator: *Reif v. Ulmer*, 9 O. N. P. (N.S.) 234, 20 O. D. (N.P.) 342 [case affirmed, see *Reif v. Ulmer*, 9 O. N. P. (N.S.) 234, 20 O. D. (N.P.) 342].

V. POWERS AND DUTIES.

An heir can prevent a sale of real estate for the payment of debts, and have a partition, only by giving bond for the payment of debts, etc., as provided by G. C., § 10785: *Stout v. Stout*, 82 O. S. 358.

An action to contest a will can be maintained only by one who was interested in the will at the time it was admitted to probate: *De Bow v. Church*, 10 O. N. P. (N.S.) 444. See also WILLS, LEGACIES AND DEVISES.

An heir has no right to prosecute error proceedings to a judgment in an action to compel the allowance of a claim unless the claim was disallowed upon his requisition: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

It is the duty of the widow as the heir or next of kin of her deceased husband to dispose of his body in a reasonable and sanitary manner, and where in conformity with his expressed desire she elects to cremate his body, injunction will not lie against that method of disposal, where based only on sentimental objections to cremation on the part of other near relatives: *Evans v. Evans*, 12 O. N. P. (N.S.) 619.

VI. PARTIES.

Under a will directing the sale of real estate and the distribution of proceeds in a prescribed manner, the executors take the fee in the real estate, and with it the right of possession; and the executors may maintain an action for possession, under G. C., § 11904, against one wrongfully in possession, and the heirs are not necessary parties: *Martin v. Spurrier*, 13 O. C. D. 110.

In this state an heir is not a party to a suit to compel the allowance of a claim unless the claim was disallowed upon his requisition: *Kemper v. Building & Loan Co.*, 5 O. N. P. (N.S.) 403, 18 O. D. (N.P.) 484. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

A judgment quieting title to certain lands in an action against the unknown heirs of a deceased ancestor is not binding on heirs not made parties who were not only known, but whose place of residence was known to plaintiffs: *Wilson v. Wilson*, 3 O. L. R. 389, 51 Bull. 344 [affirmed, *Wilson v. Wilson*, 6 O. N. P. (N.S.) 489, 18 O. D. (N.P.) 711; reversed, *Wilson v. Wilson*, 11 O. C. C. (N.S.) 450, 21 O. C. D. 39]. See also QUIETING TITLE.

An action brought to quiet title to land against W if living, and if dead, then against his unknown heirs, in which action service was made by publication and a decree rendered quieting the title of plaintiff, does not affect the title of heirs of W, whose names and places of residence in Ohio are known to the plaintiff, and who are not named as parties, or served with summons, and who have no actual notice of such action, and such heirs are not barred by the proceedings from asserting their interest in such land: *Wilson v. Wilson*, 11 O. C. C. (N.S.) 450, 21 O. C. D. 39 [reversing *Wilson v. Wilson*, 6 O. N. P. (N.S.) 489, 18 O. D. (N.P.) 711].

VII. LIMITATIONS.

Where a cause of action accrues before the expiration of the time in which an executor may be sued, suit can not be maintained against the heirs, under G. C., §§ 10876 and 10877, relating to estate of deceased persons in the hands of heirs, etc.: *Bevitt v. Diehl*, 12 O. D. (N.P.) 383.

Where defendant in an action to enforce stockholder's statutory liability died, pending suit, in October, 1895, and, without revivor in the name of the executor of deceased, appointed in October, 1895, a judgment was taken against deceased defendant May 20, 1899, an action by a receiver appointed to collect the judgments rendered in such stockholder's action, was filed May 16, 1900, against the heirs of such deceased judgment debtor, is within G. C., § 10746, as it existed October, 1895, providing a four-year limitation within which suits might be brought against an executor, and not within the amended statute of April 8, 1898, reducing the limitation to two years: *Bevitt v. Diehl*, 12 O. D. (N.P.) 383.

VIII. JURISDICTION.

The probate court, under the law of Ohio, is without jurisdiction to determine to whom

the estate of a decedent shall be distributed, but is limited in its jurisdiction to disputes as to the amount which a particular heir or heirs shall receive; the determination as to what persons shall participate in the estate must be made by the executor or administrator on his own responsibility, and in case of error, without recourse to the protection of an order of court: *Skardon v. Robinson*, 8 O. L. R. 412, 55 Bull. 373. See also **COURTS**.

IX. PLEADING.

Plaintiffs suing as heirs must show how they became such. Merely averring that they are heirs does not set out a good title: *Waldsmith v. Waldsmith*, 2 O. 156, 1 Longsdorf's Notes, 114. See also **PLEADINGS**.

A demurrer does not lie to the petition of a widow to set aside a contract embodying a family settlement entered into between herself and the heirs at law of her deceased husband, where she had no knowledge of the value of her rights or of the law governing them, and was misinformed by the administrator with reference thereto both as to the law and the facts, and was told by the heirs that the proposed settlement was all she was entitled to and by an attorney that it was the only settlement which could be made and she believed these statements and relied upon them until a comparatively recent date when the discovery was made by her that her interest in the estate was much more valuable than was assumed in the contract of settlement: *Fuller v. Melchers*, 10 O. N. P. (N.S.) 425, 21 O. D. (N.P.) 202.

X. EVIDENCE.

A package of letters dated from twenty-nine to thirty-five years ago and bearing all the appearance of age, found wrapped together in a dresser drawer of the decedent by his administrator, immediately following his death and before any one else had entered the house, are competent as evidence in establishing heirship: *Riordan v. Denehy*, 9 O. N. P. (N.S.) 406, 20 O. D. (N.P.) 260.

HEIRS EXPECTANT AND REVERSIONERS.

See **FUTURE INTERESTS**; **FEE TAIL**.

HEIRS OF THE BODY.

See **FEE TAIL**.

HENDLEY LAW.

For the Hendley law, see **TAXATION**.

HEREDITAMENTS.

A grant of an incorporeal hereditament may be presumed from long enjoyment. The mere fact of possession for a length of time, in analogy with the statute of limitations, is the only fact to be proved, from which fact alone title is peremptorily presumed: *Starke v. Smith*, 5 O. 455, 1 Longsdorf's Notes, 300. See **GRANTS**; **EVIDENCE**; **REAL PROPERTY**, and cross references thereunder.

HERON.

The white or snowy heron is a vagrant species of "water fowl," and as such is a game bird not within the protection of the Ohio statutes, and the sale of its plumage within the state is not unlawful: *State v. Abt*, 15 O. C. C. (N.S.) 26 [affirming *Abt v. State*, 9 O. N. P. (N.S.) 311; circuit court affirmed by the supreme court, without opinion, *State v. Abt*, 83 O. S. 451]; see to the same effect: *State v. Solomon*, 14 O. C. C. (N.S.) 590.

HIDDEN DANGERS.

See **NEGLIGENCE**; **NON-DISCLOSURE**; **FRAUD AND DECEIT**.

HIGH EXPLOSIVES.

See **EXPLOSIVES**.

HIGH SCHOOLS.

G. C., § 7740, providing for the payment by the board of education of a township of the tuition of pupils of that township attending high schools in the same or in an adjoining county are directory and not mandatory: *State, ex rel., v. Board of Education*, 21 O. C. C. 383, 12 O. C. D. 337 [for opinion in lower case, see *State, ex rel., v. Board of Education*, 8 O. N. P. 186, 11 O. D. (N.P.) 422].

The word "shall" in said sections relating to the payment of tuition of students attending high schools in townships other than that in which they reside, does not make the act mandatory, no provision being made for the levying of taxes to meet such expense, and it being contrary to reason and the constitution to require the payment of such expense from funds levied for the common schools, and especially in cases where such depletion would impair the usefulness of the latter: *State, ex rel., v. Board of Education*, 21 O. C. C. 383, 12 O. C. D. 337 [for opinion in lower case, see *State, ex rel.,*

v. *Board of Education*, 8 O. N. P. 186, 11 O. D. (N.P.) 422].

Either the original board or its successor, acting in good faith before the building is erected or commenced, may reconsider the first action taken in that behalf, and decide to centralize the schools of the township in two places instead of one; and its discretion as to the mode and manner of centralizing the schools can not be controlled by mandamus, notwithstanding its judgment may be at fault; if at the time of such reconsideration there is a contractor holding a valid contract for the erection of the building, his remedy, is at law: *State, ex rel., v. Board of Education*, 1 O. C. C. (N.S.) 486, 15 O. C. D. 424. See also SCHOOLS, PUBLIC.

HIGHEST BIDDERS.

See AUCTIONS; PUBLIC CONTRACTS.

HIGHROADS.

See ROADS.

HIGHWAY-CROSSINGS.

For highway crossings at railroads, see NEGLIGENCE; RAILROADS.

The authority granted by G. C., § 8863, to county commissioners and a railway company to abolish a dangerous railway crossing and substitute therefor a crossing other than at grade is not limited to the substitution of an overhead or undergrade crossing at the point of the old intersection, but a detour may be made for a short distance in the highway in order to reach a more practical location for the new crossing: *Stoner v. Railway*, 9 O. N. P. (N.S.) 337, 20 O. D. (N.P.) 448.

HIGHWAY ROBBERY.

See ROBBERY.

HIGHWAYS.

For highways, see also ROADS; STREETS.

For the dedication of highways, see DEDICATION.

For public nuisance, see NUISANCE.

For private nuisance, see NUISANCE.

The term "highway" is the generic name for all kinds of public ways, streets, alleys, etc., and is a way open to all people. The term "alley," used in a plat, will be taken to mean a public way unless the word "private" is prefixed or the context requires different meaning to be assigned: *Sullivan v. Columbus*, 12 O. D. (N.P.) 650.

The rights of the public and of an abutting property owner in a public highway are entirely separate and distinct; the public has a right of passage and a right to improve and use the highway only in the manner and for the purposes contemplated at the time it was established, and the abutting property owner has the right to all uses of the land not inconsistent with this right of passage and improvement: *Tannian v. Telegraph Association*, 1 O. N. P. (N.S.) 81, 13 O. D. (N.P.) 730.

An action can not be maintained upon the official bond of a county commissioner to recover indemnity to the county on account of damages which it has been compelled to pay for injuries to persons and property resulting from the negligence of the board of county commissioners in maintaining a highway: *State v. Collins*, 82 O. S. 240 [affirming *State v. Collins*, 8 O. N. P. (N.S.) 65, 19 O. D. (N.P.) 327].

The highways in the city are the property of the state, and the city is charged with their care and control: *Lumber Co. v. Railway*, 11 O. N. P. (N.S.) 289.

The owner of land which abuts upon a highway has three different classes of rights therein: (1) his rights within his lot lines; (2) his rights in the highway within the lot lines; (3) and his rights in the highway at either side of the lot lines extended: *Lumber Co. v. Railway*, 11 O. N. P. (N.S.) 289.

The property right of an abutting landowner in the highway rests upon the broad principle that the right of property in general is not limited to the tangible subject-matter thereof, but includes the right of user and enjoyment of the tangible thing. It requires this to complete the orbit of the right: *Furnace Co. v. Railway*, 9 O. N. P. (N.S.) 426, 20 O. D. (N.P.) 188 [affirmed, without opinion, *Furnace Co. v. Railway*, 86 O. S. 354].

Where the record of a roadway as shown by plats and other evidences of title has been destroyed, its width at a particular point may be established at sixty feet by the testimony of persons long familiar with the fences and land lines in the vicinity, aided by ancient private plats and surveys, and particularly by the presumption created by G. C., § 7515: *Commissioners v. Railway*, 12 O. N. P. (N.S.) 129.

No lapse of time bars an action by public officials to recover lands forming part of a highway or street, or to compel the removal of obstructions placed thereon, however long they may have been maintained and regardless of their character as to permanency: *Commissioners v. Railway*, 12 O. N. P. (N.S.) 129.

The fact that the highway which is being obstructed was a toll road at the time the obstruction was placed therein and was not abandoned by the company then owning it for more than twenty-one years after the placing of the obstructions does not give title by adverse possession by rendering operative the statute of limitations: *Commissioners v. Railway*, 12 O. N. P. (N.S.) 129.

A railway which is without authority under its charter to use the highway or parts thereof in such a manner as to interfere with the public use can not, after having occupied a considerable portion of a highway for a great number of years with the abutments of an overhead bridge, plead its own wrongdoing as a defense against a public demand that, on account of the great increase in traffic along the road and the construction of street railway tracks thereon, these obstructions be removed: *Commissioners v. Railway*, 12 O. N. P. (N.S.) 129.

Time does not run against the public. If a highway is closed up title can not be acquired as against the city, the public, or the state: *Hays v. Park Co.*, 13 O. D. (N.P.) 67. See also LIMITATIONS, STATUTE OF.

An act relating to highways restricted to counties having cities of the first grade of the second class, and as such applicable to but one county in the state is a law of general nature and repugnant to the constitution for want of uniform operation throughout the state: *Murphy v. Sims*, 13 O. D. (N.P.) 62. See also ROADS.

HINDERING CREDITORS.

See FRAUDULENT CONVEYANCES.

HIRING.

For hiring, see also BAILMENT; MASTER AND SERVANT; SERVICES.

A person who hired a team for one hour precisely and no more, but kept it all day, and by improper hitching and neglect the horse got loose and injured the buggy and one of the horses, is liable for the injury to the buggy and the permanent injury to the horse and the reasonable expense of endeavoring to effect a cure incurred within a reasonable time after the injury and until it could be ascertained that the hurt was incurable: *Orme v. Faws*, 22 Bull. 277 [supreme court]. See also DAMAGES.

Where S, being a creditor of his son A, bought a portable sawmill, which, by agreement, A took to that part of his father's farm on which he lived, he to use it and pay such part of the old debt as he could earn, and A used it there for over five years,

paying the taxes on it and part of the old debt, and a creditor of A, on a debt ante-dating such bailment of the mill, got judgment and levied on the mill, claiming, under G. C., § 8619, as to possession of a chattel for over five years on a pretended loan being irrevocable against creditors, to which it was urged that this was not a loan but a hiring because payments on the old debt were to be made and that the statute did not apply to debts ante-dating the bailment, and that A had no proper exclusive possession. Judgment for possession was rendered in S's favor: *McLain v. Starbuck*, 35 Bull. 127 [supreme court]. See also FRAUDS, STATUTE OF.

HISTORICAL BOOKS.

See EVIDENCE.

HISTORICAL FACTS.

See EVIDENCE.

HISTORY.

In construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts at the time of its enactment: *Manington v. Railway Co.*, 8 O. L. R. 451, 16 O. F. D. 552. See also STATUTES.

HOCKING CANAL.

See CANALS.

HOGS.

For hogs, see ANIMALS.

HOISTS.

For hoists, see ELEVATOR HOISTS.

HOLDER.

A bank having in its possession a promissory note for collection is not the "holder" of the note: *Moore v. Bank*, 12 O. C. C. (N. S.) 529, 21 O. C. D. 614. See NEGOTIABLE INSTRUMENTS.

HOLDER FOR SECURITY.

See PLEDGE AND COLLATERAL SECURITY.

HOLDING OUT.

See AGENCY; PARTNERSHIP; ESTOPPEL.

HOLDING OVER.

For holding over, see LANDLORD AND TENANT.

HOLIDAYS.

For the counting of holidays, see TIME.

The fact that the court refuses to discharge a jury, but requires it to deliberate for a period of forty-eight hours, which period includes part of Thanksgiving Day, does not show duress or prevent a fair trial: *Young v. State*, 6 O. C. C. (N.S.) 53, 16 O. C. D. 747.

The period of three days which is allowed for filing a motion for a new trial, a holiday is to be included, unless it is the last day: *Oberer v. State*, 8 O. C. C. (N.S.) 93, 18 O. C. D. 620.

If a provision in a policy of insurance requires proofs of loss to be filed within sixty days, such provision is not complied with if they are mailed so as not to reach the office until the 61st or 62nd day: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552.

A statute similar to G. C., § 5978, but applying only to cities having a population of fifty thousand or more, was held to be unconstitutional: *Diemer v. Hudson*, 18 O. C. C. 890, 9 O. C. D. 858.

The Saturday afternoon half-holiday act (G. C., § 5978; 92 v. 208) is of a general nature and being a local act is void: *Diemer v. Hudson*, 18 O. C. C. 890, 9 O. C. D. 858, 37 Bull. 194. See also CONSTITUTIONAL LAW.

If a court adjourns to a certain day, which is a legal holiday, and orders a special grand jury summoned for that day, it has power to adjourn itself and the grand jury to another day, and to be then impaneled: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305. See also GRAND JURY.

The act of 1893 making the first Monday of September Labor Day, and to be considered for all purposes as the first day of the week, makes a judgment rendered on that day—though by confession—absolutely void: *Grocery Co. v. Armstrong*, 8 O. C. C. 489, 4 O. C. D. 498.

It is not unlawful to hold the common pleas court on Labor Day, the judges having, under G. C., § 1533, fixed that day for the commencement of the term, and an indict-

ment returned by a grand jury impaneled on that day is valid: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813. See also LABOR DAY.

The mere fact that the jury is required to consider a case for forty-eight hours, including part of Thanksgiving day, does not show duress: *Young v. State*, 6 O. C. C. (N. S.) 53, 16 O. C. D. 747 [affirmed, without opinion, *State v. Young*, 73 O. S. 372]. See also TRIAL.

HOLMES COUNTY.

The act of 93 v. 660, to limit the compensation of county officers in Holmes County, is a law of general nature which does not operate uniformly throughout the state and is therefore in violation of Art. II, § 26, of the constitution: *State, ex rel., v. Garver*, 66 O. S. 555, IV Longsdorf's Notes, 917 [reversing *State, ex rel., v. Garver*, 13 O. C. D. 140; approving and following *State, ex rel., v. Yates*, 66 O. S. 546, IV Longsdorf's Notes, 916].

HOME.

See DOMICILE.

HOME FOR SOLDIERS.

See SOLDIERS' HOME AT DAYTON; OHIO SOLDIERS' AND SAILORS' HOME.

HOME, GIRLS' INDUSTRIAL.

See GIRLS' INDUSTRIAL HOME.

HOME OF THE FRIENDLESS.

See HOUSES OF REFUGE.

HOME, OHIO SOLDIERS' AND SAILORS'.

See OHIO SOLDIERS' AND SAILORS' HOME.

HOME, OHIO SOLDIERS' AND SAILORS' ORPHANS.

See OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME.

HOME-RULE CHARTERS.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS.

HOMES, CHILDREN'S.

See CHILDREN'S HOME.

HOMESTEAD.

For homestead exemptions, see EXECUTION.

HOMICIDE.

Scope Note.—Includes the unlawful killing of a human being, aiding in or soliciting such killing; nature and elements of murder and the degrees thereof; and manslaughter; and the prosecution and punishment of such acts as public offenses. Excludes killing one's self, the responsibility of infants, insane persons, etc.; assault with intent to kill; grounds of justification and excuse; and actions for damages for causing death.

Cross References.

For general questions, see AFFIDAVIT; AIDERS, ABETTORS, AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; BAIL AND RECOGNIZANCE; ERROR; EVIDENCE; GRAND JURY; INDICTMENT; JURISDICTION; JURY; SENTENCE; VENUE; VERDICT.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For assault with intent to kill, see ASSAULT WITH INTENT.

For questions relating to arrest, see ARREST.

For bail, see BAIL AND RECOGNIZANCE.

For challenges in trial for murder, see JURY.

For continuance, see CONTINUANCE.

For evidence of corpus delicti, see EVIDENCE.

For cross-examination of accused, see WITNESSES.

For impaneling of jury, see JURY.

For validity of statutes imposing life imprisonment in first degree cases, see PARDON.

For sufficiency of evidence in case of new trial, on ground of newly discovered evidence, see NEW TRIAL.

That the substitution of one judge for another one who became incapacitated during the trial for second-degree murder, constitutes grounds for a new trial, see NEW TRIAL.

That it is not prejudicial error to permit a written confession under oath, admitting crime charged and others also, to be taken to the jury-room, see TRIAL.

For pardon, see PARDON.

For self-defense, see DEFENSE OF PERSON AND PROPERTY.

For the effect of the separation of the jury during trial, see TRIAL.

For a general discussion of the subject of presumptions, see PRESUMPTIONS.

For killing one's self, see SUICIDE.

ANALYTICAL OUTLINE.

I. Definitions and Distinctions, 8503.

A. *First-degree murder*, 8503.

B. *Second-degree murder*, 8504.

C. *Manslaughter*, 8504.

II. Parties, 8505.

A. *Principals*, 8505.

B. *Aiders and abettors*, 8506.

C. *Common plan*, 8507.

III. The Person Killed, 8508.

IV. Essential Elements, 8508.

A. *First-degree murder*, 8508.

1. Intent to kill, 8508.

a. An essential ingredient, 8508.

b. What constitutes, 8509.

c. Evidence, 8510.

d. Question of fact, 8512.

- 2. Malice, 8512.
 - a. An essential ingredient, 8512.
 - b. Kinds of malice, 8513.
 - aa. Simple malice, 8513.
 - aaa. Defined, 8513.
 - bbb. When presumed, 8514.
 - bb. Deliberate and premeditated malice, 8515.
 - aaa. Defined, 8515.
 - bbb. Time, 8516.
 - ccc. When presumed, 8517.
 - 3. Killing with poison, 8517.
 - 4. Killing in perpetrating other crime, 8518.
 - a. Act takes place of malice, 8518.
 - b. Rape, 8519.
 - c. Robbery, 8519.
 - d. Burglary, 8519.
 - e. Resisting arrest, 8519.
 - 5. Obstructing railroad-track, 8520.
- B. *Second-degree murder*, 8520.
- 1. Intent to kill, 8520.
 - 2. Malice, 8520.
- C. *Manslaughter*, 8521.
- 1. Intent to kill, 8521.
 - 2. Malice, 8521.
 - 3. Provocation, 8521.
 - 4. Unlawful act, 8522.

V. **Indictment**, 8523.

- A. *For murder includes what*, 8523.
- B. *Averments*, 8524.
 - 1. Short form, 8524.
 - 2. Intent, 8525.
 - 3. Malice, 8526.
 - 4. Attempting to perpetrate, 8526.
 - 5. Miscellaneous, 8526.
- C. *Duplicity*, 8527.
- D. *Plea in abatement*, 8527.

VI. **Evidence**, 8528.

- A. *Burden and degree of proof*, 8528.
- B. *Witnesses*, 8529.
- C. *Other acts and crimes*, 8529.
 - 1. Of defendant, 8529.
 - 2. Of deceased, 8530.
- D. *Declarations*, 8531.
 - 1. Dying declarations, 8531.
 - a. Admissibility, 8531.
 - b. Form, 8532.
 - c. Impeachment, 8532.
 - 2. Other declarations, 8532.
- E. *Confessions*, 8534.
 - 1. Must be voluntary, 8534.
 - 2. *Infrajudicial confessions*, 8535.
 - a. On the trial, 8535.
 - b. In former proceedings, 8535.
 - 3. *Extrajudicial confessions*, 8535.

F. *Expert testimony*, 8536.

G. *Variance*, 8536.

H. *Miscellaneous*, 8537.

VII. Charge of the Court, 8538.

VIII. Verdict, 8540.

A. *Must state degree*, 8540.

B. *For inferior offense*, 8541.

C. *Court instructing as to degree*, 8542.

D. *Recommending mercy*, 8542.

I. DEFINITIONS AND DISTINCTIONS.

A. FIRST-DEGREE MURDER.

G. C., § 12400, provides that, "whoever purposely, and either of deliberate and premeditated malice, or by means of poison or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree."

Maliciously placing an obstruction upon a railroad track with intent to endanger the passage of a locomotive, if it results in the death of another, is murder in the first degree by G. C., § 12401. The killing of a guard by a prisoner is murder in the first degree by G. C., § 12402. Whoever purposely, and of deliberate and premeditated malice, kills another, is guilty of murder in the first degree: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94; *State v. Bennett*, 5 O. N. P. 284, 5 O. D. (N.P.) 339; *State v. Town*, W. 75, I Longsdorf's Notes, 6; *State v. Neil*, T. 88.

Before a defendant can be convicted of murder in the first degree it is necessary that the killing must be proved to have been committed, (1) unlawfully, (2) purposely, (3) maliciously and (4) deliberately and premeditatedly: *State v. Lukens*, 6 O. N. P. 363, 9 O. D. (N.P.) 349; *State v. Bennett*, 5 O. N. P. 284, 5 O. D. (N.P.) 339.

It is essential to a conviction of murder in the first degree that it appear that the defendant in the manner and form charged at the time and place charged, killed the deceased unlawfully, feloniously, purposely and of deliberate and premeditated malice. An act is done unlawfully when done in violation of the law. To do an act feloniously is to do it criminally. The word "purpose" is used in the statute in its plain and ordinary signification. It means an act done intentionally, not accidentally or by mischance. It imports an act of the will, intention, a design to do an act: *State v. Del Bello*, 8 O. D. (N.P.) 455; *State v. Strothers*, 7 O. N. P. 228, 8 O. D. (N.P.) 357.

The only difference between the crimes of murder in the first and second degree is the presence or absence of the elements of deliberation and premeditation. Where both elements are present, it is murder in the first

degree, and if both, or either, are absent, it is murder in the second degree: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975; *State v. Kerlin*, 51 Bull. 317].

A charge of court is correct which defines the different degrees of murder as follows: "If the killing was unlawful only, with or without purpose or intent to kill, not malicious and without deliberate and premeditated malice, the degree of crime is manslaughter; if the killing was unlawful and malicious and with a purpose and intent to kill, but without deliberate and premeditated malice, the degree of crime is murder in the second degree; if all of these elements were present, if the killing was unlawful and malicious with deliberate and premeditated malice and with a purpose and intent to kill, then the degree of crime is murder in the first degree": *Zeltner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

B. SECOND-DEGREE MURDER.

Whoever purposely and maliciously, but not of deliberate and premeditated malice, kills another, is guilty of murder in the second degree: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94; *State v. Bennett*, 5 O. N. P. 284, 5 O. D. (N.P.) 339; *State v. Town*, W. 75, I Longsdorf's Notes, 6; *State v. Neil*, T. 88.

Murder in the second degree is the intentional, malicious, and unlawful killing, by one reasonable being of another, without deliberate or premeditated malice: *State v. Miller*, 7 O. N. P. 458, 5 O. D. (N.P.) 703; *State v. Turner*, W. 20, I Longsdorf's Notes, 1.

If the killing is unlawful and malicious and with a purpose and intent to kill, but without deliberate and premeditated malice, the crime is murder in the second degree: *Zeltner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

C. MANSLAUGHTER.

Whoever unlawfully kills another, without malice, is guilty of manslaughter: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94; *State*

v. Bennett, 5 O. N. P. 284, 5 O. D. (N.P.) 339; *State v. Town*, W. 75, I Longsdorf's Notes, 6; *State v. Neil*, T. 88; *Sutcliffe v. State*, 18 O. 469, I Longsdorf's Notes, 857.

Prior to the codification of the criminal statutes, manslaughter was thus defined: "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter." Vol. I, S. & C. 403.

G. C., § 12404, is not different in substance and meaning from the statute in Vol. I, S. & C. 403, and it is incumbent upon the state to establish that the killing was done "either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act": *Johnson v. State*, 66 O. S. 59, IV Longsdorf's Notes, 897 [reversing *State v. Johnson*, 8 O. N. P. 496, 11 O. D. (N.P.) 774].

An intentional killing upon a sudden quarrel, without malice, is manslaughter: *Davis v. State*, 25 O. S. 369, III Longsdorf's Notes, 241.

If the killing was unlawful only, with or without purpose or intent to kill, not malicious and without deliberate and premeditated malice, the degree of crime is manslaughter: *Zeltner v. State*, 13 O. C. C. (N. S.) 417, 22 O. C. D. 102.

The unlawful killing of another is manslaughter when the killing is unintentionally done, if the act which causes death is done in the commission of a crime: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Manslaughter is an unlawful killing of another without malice either express or implied, which may either be voluntary upon sudden quarrel, or unintentional, but while the slayer is in the commission of some unlawful act: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975]; *State v. Kerlin*, 51 Bull. 317.

Manslaughter is any unlawful killing of another, either voluntarily upon a sudden heat or quarrel, or unintentionally, while the slayer is in the commission of some unlawful act: *State v. Johnson*, 8 O. N. P. 496, 11 O. D. (N.P.) 774 [reversed on other grounds, *Johnson v. State*, 66 O. S. 59, IV Longsdorf's Notes, 897].

II. PARTIES.

A. PRINCIPALS.

One who participates in the felonious intent and is present, aiding and abetting the commission of a murder is a principal,

though not himself the immediate perpetrator of the act: *Warden v. State*, 24 O. S. 143, III Longsdorf's Notes, 166.

If several persons conspire to kill and one keeps guard at the door and the others inflict the wound, the one on guard is equally guilty and responsible with the others: *State v. Town*, W. 75, I Longsdorf's Notes, 6.

B. AIDERS AND ABETTERS.

Our statutory definition of manslaughter admits of aiders and abettors and procurers of that crime: *Wilson v. State*, 2 O. C. C. 40, 1 O. C. D. 350 [motion to file petition in error overruled in the supreme court, March 1, 1887]; *Hagan v. State*, 10 O. S. 459, II Longsdorf's Notes, 454.

Where a person furnishes poison to an accomplice to be administered by him, and he administers it accordingly, the person furnishing the poison is an accessory before the fact: *Blackburn v. State*, 23 O. S. 146, III Longsdorf's Notes, 117.

One who is present when a homicide is committed by another upon a sudden quarrel is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites, or encourages, or conspires with the principal to do the act: *Goins v. State*, 46 O. S. 457, IV Longsdorf's Notes, 338.

Where A becomes involved in a fight with B, wherein B is killed by A's son, in order to constitute A an aider and abettor of the homicide it should appear, either that there was a prior conspiracy between A and his son or that A purposely incited or encouraged the slayer, or did some overt act himself, not merely tending but with intent to cause the death of B: *Woolweaver v. State*, 50 O. S. 277, IV Longsdorf's Notes, 498.

A person who becomes involved in a fight with one or more antagonists, should not upon that ground only, be held an aider and abettor of another, who may be present, and incited by the struggle, commits an independent act of violence that causes the death of the antagonist: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483 [following *Woolweaver v. State*, 50 O. S. 277, IV Longsdorf's Notes, 498].

One hiring or inciting another to kill another is an abettor and is indictable as a principal: *State v. Snell*, 2 O. N. P. 55, 5 O. D. (N.P.) 670.

Actual presence of the accused at a lynching is not necessary to convict; his encouragement of the same makes him an accessory, and such encouragement need not directly

incite the principal to kill, but is sufficient if intended to effect the crime: *State v. Diehl*, 57 Bull. 26.

For a general discussion of this subject, see AIDERS, ABETTERS AND ACCOMPLICES.

C. COMMON PLAN.

Where several persons agree together to rob another, and in furtherance of their plan leave one of the number outside the house of the person to be robbed, and where those inside while attempting to consummate the robbery and in furtherance of the common plan purposely kill the person they are attempting to rob, and such killing is the natural and probable consequence of the common purpose, the person outside is equally guilty as the one striking the fatal blow, though he did not previously agree or assent to such killing: *Stephens v. State*, 42 O. S. 160, IV Longsdorf's Notes, 99.

Where several persons plan a burglary and plan, if detected, to flee along a certain path, and arm themselves to carry out such burglary, and are detected and flee, but one becomes separated momentarily from the others, and while thus separated the pursuer is killed by one of the others, the person so separated is equally guilty of murder: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305.

One aiding, abetting or encouraging the execution of a common criminal enterprise is responsible for the intended act done, while carrying out the criminal design, and he is also responsible for any act done in furtherance of the common criminal enterprise, whether intended by him or not, if such act might have been reasonably contemplated as probable or likely to result from the attempt to commit the intended crime: *State v. Strong*, 12 O. D. (N.P.) 701.

Where two or more persons entered upon the execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if a homicide is committed by one in attempting to accomplish the common purpose, those thus abetting or aiding are equally guilty of the homicide: *State v. Strong*, 12 O. D. (N. P.) 701.

One who is not armed but who takes part in a robbery with others, without the knowledge that they are armed, will be responsible for a homicide committed by one of his confederates, if he might reasonably expect the killing as the probable result of their attempt: *State v. Strong*, 12 O. D. (N.P.) 701.

Where A and B, in the furtherance of a common plan, enter upon the perpetration of a burglary armed and prepared to kill if opposed, and while so engaged are discovered and pursued by the officers, and A,

at a short distance from the building and on another lot, shot and killed an officer, B is equally guilty with A of murder in the first degree, although B was not around, and although such killing was not a part of the prearranged plan: *Conrad v. State*, 75 O. S. 52, IV Longsdorf's Notes, 1013.

Where the evidence shows a common purpose to commit the burglary, common participation in it, a threat to kill made by the person whose building is being burglarized, the firing of a shot by one of the burglars followed by their flight, the jury are authorized to find a common purpose to commit murder: *Huling v. State*, 17 O. S. 583, II Longsdorf's Notes, 851.

In a prosecution of one participating in a lynching for murder, it is proper to charge that "any word, acts, signs or motions, done or made for the purpose of encouraging the commission of the crime" may be considered by the jury in connection with the criminal character of the alleged acts of the defendant, and a verdict of guilty may be based on evidence that the defendant mingled with the crowd before the lynching occurred, and was heard to urge the crowd to avenge the blood which had been shed, and soon after the doors of the jail were battered open, and the deceased taken out and hanged to a telephone pole: *Watha v. State*, 14 O. C. C. (N.S.) 145, 24 O. C. D. 60 [motion to file petition in error overruled, *Watha v. State*, 9 O. L. R. 123].

III. THE PERSON KILLED.

Neither degree of felonious homicide can be predicated upon the killing of an unborn child: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

It is not necessary that the person killed should have been the person intended. Where one strikes purposely and maliciously with intent to kill A, and the blow takes effect upon and kills B, it is the killing of another within the meaning of G. C., § 12400, and constitutes murder: *Wareham v. State*, 25 O. S. 601, III Longsdorf's Notes, 270.

IV. ESSENTIAL ELEMENTS.

A. FIRST-DEGREE MURDER.

1. Intent to Kill.

(a) An Essential Ingredient.

Intent to kill, although not an essential element at common law, is an essential element of murder in either degree in Ohio, except in cases arising under G. C., §§ 12401 and 12402: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545; *Filmore v. Insurance Co.*, 82 O. S. 208.

Intent is an essential element of murder in either degree in Ohio: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329; *Kain v. State*, 8 O. S. 306, II Longsdorf's Notes, 343; *Nichols v. State*, 8 O. S. 435, II Longsdorf's Notes, 356; *Hagan v. State*, 10 O. S. 459, II Longsdorf's Notes, 454; *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

The word "purposely" as used in G. C., § 12400, relating to first degree murder, qualifies all that follows it, and the killing of another can not be murder under that section unless it is done with intent to kill: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

If a burglar, in passing through a house, should accidentally and unintentionally upset a piece of furniture and thereby kill another, he would not be guilty of murder: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

Where A did not intentionally point and aim his pistol at B, but the same was accidentally discharged without fault on his part, and he was not at the time engaged in an unlawful act, he can not be found guilty of any offense under an indictment for murder in the first degree: *Williamson v. State*, 2 O. C. C. 292, 1 O. C. D. 492.

The turpitude of the act of poisoning, supplies by our statute the place of deliberate and premeditated malice, but the purpose to kill is not displaced: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

(b) What Constitutes.

"Purposely implies an act of the will, an intention, a design to do the act": *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616; *State v. Del Bello*, 8 O. D. (N.P.) 455.

"But it is not essential that the person assaulted should then and there die, or that the slayer intended that death should take place then and there": *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252.

The term "purposely," as used in the definition of murder in the first or second degrees, means that at the time of doing the act from which death results, there must be a definite purpose and intention actually formed and existing in the mind to do the act, and by means thereof to kill or cause the death of another: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The word "purposely," in G. C., § 12400, used in defining murder in the first degree, means an intent to kill, intentionally and not accidentally; an operation of the mind,

an act of the will, an intention or design to kill: *State v. Oppenheimer*, 49 Bull. 257.

The purpose or intent is defined to be "to kill another," and not to kill any particular person, and where one strikes purposely and maliciously, with intent to kill A, and the blow takes effect upon and kills B, the slayer is guilty of murder: *Wareham v. State*, 25 O. S. 601, III Longsdorf's Notes, 270.

Where one maliciously shoots into a crowd, he may be presumed to have intended causing the death of the person he kills: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

If a person wantonly does an act, such as the placing of a heavy oak plank on a railroad track, which greatly endangers human life, and death results, this is a sufficient purpose to kill to constitute murder in the first degree, even though the defendant did not know whose life was endangered: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

Administering a drug to a pregnant woman with intent to procure an abortion, but without an intent to kill, although death results from the drug, is not murder: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

If the proof satisfies the jury that the purpose or intention of the prisoner was to cut or wound—short of inflicting a mortal wound—no matter how serious an injury, short of death, may have been intended, the crime of murder is not made out: *Bailus v. State*, 16 O. C. C. 226, 8 O. C. D. 526; *Bennett v. State*, 10 O. C. C. 84, 4 O. C. D. 129.

(c) Evidence.

The purpose or intent to kill is proved by all the circumstances surrounding the case, by what the party does and says, the place where the blow was struck, the manner of inflicting wounds, the instrument used and its tendency to destroy life: *State v. Gardner*, W. 392, I Longsdorf's Notes, 32; *State v. Thompson*, W. 617, I Longsdorf's Notes, 48; *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472.

Intent to kill must be established beyond a reasonable doubt, and this rule is not changed by reason of the introduction of evidence by the accused intended to prove that the homicide was accidental. The legal effect of such evidence being, simply, to controvert an inference of intent to kill which may arise by evidence introduced by the state: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545.

Prior to G. C., § 12402, premeditation and deliberation by a prisoner who killed a guard in attempting to escape from the penitentiary must be proved beyond a reasonable doubt to constitute first degree murder. G. C., § 12400, making an attempt at rape, arson,

robbery or burglary equivalent to premeditation does not include an attempt to escape: *State v. Atkinson*, 6 O. N. P. 232, 8 O. D. (N.P.) 405.

A man is presumed to intend the natural and probable consequence of his voluntary act: *State v. Del Bello*, 8 O. D. (N.P.) 455.

The general principle that what a man of sound mind has done willfully, that he intended to do, and that he intended the natural and reasonable consequences of his voluntary and deliberate acts, unless the circumstances indicate the absence of such intent, is applicable in a murder case: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

The doing of acts that would necessarily or naturally destroy life raises a rebuttable presumption of intent to kill: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

Intent is generally proved by the circumstances, and where the means used was calculated to take life, an intent to kill may be presumed unless the other circumstances of the killing negative such presumption: *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472.

From the fact that A purposely struck a blow causing the death of B, there is no conclusive presumption that A intended to kill B. Such presumption of intent to kill is rebuttable: *Munday v. State*, 5 O. C. C. (N. S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

"Where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill, from the isolated fact that death was caused by the use of a deadly weapon. In such cases the presence of malice or intent to kill must be determined from all the circumstances proved, including, of course, the character of the weapon": *Erwin v. State*, 29 O. S. 186, III Longsdorf's Notes, 455.

A purpose or intent to kill will be presumed if a dose of poison sufficient to kill, was given intentionally knowing it to be such, to an infant child: *State v. Oppenheimer*, 49 Bull. 257.

If the act itself was one palpably calculated to destroy life the presumption is that the one who did it intended the result: *State v. Strong*, 12 O. D. (N.P.) 698.

It is a fair inference and presumption that one who intentionally strikes, wounds, etc., with an instrument, and in such a manner

as naturally calculated to produce death, intended to kill: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Purpose to kill, malice, deliberation or premeditation may be proved by deduction and inference from the fact of the unlawful killing of another, the manner and means by which death was caused, and other facts and circumstances preceding, attending and surrounding the crime, provided such deductions and inferences are warranted from the facts and consistent with the elements of the crime and inconsistent with every other reasonable hypothesis: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The presumption of an intent to kill from the use of a deadly weapon is not a legal presumption, but a mere argumentative deduction from the facts and does not obtain when other circumstances of the killing are shown, in which case such a charge to that effect is error, for then the use of a deadly weapon is merely one of the circumstances and often of little weight, and the jury must be left free to find that the intent was to wound or disable, or that death resulted from accidentally running against the knife while the combat was between others, or that the cutting was done while in great fear and excitement: *Bailus v. State*, 16 O. C. C. 226, 8 O. C. D. 526.

The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural consequences of his act. The purpose or intent to kill in general is proved by the circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life, intent may be presumed: *Carr v. State*, 21 O. C. C. 43, 11 O. C. D. 354.

(d) Question of Fact.

Purpose or intent to kill is a question of fact for the jury: *State v. Del Bello*, 8 O. D. (N.P.) 455.

2. Malice.

(a) An Essential Ingredient.

Malice, either simple or deliberate and premeditated, is an essential ingredient in the crime of murder: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *State v. Turner*, W. 20, I Longsdorf's Notes, 1; *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32; *State v. Thompson*, W. 617, I Longsdorf's Notes, 48; *State v. Neil*, T. 88.

(b) *Kinds of Malice.*

(aa) Simple Malice.

(aaa) Defined.

"Malice signifies a willful design to do another an unlawful injury, whether such design be prompted by deliberate hatred or revenge, or by the hope of gain, or springs from the wantonness or depravity of a heart regardless of social duty and fatally bent upon mischief": *State v. Del Bello*, 8 O. D. (N.P.) 455.

Malice is the dictate of a wicked and malignant heart. It is not necessary that the malignity should be confined to a particular ill-will toward the person injured. It is evidenced from any act which springs from a wicked and corrupt motive indicating a heart regardless of social duty, and bent on mischief: *State v. Turner*, W. 20, I Longsdorf's Notes, 1.

Malice is not hatred or envy, though it frequently includes both. It is not anger merely, for passion sometimes rebuts the presumption of malice. It is depravity—it is wickedness of heart loving mischief, and usually cold and capable of calculation of purpose: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

The term "malice" and "maliciously," as used to define the crime of murder in connection with the term "purposely," signifies that the killing is done unlawfully and intentionally, and without any reasonable provocation, and under such circumstances of cruelty, brutality or wantonness as to show such killing to have been done from the prompting of a wicked and depraved heart, regardless of social duty and fatally bent on mischief: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Malice is an evil design, the influence of a wicked, depraved, malignant heart, bent on mischief: *State v. Town*, W. 75, I Longsdorf's Notes, 6.

Implied malice or malice by construction of law is where the act done (in this case killing another) is of unusual aggression, enormity or cruelty, though without previous grudge or enmity: *State v. Town*, W. 75, I Longsdorf's Notes, 6.

Express malice is where one with a sedate, deliberate mind and formed design, commits an act (in this case kills another) and the design is evinced by external circumstances, discovering the inward intention as by lying in wait, antecedent menaces, former grudges, concerted schemes to do bodily harm: *State v. Town*, W. 75, I Longsdorf's Notes, 6.

Malice is the state of mind which prompts a conscious violation of the law to the prejudice or injury of another, but not necessarily

ill will or hatred towards the person injured: *State v. Snell*, 2 O. N. P. 55, 5 O. D. (N.P.) 670.

In criminal law, malice does not necessarily mean ill will or hatred towards the victim, but refers to a conscious or intentional violation of law without just cause: *State v. Stout*, 49 O. S. 270, IV Longsdorf's Notes, 453.

Malice is the doing of an unlawful act to the injury of another, without just cause or excuse therefor: *State v. Kerlin*, 51 Bull. 317; *State v. Hilbrant*, 7 O. L. R. 440.

Malice is to be determined from the act of the party and is often associated with anger, hatred or revenge, but it not infrequently exists without either: *State v. Kerlin*, 51 Bull. 317.

Malice, in its legal sense may be said to be a willfully formed design to do another unlawful injury, whether prompted by hatred, revenge or ill will, or whether it springs from the wantonness of a depraved heart. Anything done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and bent on mischief indicates malice within the meaning of the law: *State v. Strong*, 12 O. D. (N.P.) 701.

Malice, in a legal sense, means a motive or purpose from which flows an act injurious to another person, and which is done intentionally and without lawful excuse or justification; it signifies a willful design to do another unlawful injury, whether such design be prompted by hatred or revenge, or springs from the wantonness or depravity of the heart, disregarding all social and moral duties, and fatally bent on mischief. It may exist without the presence of the passions of anger and hatred or desire for revenge: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975; *State v. Kerlin*, 51 Bull. 317.

For other definitions of malice, see *State v. Bennett*, 5 O. N. P. 284, 5 O. D. (N.P.) 339; *State v. Summons*, 1 Dec. Rep. 416, 9 W. L. J. 407; *State v. Cook*, 2 Dec. Rep. 36, 1 W. L. M. 201; *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32; *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

(bbb) When Presumed.

When the killing is established, our law raises the presumption of simple malice only, or of such malice as under our statutes would constitute murder in the second degree. The presumption of the English law under such circumstances was of malice aforethought:

State v. Turner, W. 20, I Longsdorf's Notes, 1; *State v. Noble*, 1 Dec. Rep. 1, 1 W. L. J. 23; *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

Where the fact of killing is proved, malice is to be presumed, and all the circumstances of justification, excuse, or extenuation must be made out by the accused, unless they appear from the evidence adduced against him: *Davis v. State*, 25 O. S. 369, III Longsdorf's Notes, 241; *Silvus v. State*, 22 O. S. 90, III Longsdorf's Notes, 60; *State v. Turner*, W. 20, I Longsdorf's Notes, 1; *Schneider v. State*, 2 O. C. C. 420, 1 O. C. D. 565; *State v. Neil*, T. 88; *State v. Town*, W. 75, I Longsdorf's Notes, 6.

(bb) Deliberate and Premeditated Malice.

(aaa) Defined.

To deliberate is to weigh and consider, premeditate is to think of before, in their general and true meaning. The killing may be a fact; the will or purpose to kill may be present; malice may be in the act; and yet deliberation and premeditation may be absent: *State v. Cook*, 2 Dec. Rep. 36, 1 W. L. M. 201; *Burns v. State*, 3 Dec. Rep. 122, 3 Gaz. 323.

By the term "premeditated," as used to define malice constituting murder in the first degree, it is meant that the purpose to kill was considered and thought about before it was put into execution: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Deliberation and premeditation imply that the accused understood what he was about to do, and intended to do it in order to accomplish harm; both require action of the mind, and an exercise of reason, reflection, judgment and decision, and can not happen in any case where the faculties of the mind are deranged, destroyed and do not exist: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Deliberation and premeditation are operations of the mental faculties, and involve the exercise of reason, reflection, judgment and decision. To deliberate is to reflect with a view to make a choice or determination. To premeditate is to think of beforehand, to conceive a thing before it is executed: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Deliberation and premeditation require mental action, and an exercise of the reason, reflection, judgment and decision, and can not take place where the mind is deranged, destroyed or does not exist: *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616.

One who has deliberately and premeditatedly committed a rape, and then in the

excitement naturally brought about determines to kill the woman in order to conceal the crime, and goes for a weapon and kills her, a finding of first degree is proper. His excitement so brought about is not sufficient inability to premeditate: *Haas v. State*, 13 O. C. C. 418, 7 O. C. D. 509.

(bbb) Time.

If the prisoner coolly formed the design to kill for any time before he executed it, the act was deliberate and premeditated: *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32; *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

When the purpose to maliciously kill with premeditation and deliberation is formed, the length of time between the design so formed and its execution is immaterial: *Shoemaker v. State*, 12 O. 43, I Longsdorf's Notes, 595; *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

To constitute deliberation there must be reflection and planning for some time, however short, and this planning must be cool, and in the exercise of clear reason: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

It is not the time of deliberation and premeditation that is requisite but the actual existence of deliberation and premeditation before the fatal act is done: *Zelner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

It is error to charge that "deliberation and premeditation may be accomplished in a very short time—in a moment—so swift is thought." The case of *Shoemaker v. State*, 12 O. 43, I Longsdorf's Notes, 595, goes to the extreme verge of what the statutes of Ohio will permit: *Burns v. State*, 3 Dec. Rep. 122, 2 Dec. Rep. 97, 3 Gaz. 323, 1 W. L. M. 355.

But to charge that "deliberation and premeditation for a moment, as well as for a week, or longer, will render an intentional killing murder in the first degree," is not erroneous, the court distinguishing such charge from the charge given in the case of *Burns v. State*, *supra*: *Early v. State*, 16 O. C. C. 646, 7 O. C. D. 594.

To constitute deliberation and premeditation, the intention to do the injury must have been deliberated upon, and the design to do it formed, before the act was done, though it is not required that either should have been for any considerable time before. This supposes that the party by reflection understood what he was about to do, and intended to do it in order to do harm: *State v. Turner*, W. 20, I Longsdorf's Notes, 1.

The law fixes no time during which the deliberation and premeditation, necessary elements to the crime of murder in the first de-

gree, shall take place; but the jury must be satisfied beyond a reasonable doubt, that defendant had formed a purpose to kill in his mind, and had deliberated and reflected upon it; it is sufficient, although a short time only had elapsed after such purpose was formed and the killing was done, if the same was deliberated upon and premeditated by defendant: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975]; *State v. Kerlin*, 51 Bull. 317.

Where A has threatened violence to B but several hours later receives B in his home in a quiet and peaceable manner, and then killed B in a struggle, the jury may consider whether or not A had abandoned his former violent purposes: *State v. Miller*, 7 O. N. P. 458, 5 O. D. (N.P.) 703.

(ccc) When Presumed.

Premeditation necessary to constitute murder in the first degree is not presumed from the fact of intentional killing: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Knowingly putting a poisonous drug into water or tea, believing it would be swallowed by another person, raises a presumption of premeditation and deliberation accompanied by malice: *State v. Summons*, 1 Dec. Rep. 416, 9 W. L. J. 407.

Where from lapse of time passion has subsided and reason assumed her empire before the act was done, deliberation and premeditation are presumed: *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

If the provocation was slight, and the retort greatly beyond it, and if considerable time elapsed between the provocation and the retort, the act was willful and deliberate: *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

3. Killing With Poison.

The overt act of homicide by administering poison, within the meaning of the law, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken, so that if the poison be prescribed and furnished in one county to a person who carried it into another county, and there under the directions given, takes it and becomes poisoned, and dies of the poison, the administering is consummated and the crime committed, if committed at all, in the county where the person is poisoned: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 328.

To force poison into the stomach of another; to compel another by threats of vio-

lence to swallow poison; to furnish poison to another, for the purpose and with the intention that the person to whom it is delivered shall commit suicide therewith, and which poison is accordingly taken by a suicide, for that purpose; or to be present at the taking of poison by a suicide, participating in the taking thereof, by assistance, persuasion or otherwise, although the party so present and participating at the time intends and agrees himself also to commit suicide; each and all of these are forms and modes of "administering poison," within the meaning of the act: *Blackburn v. State*, 23 O. S. 146, III Longsdorf's Notes, 117.

In the use of a deadly poison, such as arsenic, a scienter is presumed in the absence of proof to the contrary, and on an indictment charging A with poisoning B in December 1851, it is error to permit evidence to show that A poisoned C prior to that time, for the purpose of proving guilty knowledge on the part of A: *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021.

To warrant a conviction for murder by means of administering bichloride of mercury or corrosive sublimate, it must, among other things, be shown beyond a reasonable doubt that the article found in deceased's stomach was a deadly poison, and had fatal properties when introduced into the human system; that a sufficient quantity thereof had been administered internally and absorbed by the system, or some of the organs so as to produce death; that such poison had directly produced death, either immediately or after deceased lived and languished; that the same was not administered by some person other than accused, but was in fact given or administered by her or by her direction; that it was so administered by the accused or by her direction with knowledge that it was a deadly poison, or with good reasons to believe that it was such beforehand. Failure to establish all these elements beyond a reasonable doubt must be followed by acquittal: *State v. Oppenheimer*, 49 Bull. 257.

Neither purpose to kill, nor malice, is necessary to convict the accused of manslaughter under an indictment charging murder in the first degree by means of poison; and inasmuch as the knowingly giving of poison presumes deliberation, premeditation and malice, the jury need not consider these elements: *State v. Oppenheimer*, 49 Bull. 257.

4. Killing In Perpetrating Other Crime.

(a) Act Takes Place of Malice.

In the case of homicide which occurs in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, the enormity and turpitude of the criminal act, in

which the offender is engaged at the time, supplies the place of the deliberate and premeditated malice made an element of the first class of homicide defined by the statute: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329. See also *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

(b) *Rape.*

Where the defendant is indicted for murder in the attempt to perpetrate a rape, there is but one *corpus delicti*—the murder—requiring proof outside of a confession made before a coroner: *State v. Leuth*, 5 O. C. C. 94, 3 O. C. D. 48.

(c) *Robbery.*

Where the act of killing was unlawfully and purposely done in an attempt to rob, it is not necessary to prove deliberation and premeditation: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957, 69 N. E. Rep. 126; *Stevens v. State*, 42 O. S. 150, IV Longsdorf's Notes, 99.

The words "attempting to perpetrate a robbery," in the indictment, takes the place of and dispenses with "deliberate and premeditated malice": *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242 [affirmed, without opinion, *Blair v. State*, 25 Bull. 388].

Purposely killing another by one engaged in perpetrating a robbery does not admit of any lower degree than first. The property taken must have some value, however little, to the person robbed, but the amount is not material: *State v. Lukens*, 6 O. N. P. 363, 9 O. D. (N.P.) 349.

In an indictment for murder in the first degree, when the act was unlawfully and purposely done in an attempt to rob, premeditation is not an essential element under G. C., § 12400: *Lindsay v. State*, 4 O. C. C. (N.S.) 409, 14 O. C. D. 1.

(d) *Burglary.*

Where one starts to carry out the purpose to commit a rape, arson, robbery or burglary, and kills another under circumstances so closely connected with the crime which he has undertaken as to be a part of the *res gestae* thereof, he is guilty of murder in the first degree, whether the crime which he originally undertook has been technically completed or not: *Conrad v. State*, 75 O. S. 52, IV Longsdorf's Notes, 1013.

(e) *Resisting Arrest.*

If the accused prepares himself to resist arrest, even to the taking of life, and purposely kills the officer in his attempt to dis-

arm and arrest him, it is murder in the first degree: *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 552 [affirmed, without opinion, *State v. Miller*, 55 O. S. 685].

5. *Obstructing Railroad-track.*

An intent to kill is not an essential element of murder in the first degree under G. C., § 12401, punishing the killing of another by maliciously obstructing a railroad track: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545.

Where A willfully and maliciously places an obstruction on a railroad track, such as a heavy oak plank, whereby one B, a passenger on a train is killed, A is guilty of murder in the first degree, although he had no special design on B's life: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109.

B. SECOND-DEGREE MURDER.

1. *Intent to Kill.*

The intent to kill in second degree must be actual, and not merely constructive: *State v. Powell*, 1 Dec. Rep. 38, 1 W. L. J. 273.

To show that the accused purposely inflicted the wound that caused the death, or that he purposely struck the deceased, from which blow the deceased died, is not sufficient to constitute murder in the second degree; it must be shown that the killing was "purposely" done: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

To constitute murder in the second degree an intent to kill must be established beyond a reasonable doubt: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545.

Intent to kill and also malice must be affirmatively shown to authorize a verdict of murder in the second degree: *Bennett v. State*, 10 O. C. C. 84, 4 O. C. D. 129.

In murder of the second degree intent or purpose to kill must be specifically averred in every indictment: *Hagan v. State*, 10 O. S. 459, II Longsdorf's Notes, 454.

See also Intent to Kill, IV, A, 1, herein.

2. *Malice.*

Simple malice only, or malice without deliberation and premeditation, is necessary to constitute murder in the second degree; and such malice is presumed when the fact of killing is proved: *State v. Turner*, W. 20, I Longsdorf's Notes, 1; *State v. Town*, W. 75, I Longsdorf's Notes, 6.

Intent to kill and also malice must be affirmatively shown to authorize a verdict of murder in the second degree: *Bennett v. State*, 10 O. C. C. 84, 4 O. C. D. 129.

In every case of intentional killing not otherwise explained by circumstances so as to give rise to a reasonable doubt thereof, it is to be presumed that the slayer was actuated by the malice necessary to constitute murder in the second degree. But this presumption does not include the deliberation and premeditation necessary to constitute the crime of murder in the first degree: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

See also, Malice, IV, A, 2, herein.

C. MANSLAUGHTER.

1. Intent to Kill.

An intent to kill is not an essential element of manslaughter either at common law or in Ohio: *Montgomery v. State*, 11 O. 424, I Longsdorf's Notes, 577; *Sutcliffe v. State*, 18 O. 469, I Longsdorf's Notes, 857; *Cline v. State*, 43 O. S. 332, IV Longsdorf's Notes, 169.

A purpose to kill, or malice, are not essential to constitute the crime of manslaughter: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

An intent or purpose to kill may be present in the crime of manslaughter, where the killing is without malice and upon a sudden quarrel: *Montgomery v. State*, 11 O. 424, I Longsdorf's Notes, 577; *Erwin v. State*, 29 O. S. 186, III Longsdorf's Notes, 455.

See also Intent to Kill, IV, A, 1, herein.

2. Malice.

Malice is not a necessary ingredient to manslaughter, but the act of maliciously killing, unintentionally, is manslaughter nevertheless. The presence of the aggravating ingredient, malice, does not render the act less criminal than it would have been without malice: *Nichols v. State*, 8 O. S. 435, II Longsdorf's Notes, 356. See also ASSAULT WITH INTENT.

See also Malice, IV, A, 2, herein.

3. Provocation.

It is manslaughter when a person is killed under the influence of sudden passion or in the heat of blood produced by an adequate and reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to assume its habitual control: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

To reduce an intentional killing from murder to manslaughter the provocation need not be offered at the exact time of the affray,

but must be so recent, only, as to show that there was not time for the blood to cool: *Thurman v. State*, 4 O. C. C. 141, 2 O. C. D. 466.

Calumny written or spoken concerning one's self or one's family, is never a sufficient provocation to reduce the intentional killing of the author from murder to manslaughter, *State v. Elliott*, 11 Dec. Rep. 332, 26 Bull. 116.

A day is a sufficient cooling time: *State v. Elliott*, 11 Dec. Rep. 332, 26 Bull. 116.

4. Unlawful Act.

The unlawful killing of another is manslaughter when the killing is unintentionally done, if the act which causes death is done in the commission of a crime: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Where A, riding a bicycle through a city street at more than twenty miles an hour, unintentionally strikes and kills B, such killing is not manslaughter in Ohio unless A's act was one prohibited by the law of this state, and this is so even if A's act was one of gross and culpable negligence at common law: *Johnson v. State*, 66 O. S. 59, IV Longsdorf's Notes, 897.

Causing the death of a human being by striking him with an automobile running at a speed of more than fifteen miles an hour within the limits of a municipality is manslaughter: *State v. Fishwick*, 10 O. N. P. (N.S.) 110, 21 O. D. (N.P.) 127, 7 O. L. R. 392.

The violation of a penal ordinance of a municipality against fast driving, as a result of which violation death ensues, is not an unlawful killing within the provisions of G. C., § 12404, which defines the crime of manslaughter: *State v. Collingsworth*, 82 O. S. 154 [overruling exceptions, *State v. Collinsworth*, 8 O. N. P. (N.S.) 383, 19 O. D. (N.P.) 557].

Gross negligence in the operation of street cars resulting in the death of any person, is not manslaughter: *In re Grand Jury*, 5 O. N. P. (N. S.) 33, 52 Bull. 241.

Killing by shooting without intent to kill, but with intent to injure, is manslaughter, for it is killing while engaged in an unlawful act. The prisoner need not be then engaged in any other unlawful act: *Sutcliffe v. State*, 18 O. 469, I Longsdorf's Notes, 857.

Gross negligence in pointing and discharging a pistol at another is not manslaughter unless the pointing of the pistol is an unlawful act within the meaning of G. C., § 12422: *Weller v. State*, 19 O. C. C. 166, 10 O. C. D. 381; *Williamson v. State*, 2 O. C. C. 292, 1 O. C. D. 492.

One who unintentionally shoots and kills another by discharging firearms on his own premises is not guilty of manslaughter, since this is not an unlawful act punished by G. C., § 12817: *Martin v. State*, 70 O. S. 219, IV Longsdorf's Notes, 972.

Giving poison to a child intending to give it to another; giving to a child, by gross carelessness or wantonness, a large dose of poison sufficient to kill a grown person, which results in death; experimenting upon the life of a human being, without intent to kill, by administering a deadly poison, not in good faith as a cure, which results in death, constitute manslaughter: *State v. Oppenheimer*, 49 Bull. 257.

The offense of killing a pregnant woman by administering medicine with intent to procure an abortion, while manslaughter, is specially provided for by G. C., § 12412: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

An indictment for manslaughter, which avers that the defendant did unlawfully kill another, while the slayer was in the commission of an unlawful act, i. e., the act of using drugs and instruments upon the person of a woman, with intent to procure an abortion, without averring that death was occasioned by the use of such instruments or drugs, is a sufficient indictment for manslaughter: *State v. Barker*, 28 O. S. 583, III Longsdorf's Notes, 425. See also ABORTION.

Where the engineers on two trains approaching the crossing of two railroads fail to come to a full stop as required by G. C., § 12549, and in the resulting collision one is killed, the other may be prosecuted for manslaughter; and it is no defense that the deceased was also violating the statute: *State v. Snyder*, 5 O. L. R. 580, 53 Bull. 110.

V. INDICTMENT.

A. FOR MURDER INCLUDES WHAT.

An indictment for murder in the first degree includes both of the lesser degrees of homicide: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

The crime of murder in the first degree, committed in an attempt to perpetrate a robbery, necessarily includes within it an assault, and an assault with intent to commit a robbery, whether such assault be formally or especially averred or not. It also includes all degrees of homicide below the first unless perhaps the second degree is not included: *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242 [affirmed, without opinion, *Blair v. State*, 25 Bull. 388].

A charge of murder in the first degree includes the crimes of murder in the second

degree, manslaughter, assault with intent to kill, assault and battery and assault: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The crime of murder in the second degree is not included as one of the lower grades of crimes under an indictment for murder in the first degree by means of poison (there being no evidence or feature in the case which would warrant such a finding), and the jury, in such event, will not be instructed as to such crime: *State v. Oppenheimer*, 49 Bull. 257.

A charge of murder in the first degree includes also, by force of law, the crimes of murder in the second degree, manslaughter, and assault and battery and under such charge the accused may be convicted of either of the crimes named: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas court affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

An indictment for murder in the first degree includes within its scope the other lesser crimes of murder in the second degree, manslaughter, shooting with intent to kill, shooting with intent to wound, assault and battery: *State v. Kerlin*, 51 Bull. 317.

On indictment for second degree the accused can be convicted of manslaughter, for the former contains all the elements of the latter, though the word unlawful is not used: *Wroe v. State*, 20 O. S. 460, II Longsdorf's Notes, 1010; *State v. Noble*, 1 Dec. Rep. 1, 1 W. L. J. 23; *Birch v. State*, 1 Dec. Rep. 453, 10 W. L. J. 82.

Under an indictment for murder it is competent for the jury, where the evidence justifies it, to find the defendant guilty of an assault and battery only: *Marts v. State*, 26 O. S. 162, III Longsdorf's Notes, 294.

B. AVERMENTS.

1. Short Form.

G. C., § 13583, providing a short form of indictment for second degree murder and manslaughter is not repugnant to any of the provisions of the constitution of this state: *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942; *Williams v. State*, 35 O. S. 175, III Longsdorf's Notes, 770.

An indictment for manslaughter which follows approved common law precedents, is good under G. C., § 13583: *Sutcliffe v. State*, 18 O. 460, I Longsdorf's Notes, 857.

The short form of indictment that the defendant unlawfully killed the deceased, is sufficient, notwithstanding the change in our statutes defining manslaughter: *Williams v.*

State, 35 O. S. 175, III Longsdorf's Notes, 770.

An indictment which simply alleges that the defendant "one Samuel Lee, then and there did unlawfully kill and slay" is sufficient: *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942.

A statement that the prisoner made an assault and unlawfully discharged a gun, loaded with powder and lead, at the person killed, is a sufficient averment of the unlawful act designated in the statute: *Sutcliffe v. State*, 18 O. 469, I Longsdorf's Notes, 857.

An indictment for manslaughter which avers that defendant did unlawfully kill and slay another, while the slayer was in the commission of an unlawful act, i. e., the act of using instruments and drugs upon the person of a woman, with intent to procure an abortion, without averring that death was occasioned by the use of such instruments, or drugs, is a sufficient indictment for manslaughter: *State v. Barker*, 28 O. S. 583, III Longsdorf's Notes, 425.

2. Intent.

An indictment, following common law precedents which avers that A "purposely, and of deliberate and premeditated malice did strike" the deceased, "giving to him * * * one mortal wound," and that the deceased "of the mortal wound aforesaid died," does not sufficiently aver the intent to kill; purposely being predicated of the assault and wounding, but not of the killing: *Kain v. State*, 8 O. S. 306, II Longsdorf's Notes, 343; *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *Hagan v. State*, 10 O. S. 459, II Longsdorf's Notes, 454.

In an indictment averring that A assaulted and stabbed B "purposely, and of deliberate and premeditated malice giving to B a mortal wound," of which wound he instantly died, is sufficient; the intent to inflict a mortal wound importing *ex vi termini*, an intent to kill: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469.

Where the intent to kill is not averred in the descriptive part of the indictment, the defect is not cured by the formal concluding part, in which it is averred: "and so the jurors * * * do say that" the accused, "in the manner and by the means aforesaid, * * * purposely, and of deliberate and premeditated malice, did kill and murder" the deceased; such averment being a conclusion of law, and not of the existence of facts: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *Kain v. State*, 8 O. S. 306, II Longsdorf's Notes, 343.

An indictment charging A, B and C with assaulting and wounding S with a club or a

pitchfork, at a certain time and place, "with intent him the said S purposely, and of deliberate and premeditated malice to kill and murder," shows with sufficient certainty the purpose to kill, at that time, notwithstanding the usual predicate "then and there" was omitted: *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252.

An indictment in which it is averred that A assaulted and purposely wounded B, with the intent to kill him, of which wound B died, sufficiently charges that A purposely killed B: *Price v. State*, 35 O. S. 601, III Longsdorf's Notes, 812.

An indictment charging that the defendant "did unlawfully, purposely and maliciously kill and murder" the deceased, is sufficient under G. C., § 13583, the word purposely importing an intent to kill: *State v. Williamson*, 7 Dec. Rep. 618, 4 Bull. 279.

3. Malice.

The form of indictment declared to be sufficient by G. C., § 13583, is not indispensable. Accordingly, an indictment for murder in the second degree, in which the word "malice" is not found, is good if it sets forth the manner and means of killing in such language as to necessarily import malice: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

It is not necessary to specifically allege malice in an indictment if the facts alleged sufficiently imply it. Thus an indictment which charges A with an attempt to commit a robbery and then avers that he, with others, in such attempt, did unlawfully and purposely, shoot the deceased, with intent to unlawfully and purposely kill and murder him, and by means of the shooting it gave him a mortal wound, from which he instantly died, sufficiently charges A with murder in the second degree: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

4. Attempting to Perpetrate.

An averment merely that the accused killed another while he was attempting "to perpetrate a robbery," is not sufficient, since that is a mere conclusion. The indictment must state the facts which show that the killing occurred while the accused was engaged in the "attempt to commit robbery": *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242 [affirmed, without opinion, *Blair v. State*, 25 Bull. 388].

5. Miscellaneous.

It is sufficient to charge in an indictment that the defendant, with two other defendants, held a pistol and "discharged and shot it off against and upon the deceased": *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 306.

An indictment charging that the mortal blow was struck on the 24th day of the month, that death occurred on the 28th, and that the murder was committed on the 24th, is bad: *Hill v. State*, 1 Dec. Rep. 135, 2 W. L. J. 427.

An averment that A, after inflicting a mortal wound on B, then placed B's body on the railroad track so that he was run over and killed, sufficiently shows mortal injury: *Hotelling v. State*, 3 O. C. C. 630, 2 O. C. D. 366.

A phrase in an indictment for first degree murder charging that accused "did strike, penetrate, and wound (the deceased, naming him) * * * one mortal wound" with a pistol and leaden bullets, is equivalent to charging the giving of such wound, and such indictment having stated all the essentials to charging such crime is valid under G. C., § 13581, providing what defects in an indictment shall not be fatal: *Goodlove v. State*, 13 O. C. C. (N.S.) 17, 21 O. C. D. 537 [reversed, *Goodlove v. State*, 82 O. S. 365].

Where the act or crime was committed by several persons, all being present at the time, it is not necessary when jointly indicted, for the indictment to set out which one of the defendants committed the act of killing: *Lindsey v. State*, 4 O. C. C. (N.S.) 409, 14 O. C. D. 1. See also INDICTMENT.

C. DUPLICITY.

A count charging A with robbery and with murder in the commission of robbery, and in which it is alleged that the blows causing death were struck with a piece of iron, a sledge and a shovel, is not bad for duplicity; the state can not be required to elect upon a trial upon such count: *Jackson v. State*, 39 O. S. 37, III Longsdorf's Notes, 1005.

A count charging murder in the first degree, where the killing was done in attempting to perpetrate a robbery, is not bad for duplicity on the ground that in the same count it charges an assault with intent to rob, since such averments are essential in murder: *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242.

Where an indictment for murder contains several counts each describing the same transaction, for the purpose of meeting any phase of the testimony developed at the trial, the state can not be compelled to elect: *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472; *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

For duplicity and election by the prosecutor, see INDICTMENT.

D. PLEA IN ABATEMENT.

A plea in abatement does not lie to an indictment for murder in the first degree, where based on the ground that the judges

of the common pleas court in appointing the jury commission failed to designate the number of names which the commission should place in the jury wheel of persons to serve as grand and petit jurors during the current year: *State v. Cleveland*, 9 O. L. R. 203. See also INDICTMENT.

VI. EVIDENCE.

A. BURDEN AND DEGREE OF PROOF.

A defendant is presumed innocent and the burden rests upon the state to prove his guilt beyond a reasonable doubt: *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

A reasonable doubt of any matter essential to the crime of murder authorizes acquittal: *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32.

An instruction that the state must prove the material elements of the crime beyond a reasonable doubt fully secures to the defendant the benefit of the legal presumption of his innocence: *Morehead v. State*, 34 O. S. 212, III Longsdorf's Notes, 709.

Evidence as to the disappearance of the deceased, the finding of his body with contusions and abrasions, together with the testimony of reputable physicians that death was caused by suffocation, if it does not establish beyond a reasonable doubt that death was caused by violence, at least outweighs the idea of death by accident, and reasonably brings to the jury the theory that violence was employed: *Williams v. State*, 11 O. C. C. (N.S.) 4, 20 O. C. D. 342 [leave to file petition in error refused, *Williams v. State*, 53 Bull. 281].

Where the state has proved a deliberate and premeditated killing the duty of introducing evidence to prove manslaughter rests on the defendant: *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

Where in an indictment for murder in the first degree, it is charged that there were two shots fired and two mortal wounds inflicted from which death resulted, the state is not compelled to prove, beyond a reasonable doubt, that either the first or second shot alone produced the death, nor, if the death results from the combined effects or results of both shots, that each of said shots were fired unlawfully: *Wray v. State*, 5 O. C. C. (N.S.) 437, 17 O. C. D. 1.

Where in a trial for homicide the insanity of the accused is set up, the burden of establishing such defense by a preponderance of the evidence rests upon the defendant: *State v. Austin*, 71 O. S. 317, IV Longsdorf's Notes, 983. See also INSANE, IMBECILES AND IDIOTS.

It is error to charge without qualification that upon the requisite measure of proof by

the state, of an unlawful killing by the defendant the burden is thrust upon him to show, by the greater weight of evidence, that it "was done, not of malice, but in the necessary defense of his person from death or enormous bodily harm"; inasmuch as the apparent effect of such an instrument is to preclude him from the right to take life to protect against the reasonable apprehension of such consequences: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483. See also DEFENSE OF PERSON AND PROPERTY.

From the intentional killing, the presumption of law is murder in the second degree: *State v. Noble*, 1 Dec. Rep. 1, 1 W. L. J. 23.

For the general discussion of the subject of evidence, see EVIDENCE.

B. WITNESSES.

The defendant as a witness is subject to the same rules as other witnesses: *Hanoff v. State*, 37 O. S. 178, III Longsdorf's Notes, 903.

Formerly the defendant's wife was not a competent witness in his behalf: *Thurman v. State*, 4 O. C. C. 141, 2 O. C. D. 466.

Where a witness admits having talked of the homicide with another person but denies that he said the defendant did not commit it, on re-examination he can not be asked what he did say on that occasion unless his former statement has been denied: *Dickson v. State*, 39 O. S. 73, III Longsdorf's Notes, 1009.

A witness called by the accused to testify as to the reputation of the accused as a quiet, peaceable citizen, may be asked on cross-examination if he had not heard of instances of trouble the accused had with neighbors: *Zeltner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102. See also WITNESSES.

C. OTHER ACTS AND CRIMES.

1. Of Defendant.

Where A is charged with poisoning B, in December, it is error to permit evidence in chief to show that A poisoned C in August preceding: *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021.

It is not competent for the state to introduce evidence in chief of other and prior crimes, yet the commission of a prior crime may be shown for the purpose of furnishing a motive for the crime charged in the indictment, provided such prior crime is so related to the latter as to have a logical connection therewith, and reasonably to disclose a motive for its commission: *State v. Dickerson*, 77 O. S. 34, IV Longsdorf's Notes, 1029.

In a trial for murder in the second degree the state may prove previous threats made

by the accused against the person he afterwards killed, even though such threats tend to prove deliberate and premeditated malice: *Stewart v. State*, 1 O. S. 66, I Longsdorf's Notes, 941.

Proof that the defendant seduced the deceased prior to the murder is incompetent where it does not appear affirmatively that such seduction was the motive for the crime: *Rose v. State*, 13 O. C. C. 342, 7 O. C. D. 226.

A defendant may show how he was employed at the time he met the person he is charged with killing, and his conduct a short time before the affray which resulted in the killing: *Stewart v. State*, 19 O. 302, I Longsdorf's Notes, 878.

In a trial for homicide evidence that the defendant on a former occasion attempted to shoot another person is not competent: *Zeltner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

The conduct of the defendant subsequent to the homicide is competent evidence for the purpose of determining the degree of the crime: *Blythe v. State*, 4 O. C. C. 435, 2 O. C. D. 636 [affirmed, *Blythe v. State*, 47 O. S. 234, IV Longsdorf's Notes, 370].

Robbery from the body, the concealment of the body, false statements by the accused in his flight, are all facts which must be considered by the jury: *Blythe v. State*, 4 O. C. C. 435, 2 O. C. D. 636 [affirmed, *Blythe v. State*, 47 O. S. 234, IV Longsdorf's Notes, 370].

The extent to which a defendant may be cross-examined as to prior crimes when he voluntarily takes the stand rests in the sound discretion of the court: *Hanoff v. State*, 37 O. S. 178, III Longsdorf's Notes, 903.

On the cross-examination of character witnesses rumors in the community of prior crimes committed by the defendant are not admissible: *State v. Dickerson*, 77 O. S. 34, IV Longsdorf's Notes, 1029.

2. Of Deceased.

Evidence to prove that the deceased and other persons agreed to go to the defendant's house for the purpose of quarreling with him, is admissible: *Stewart v. State*, 19 O. 302, I Longsdorf's Notes, 878.

Where the defendant is trying to prove the suicide of the deceased, evidence that six years prior to her death she was of a melancholy disposition and threatened to commit suicide, is admissible; the remoteness affects the weight of such evidence but not its competency: *Blackburn v. State*, 23 O. S. 146, III Longsdorf's Notes, 117.

Where a father charged with killing his son, claims that the killing was accidentally done while he was attempting to rescue his

son from association with immoral women, evidence of the character of such women is admissible to show the father's motives: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545.

The character of the deceased as a vicious and dangerous man and the defendant's knowledge of this may be proved by the evidence of one who had only four or five months' acquaintance with the deceased: *Turner v. State*, 5 O. C. C. 537, 3 O. C. D. 263.

Evidence of threats made by the deceased immediately preceding the attack is competent as part of the *res gestae*: *Dickson v. State*, 39 O. S. 73, III Longsdorf's Notes, 1009.

A, on trial for killing C, claiming that he killed to save the life of his brother, B, with whom C was then in a fight, may show that C had committed rape on his own daughter, whom B subsequently married, and that C knew that B knew this, and, hence, had a malice against B and a motive to kill him so that he could not prosecute: *State v. Nevin*, 23 Bull. 411 [supreme court].

On a trial for murder it is error to permit the state in the first instance and as a part of its case, to offer testimony showing the character or reputation of the deceased as a quiet and peaceable man: *Carr v. State*, 21 O. C. C. 43, 11 O. C. D. 353. See also EVIDENCE.

D. DECLARATIONS.

1. Dying Declarations.

(a) Admissibility.

The provision of Art. I, § 10, of the constitution of Ohio, which provides that the accused shall have the right to meet witnesses face to face is not violated by the introduction of dying declarations where the accused is confronted by the witnesses who testify: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

Dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations: *State v. Harper*, 35 O. S. 78, III Longsdorf's Notes, 758.

Prior to G. C., § 12412-1, upon an indictment for unlawfully using an instrument upon the person of a woman, with intent to destroy a vitalized embryo, in consequence of which she died, her dying declarations are inadmissible: *State v. Harper*, 35 O. S. 78, III Longsdorf's Notes, 758.

G. C., § 12412-1, provides that the dying declarations of a woman who dies in consequence of a miscarriage are admissible where

the causes of such miscarriage are under investigation.

A dying declaration that the act was done without provocation is not incompetent as being a matter of mere opinion: *Wroe v. State*, 20 O. S. 460, II Longsdorf's Notes, 1010.

A dying declaration is not admissible until it is shown not only that it was made in *articulo mortis*, but also under a sense of impending death, which excluded from the mind of the dying person all hope or expectation of recovery: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329; *Montgomery v. State*, 11 O. 424, I Longsdorf's Notes, 577; *Wade v. State*, 2 O. C. C. (N.S.) 189, 15 O. C. D. 279 [affirmed, without opinion, *Wade v. State*, 70 O. S. 463]; *Martin v. State*, 17 O. C. C. 406, 9 O. C. D. 621.

Deceased's exculpatory declaration in regard to the accused not part of the *res gestae* nor a dying declaration, is not competent on behalf of the accused: *State v. Grayson*, 10 Dec. Rep. 55, 18 Bull. 221. See also EVIDENCE.

(b) Form.

The substance of competent dying declarations may be given although the witness is not able to give the precise words: *Montgomery v. State*, 11 O. 424, I Longsdorf's Notes, 577.

Dying declarations reduced to writing by a competent person at the instance of the declarant and approved and signed by him are admissible: *State v. Kindle*, 47 O. S. 358, IV Longsdorf's Notes, 378.

(c) Impeachment.

Where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration, nor a part of the *res gestae*, is not admissible to impeach such declaration: *Wroe v. State*, 20 O. S. 460, II Longsdorf's Notes, 1010.

Upon the admission of dying declarations the defendant may cross examine to show that they were not dying declarations, or that there were no such declarations made, or that if made they were not credible: *Martin v. State*, 17 O. C. C. 406, 9 O. C. D. 621.

2. Other Declarations.

Declarations made by the defendant immediately after the homicide detailing its facts form no part of the *res gestae*, but are simply a narrative made by the defendant in regard to a past transaction. The fact that the state did not object to some of such declarations gives the defendant no right to

introduce the others: *Forrest v. State*, 21 O. S. 641, III Longsdorf's Notes, 48.

Declarations made by the defendant after the homicide but before its discovery, that he could kill a man by knocking the breath out of him and then grasping him by the throat are admissible in a prosecution for homicide by strangling, as tending to show the workings of the defendant's mind: *Moore v. State*, 2 O. S. 500, I Longsdorf's Notes, 1077.

Where property in the possession of the deceased shortly before the murder is found concealed on the premises of a third person, about that time in the company of the defendant, the acts and declarations of such third person accompanying the discovery of the property, are admissible: *Mimms v. State*, 16 O. S. 221, II Longsdorf's Notes, 771.

Previous threats by defendant against deceased are admissible to show the killing was malicious in a second degree case: *Stewart v. State*, 1 O. S. 66, I Longsdorf's Notes, 941. See also EVIDENCE.

Threats of the deceased made immediately preceding the attack are competent as part of the *res gestae*: *Dickson v. State*, 39 O. S. 73, III Longsdorf's Notes, 1009.

Threat to kill a person made on the day he was killed is competent as tending to show malice and deliberation, and which of the two struck the fatal blow: *Dickson v. State*, 39 O. S. 73, III Longsdorf's Notes, 1009. See also EVIDENCE.

Declarations made by the victim of a homicide some time after the assault which caused her death, at a house sixty rods distant from the scene of the crime, narrating certain facts in regard to the assault, are not part of the *res gestae* and are not competent evidence upon the trial of her assailant: *Wade v. State*, 2 O. C. C. (N.S.) 189, 15 O. C. D. 279 [affirmed, without opinion, *Wade v. State*, 70 O. S. 463].

The defendant and his son being jointly indicted for murder by shooting, on the trial of the former, evidence of the son's statements, made at his home soon after the killing occurred, tending to show who fired the fatal shot, is incompetent, as what was said was not part of the *res gestae*, and was properly refused: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483. See also AIDERS, ABETTORS AND ACCOMPLICES.

After evidence of a conspiracy between the defendant and his son to kill the deceased, against objection, the state was allowed to put in the son's declarations to a third party, in the father's absence, as follows: "Are you going to town today? There is going to be some shooting; if father don't kill a man, I will." At another time: "I would as soon shoot Snyder as I would a rabbit." It was

held to constitute error, as the statements were not in furtherance of a common purpose of the two to kill S: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483.

As showing a person's state of mind when killing another with whom he was in conflict, it is not competent to prove the acts or declarations of a third party at enmity with him, in no wise connected with the homicide, notwithstanding they manifest most vicious feeling, and are by one who sometime prior thereto had joined in a violent assault upon him: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483. See also EVIDENCE.

Evidence may be given of a conversation between the accused after his confinement in jail and a third person which was overheard by the sheriff without the knowledge of the accused if such third person made no representations to the accused which inspired him with such hope or fear as induced him to make such declarations: *Morrow v. State*, 24 O. C. D. 140.

It is not error to admit as evidence a conversation between the accused and a third person with reference to the alleged crime in which the accused asked said third person how the people generally felt about such crimes: *Morrow v. State*, 24 O. C. D. 140.

E. CONFESSIONS.

1. Must be Voluntary.

A confession is voluntary where no threats or promises were used in obtaining it, and where the person to whom the confession was made informed the accused that he had no power to grant him immunity from punishment: *Wade v. State*, 2 O. C. C. (N. S.) 189, 15 O. C. D. 279 [affirmed, without opinion, *Wade v. State*, 70 O. S. 463].

A confession made to an officer before a warrant has been issued, where no promise of advantage was made to induce it and where the accused was informed that a confession would not induce clemency, is voluntary and admissible: *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

A confession is not rendered inadmissible because it was made to a police officer or to a coroner or because the defendant was told he had "better tell the truth," or because it was accompanied with emotion: *State v. Leuth*, 5 O. C. C. 94, 3 O. C. D. 48.

Whether a confession is in fact voluntary or not may be left to the jury. The burden of proof is on the prisoner to show by a preponderance of the evidence that the confession is inadmissible: *State v. Strong*, 12 O. D. (N. P.) 698.

The burden of showing that a confession of guilt was obtained by improper inducements

rests with the defendant: *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252.

2. *Infrajudicial Confessions.*

(a) *On the Trial.*

A confession by the defendant in open court that he committed a homicide renders a jury unnecessary, and by virtue of G. C., § 13692, the court may examine witnesses to determine the degree of crime and pronounce sentence accordingly: *Craig v. State*, 49 O. S. 415, IV Longsdorf's Notes, 462.

(b) *In Former Proceedings.*

A voluntary statement of the accused made before a grand jury is competent evidence against him upon his trial: *Wade v. State*, 2 O. C. C. (N.S.) 189, 15 O. C. D. 279 [affirmed, without opinion, *Wade v. State*, 70 O. S. 463].

Testimony by the accused before the grand jury that he was not guilty but knew how the murder was committed was properly admitted at the trial together with other incriminating statements and admissions on his part showing guilty knowledge: *Williams v. State*, 11 O. C. C. (N.S.) 4, 20 O. C. D. 342 [affirmed, *Williams v. State*, 53 Bull. 28].

Where, on a preliminary examination, after having been warned by the magistrate that he need not testify to anything that would tend to incriminate him, the accused confesses, this confession may be proved on the subsequent trial: *Jackson v. State*, 39 O. S. 37, III Longsdorf's Notes, 1005.

Where a man charged with murder voluntarily goes before the grand jury and makes a statement of what he knows about the case and afterwards, during the trial at a preliminary examination had in the absence of the jury to determine the circumstances under which such statement was made and whether it was voluntary, testifies that his statement before the grand jury was true, and it was shown had been made with the knowledge, consent and under the advice of counsel, evidence of his statements made before the grand jury is competent evidence against him upon his trial: *Wade v. State*, 2 O. C. C. (N.S.) 189, 15 O. C. D. 279 [affirmed, without opinion, *Wade v. State*, 70 O. S. 463]. See also EVIDENCE.

3. *Extrajudicial Confessions.*

Although extrajudicial confessions alone are not sufficient to prove the body of the crime in cases of homicide, they may be taken and used for that purpose in connection with other evidence: *Blackburn v. State*, 23 O. S. 146, III Longsdorf's Notes, 117; *Hotelling v. State*, 3 O. C. C. 630, 2 O. C. D. 366; *State v. Lueth*, 5 O. C. C. 94, 3 O. C. D. 48.

When the proof of the death is direct and positive, if the circumstances shown are of such force when taken together as to leave no room for doubt that the deceased was murdered, any extrajudicial confession by the prisoner, if otherwise competent, may be admitted in evidence for the purpose of establishing his connection with the crime: *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975.

Where the prisoner has made a written confession admitting that he had perpetrated the crime charged in the indictment and other crimes, and the whole of the confession is offered by the state and is objected to on the part of the defendant, it is not error to allow the whole confession to go to the jury when the court at the time instructs the jury that it is admitted only to prove the killing of the person named in the indictment, and that they should disregard any portion of the confession which does not relate to such killing; and, further, that they should not permit the statements in the confession to prejudice them against the defendant, for the reason that they were only trying him on the charge of killing alleged in the indictment: *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975 [reversing *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571]. See also EVIDENCE.

Oral confessions are not merged in a later written confession and are also admissible: *State v. Lueth*, 5 O. C. C. 94, 3 O. C. D. 48.

Confessions should be given to the jury in full, but all that the defendant says is not entitled to equal credit: *Schneider v. State*, 2 O. C. C. 420, 1 O. C. D. 565.

F. EXPERT TESTIMONY.

The value of expert testimony is to be determined by the jury: *State v. Del Bello*, 8 O. D. (N.P.) 455.

The opinion of a physician on a hypothetical question which assumes material facts of which there is no evidence is irrelevant: *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

When a physician has given a full description of the wounds and their location, it is error to permit him to express his opinion as to the relative position of the parties at the time the fatal blow was struck, this is a matter of mere opinion which the jury is as capable of inferring as the physician: *Perkins v. State*, 5 O. C. C. 597, 3 O. C. D. 292. See also EVIDENCE.

G. VARIANCE.

Where an indictment charges the accused with having assaulted and killed one "Percy Stuckey, alias Frank McCormick," evidence

that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person: *Goodlove v. State*, 82 O. S. 365.

If an indictment charge the name of the person slain as Maria Gardiner, alias Maria Buel, and the proof shows her real name to have been Maria Frances Buel, though generally known by the names in the indictment, it is sufficient: *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32.

An indictment charging an unlawful killing while doing an unlawful act, viz.: procuring an abortion, is a good indictment for manslaughter. But if it appears on the trial that the death was in consequence of the unlawful act, and not merely during it, the offense is under the abortion act, and not manslaughter, and a variance (G. C., § 12412), since a person can not be indicted for one crime and tried for another: *State v. Barker*, 28 O. S. 583, III Longsdorf's Notes, 425 [distinguished *State v. Harper*, 35 O. S. 79, III Longsdorf's Notes, 758].

In an indictment for murder, it is not necessary that the alleged mortal wounds should be proved to be of the exact dimensions and descriptions set forth, but it is sufficient if they are substantially described, and if one or more of them is proved to be sufficient to produce death beyond a reasonable doubt, and that death was caused thereby: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

For the effect of a material variance, see also VARIANCE.

H. MISCELLANEOUS.

The implement used in committing a homicide may be considered by the jury: *Stewart v. State*, 1 O. S. 66, I Longsdorf's Notes, 941.

On a trial for murder during an affray it is error to exclude evidence offered by defendant as to what he was doing in the interval between the meeting of the parties and the affray. This is a vital question, for if the killing was in a sudden quarrel he could not be convicted of murder: *Stewart v. State*, 19 O. 302, I Longsdorf's Notes, 878.

Evidence of familiarity with firearms is competent to show that the shooting of the deceased was not accidental: *Weller v. State*, 19 O. C. C. 166, 10 O. C. D. 381.

Where A is charged with killing B by firing two shots it is not necessary to prove that either the first or second shot alone produced death: *Wray v. State*, 5 O. C. C. (N.S.) 437, 17 O. C. D. 1.

To lay a proper foundation for the introduction of testimony relating to the conduct

of bloodhounds placed on the track of the defendant, it is necessary to show that the particular dog had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was placed on the trail at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him: *State v. Dickerson*, 77 O. S. 34, IV Longsdorf's Notes, 1029.

A petition in a civil action is admissible to show that such an action was pending at the time of the crime, but not for the purpose of establishing the facts therein alleged: *State v. Snell*, 2 O. N. P. 55, 5 O. D. (N.P.) 670.

On a trial for homicide the state may prove what took place in the pursuit and capture of the defendant: *Zeltner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

An ordinance making it a misdemeanor to cause a vehicle to collide with a person is not admissible as evidence in a prosecution for manslaughter because of a death growing out of such a collision: *State v. Collingsworth*, 8 O. N. P. (N.S.) 383, 19 O. D. (N.P.) 557 [affirmed, *State v. Collingsworth*, 82 O. S. 154].

Where a person is on trial for manslaughter, by running an automobile in a business and closely built up portion of a municipality at a greater rate of speed than is permitted by G. C., § 12604, it is not competent to prove such fact by an ordinance of the municipality defining what are the business and closely built up portions thereof (G. C., § 12608): *State v. Born*, 85 O. S. 430. See also MOTOR VEHICLES.

Upon a trial for murder it is not error to admit evidence tending to show the discovery and location of the body of the murdered man: *Morrow v. State*, 24 O. C. D. 140.

VII. CHARGE OF THE COURT.

As to the instructions proper where the killing was done by use of a deadly weapon, see *Bailus v. State*, 16 O. C. C. 226, 8 O. C. D. 526; *Erwin v. State*, 29 O. S. 186, III Longsdorf's Notes, 455; *Williamson v. State*, 2 O. C. C. 292, 1 O. C. D. 492.

In a prosecution for murder where it is claimed the defendant acted in self-defense, a charge that "no other ground of justification or excuse than self-defense is claimed by the defendant, and no other will be considered by you," is erroneous in that it tends to exclude the right of the defendant to reduce the offense from murder to manslaughter: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v.*

Munday, 72 O. S. 614]. See also DEFENSE OF PERSON AND PROPERTY.

On the trial of an indictment for murder in the first degree where the court instructs the jury that if they shall find the defendant guilty as charged, they may, if they think proper, recommend mercy; and further instructs them that the legal effect of such recommendation by them will be to change the punishment of the accused from death to imprisonment in the penitentiary for life, such instruction is a correct and sufficient charge or instruction on that subject, and it is not necessary to instruct the jury that no person so convicted and imprisoned "shall be recommended for pardon * * * except upon proof of innocence established beyond a reasonable doubt": *State v. Schiller*, 70 O. S. 1, IV Longsdorf's Notes, 967.

Where manslaughter is erroneously defined in the charge and the jury returns a verdict of guilty of murder in the first degree there is no prejudicial error: *Zellner v. State*, 13 O. C. C. (N.S.) 417, 22 O. C. D. 102.

An erroneous charge on the subject of premeditation is not prejudicial unless the accused is convicted of murder in the first degree: *Thurman v. State*, 4 O. C. C. 141, 2 O. C. D. 466.

In a prosecution upon an indictment for murder in attempting to perpetrate a robbery, it is not error for the court, in connection with proper instructions with respect to the several degrees of murder, and as to assault and battery, to charge, if the facts proved warrant it, as follows: "Has the state established by clear, convincing and satisfactory evidence beyond a reasonable doubt, that the defendant is guilty as charged in the indictment or of some other degree of murder or manslaughter, or it may be assault and battery, or assault merely; otherwise your verdict should be not guilty": *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

Where the charge is murder in the first degree by administering poison, and the evidence shows no other grade of offense, it is error to charge that the accused may be found guilty of either murder in the first or second degree, or manslaughter: *Dresback v. State*, 38 O. S. 365, III Longsdorf's Notes, 975. See also VERDICT.

Where in a charge the word "excuse" instead of "justify" would have been technically the proper word, yet it is not to be supposed that the jury would be mistaken or misled by such use of the word "justify" rather than "excuse," and it would not constitute reversible error: *Carr v. State*, 21 O. C. C. 43, 11 O. C. D. 354.

A charge that "where self-defense is claimed and the homicide is sought to be ex-

cused on the ground of self-defense, it implies, it presupposes, that the deceased was intentionally killed," does not constitute reversible error: *Carr v. State*, 21 O. C. C. 44, 11 O. C. D. 354 [following but not approving *State v. Elliott*, 26 Bull. 116].

A charge to the effect that, when an intentional killing is proved beyond a reasonable doubt, the burden is on the defendant to make out his defense. Query, whether the use of the term "intentional killing" instead of "unlawful killing" is error: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483.

For a charge relative to the reputation of one accused of a capital offense, for peace and quietness, which was held not to be prejudicial, see *Watha v. State*, 14 O. C. C. (N. S.) 145, 24 O. C. D. 60 [motion to file petition in error overruled, *Watha v. State*, 9 O. L. R. 123].

Where, in the trial of an indictment for murder, the defense being insanity, the court before the argument to the jury, gave several instructions, at defendant's request, upon the questions of reasonable doubt of insanity, and a definition in the language of the statute defining the crime of murder in the first degree, in the second degree, and manslaughter, and again in his general charge defined these crimes, it is not error to refuse a further request of defendant defining manslaughter made after argument, such request being a correct abstract proposition of law, but being inapplicable to the defense of insanity or to the facts of the case: *Reighard v. State*, 22 O. C. C. 340, 12 O. C. D. 382.

To submit to a jury in a trial of one for murder, by a charge to that effect, a question as to the defendant's guilt, upon the theory of his "aiding and abetting" another who may have done the killing, when there was no evidence upon that point, is misleading and erroneous: *Donald v. State*, 21 O. C. C. 124, 11 O. C. D. 483. See also CHARGE OF COURT.

It is error to charge that there are no degrees of murder by poisoning but that the crime is first degree only: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

It is not error for the court at the trial of a criminal case to refuse to give an instruction to the jury in the case of the defendant before the commencement of the argument: *Morrow v. State*, 24 O. C. D. 140; *Umbenhauer v. State*, 4 O. C. C. 378, 2 O. C. D. 606 [motion for leave to file petition in error overruled by supreme court].

VIII. VERDICT.

A. MUST STATE DEGREE.

On an indictment for homicide the verdict should state the degree and if it does not the

court will refuse to pass sentence and award a new trial: *State v. Town*, W. 75, I Longsdorf's Notes, 6; *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32.

On the trial of an indictment charging the crime of murder in the first degree in the descriptive words of the statute, a verdict of "guilty in manner and form as he stands charged in said indictment," is sufficient: *Dick v. State*, 3 O. S. 89, II Longsdorf's Notes, 8; *Parks v. State*, 3 O. S. 101, II Longsdorf's Notes, 9.

A verdict of guilty of murder in the second degree without expressly acquitting the defendant of murder in the first degree, is good. Such verdict is equivalent to "not guilty" of the higher degree: *Morehead v. State*, 34 O. S. 212, III Longsdorf's Notes, 709; *Sutcliffe v. State*, 18 O. 469, I Longsdorf's Notes, 857.

The degree may be determined not merely from conduct before, and at the killing, but the jury may look at subsequent acts, as robbery from the corpse, concealing the body, false statements, and flight: *Blythe v. State*, 4 O. C. C. 435, 2 O. C. D. 636 [affirmed on other points, *Blythe v. State*, 47 O. S. 234, IV Longsdorf's Notes, 370].

The use in a verdict in a case of homicide of a figure to designate the degree of murder of which the defendant has been convicted, while to be reprobated as bad practice, does not prejudice the defendant nor afford ground for a reversal of the judgment: *Smile v. State*, 1 O. C. C. A. 142.

B. FOR INFERIOR OFFENSE.

One charged with murder in the first degree, if the evidence justifies it may be found guilty of murder in the second degree, or of manslaughter or of assault and battery: *Van Zant v. State*, 13 O. C. C. (N.S.) 526.

An indictment for murder in the first degree will sustain a conviction for manslaughter: *Robbins v. State*, 8 O. S. 131, II Longsdorf's Notes, 329.

An indictment for murder in the second degree will sustain a conviction of manslaughter: *Wroe v. State*, 20 O. S. 460, II Longsdorf's Notes, 1010; *State v. Noble*, 1 Dec. Rep. 1, 1 W. L. J. 23.

Under an indictment for murder in either degree, the jury may render a verdict of guilty of assault and battery only: *Marts v. State*, 26 O. S. 162, III Longsdorf's Notes, 294; *State v. Powell*, 1 Dec. Rep. 38, 1 W. L. J. 273.

Under an indictment for murder in the first degree a jury can not find the defendant guilty of riot: *Watha v. State*, 14 O. C. C. (N.S.) 145, 24 O. C. D. 60 [motion to file petition in error overruled, *Watha v. State*, 9 O. L. R. 123].

C. COURT INSTRUCTING AS TO DEGREE.

It is error for the court to charge the jury that if they find the prisoner guilty of the homicide they must state in their verdict that they find him guilty of murder in the first degree: *Beaudieu v. State*, 8 O. S. 634, II Longsdorf's Notes, 371.

It is the province of the jury to determine the particular grade of homicide and the court can not imperatively require the jury to render a verdict for a particular degree: *Adams v. State*, 29 O. S. 412, III Longsdorf's Notes, 481.

Where an indictment for murder in the first degree contains several counts, under either of which it is equally competent on the same proof to return a verdict of murder in the second degree, it is not to the prejudice of the accused for the court to restrict the jury in finding the defendant guilty of murder in the second degree, to one of the counts only: *Adams v. State*, 29 O. S. 412, III Longsdorf's Notes, 481.

Where the charge is murder in the first degree by administering poison, and the evidence shows no other grade of offense, it is error to charge that the accused may be found guilty of either murder in the first or second degree, or manslaughter: *Dresback v. State*, 38 O. S. 365, III Longsdorf's Notes, 975.

On trial for first degree murder it is not error to charge that the verdict may be returned for second degree, manslaughter, or assault and battery: *Van Zandt v. State*, 13 O. C. C. (N.S.) 526.

D. RECOMMENDING MERCY.

It is entirely within the province and discretion of the jury as to whether or not mercy or clemency toward the accused shall be recommended in their verdict of guilty of murder in the first degree. No testimony or proof from defendant is required, and when such recommendation is made, the court is bound to reduce the punishment to life imprisonment: *State v. Oppenheimer*, 49 Bull. 257.

Where public sentiment is worked up to such a pitch that a mob is formed, and without protest from any quarter the jail is stormed and one of the prisoners therein is torn from his cell and hanged to a telephone pole, and the court is called to pronounce sentence upon a youth on whom consumption has laid its hand who was caught in the tide on that fatal night and now stands before the bar in the place of responsible members of the community who aided in creating the frenzy but can not be reached by the law, justice requires that the sentence pronounced should be commensurate with the prisoner's moral guilt as compared with that of a

thousand others who have gone unwhipped, rather than that it should be commensurate with the enormity of the crime of the mob and the community as a whole: *State v. Sutley*, 9 O. L. R. 111.

HONOR, ACCEPTANCE FOR.

See NEGOTIABLE INSTRUMENTS.

HONOR, PAYMENT FOR.

See NEGOTIABLE INSTRUMENTS.

HOPE.

For confessions induced by hope of reward, see CONFESSIONS; EVIDENCE.

HORSE-RAILWAY.

For horse-railway, see STREET RAILWAYS AND INTERURBAN RAILWAYS.

HORSE.

For horses, see also ANIMALS; HORSE-STEALING.

The use of the word "nice" by a witness, who testified that the horse in question had a "nice round hoof," does not render the answer sufficiently objectionable to warrant a reversal of the judgment: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617.

A charge of court as to the right of a purchaser to return a horse not coming up to the warranty should specify that the return must have been made within a reasonable time and under circumstances which placed the vendor in *statu quo*: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617.

A charge of court to the effect that warranty of soundness would cover the condition of the shoulders, where the vendor had said of the thin shoulders that they were all right, was erroneous, unless it appeared that the fact that the horse was sweenied was not obvious to those who examined him: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617.

A verdict in favor of the defendant in an action for recovery on a warranty by him of a horse sold to the plaintiff, will not be set aside, where the evidence was such that the jury might, without bias or prejudice, but in the exercise of a sound judgment, have reached the conclusion that the horse was not sweenied at the time of the sale: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617.

The owner of a stallion is bound to use ordinary care in restraining him. Such owner is not guilty of contributory negligence

merely because G. C., § 5808, forbids the owner of a stallion to allow him to go or be at large and his stallion happened to be at large whereby he fell into a hole and was killed: *Kittredge v. Cincinnati*, 2 O. N. P. (N.S.) 6, 14 O. D. (N.P.) 504 [affirmed, *Kittredge v. Cincinnati*, 6 O. C. C. (N.S.) 646, 18 O. C. D. 100].

It is competent to prove by one acquainted with the habits and disposition of horses that a stallion is liable to jump over fences or break out of pasture: *Kittredge v. Cincinnati*, 6 O. C. C. (N.S.) 646, 18 O. C. D. 100 [affirming *Kittredge v. Cincinnati*, 2 O. N. P. (N.S.) 6, 14 O. D. (N.P.) 504].

In a present and executed sale of a stallion by one who is not a dealer in such horses for breeding purposes, there is no implied warranty that the stallion is reasonably fit for breeding purposes: *Thompson v. Miser*, 82 O. S. 289, IV Longsdorf's Notes, 1060. See also SALES.

Where, in a suit by a servant for recovery of damages from his employer for injuries resulting from the kick of a horse, the evidence shows a difference of opinion as to whether, at the time the injury was received, the animal was being handled in a horsemanlike manner, an issue is presented which should be given to the jury: *Hagan v. Ice Delivery Co.*, 2 O. N. P. (N.S.) 592, 15 O. D. (N.P.) 568. See also MASTER AND SERVANT.

Starting a horse suddenly by calling on him to "get up," whereby a party is thrown from the wagon is, under the circumstances of the case, not such negligence as will make the driver liable for the injury: *Flannagan v. Holloway*, 20 O. C. C. 700, 11 O. C. D. 373. See also NEGLIGENCE.

Where a horse was purchased under a warranty of soundness, etc., and paid for with a certified check, the purchaser can not stop payment of such check in the hands of third persons, because of the falsity of such warranty: *Blake v. Bank*, 9 O. C. C. (N.S.) 196, 19 O. C. D. 465.

Failure of the warranty that a horse is sound in every way, gives to the purchaser a right of action against the seller, either for damages or for rescission of contract: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617.

A servant does not assume the risk of viciousness on the part of an animal furnished him by the master, and if he did not previously know and continued in the service without discovering that the animal was vicious, and received an injury because of such viciousness, he can not be charged with contributory negligence: *Hagan v. Delivery Co.*, 2 O. N. P. (N.S.) 592, 15 O. D. (N.P.) 568.

The guaranty of a horse as sound and a good family horse is not available to the purchaser as a basis for damages resulting from his running away, where the purchaser from personal experience became aware of the vicious disposition of the horse before the runaway occurred: *Degenhardt v. Billings*, 13 O. C. C. (N.S.) 414, 23 O. C. D. 232.

Where there is testimony tending to prove the material averments as to the viciousness of a horse, under the scintilla rule, it is for the jury to determine whether under all the circumstances the horse was a vicious or kicking horse, and whether the owner knew or could have known that fact: *Hagen v. Delivery Co.*, 2 O. N. P. (N.S.) 592, 15 O. D. (N.P.) 568. See also TRIAL.

Where an action is for rescission of a contract for the purchase of a horse for failure of warranty, it is not error to exclude testimony to the effect that at the time of the trial the horse was dead; or the statement that certain of the witnesses were jurors at the trial of the same case before the justice of the peace; or to permit one who has had long experience with horses to testify, although not a veterinarian; or to exclude a statement of the purpose the witness had in examining the horse: *Palmer v. Cowie*, 7 O. C. C. (N.S.) 46, 17 O. C. D. 617. See also RESCISSION.

In a suit by a servant for recovery of damages from his employer for injury resulting in the course of his employment from the kick of a horse, it is not necessary to show knowledge on the part of the master that the horse would kick under the particular circumstances in which the injury was received: *Hagen v. Delivery Co.*, 2 O. N. P. (N.S.) 592, 15 O. D. (N.P.) 568.

In an action against the bailees of a team of horses, for causing the death of one of the horses and injuring the other by negligently driving the same, the burden is on the bailor to prove negligence, and it is not shifted by showing the horses were sound when delivered to the bailees, the bailor being immediately informed by the bailees of the circumstances attending the injury to the team: *McDonald v. Miser*, 2 O. C. C. (N.S.) 313, 15 O. C. D. 753. See also BAILMENT.

Notice to an agent or servant of a corporation in respect to a matter over which he has control, is notice to the company, but it can not be said that notice to a man whose business was to shovel snow off the track of a street railway, and who had nothing to do with the movement, control or management of a snow plow, which was left in the street, is notice to the company that horses had been frightened by it: *Transit Co. v. Stephenson*, 12 O. C. D. 631. See also CORPORATIONS.

HORSE-STEALING.

Scope Note.—Includes the stealing of a horse, mare, gelding, foal, filly, ass or a mule of any value; the receiving or buying of any such, knowing it to have been stolen; grounds of defense; and prosecution and punishment of such acts as public offenses. Excludes all other forms of larceny and receiving stolen property, and concealing of a horse-thief

Cross References.

For general questions, see AIDERS, ABETTERS AND ACCOMPLICES; ARREST; AUTREFOIS ACQUIT AND CONVICT; EXTRADITION; EVIDENCE; INDICTMENT; JURISDICTION; SENTENCE; VENUE; VERDICT.

For questions relating to sentence, see SENTENCE.

For stealing other property, see LARCENY.

For receiving other stolen property, see STOLEN PROPERTY.

For extradition for horse-stealing, see EXTRADITION.

ANALYTICAL OUTLINE.

- I. What Constitutes.
- II. Jurisdiction.
- III. Indictment.
- IV. Evidence.
- V. Verdict.

I. WHAT CONSTITUTES.

For statutory definition, see G. C., § 12448.

The wrongful taking and driving away of the horse of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining such reward, constitutes horse stealing: *Berry v. State*, 31 O. S. 219, III Longsdorf's Notes, 575.

The hiring of a horse merely as a subterfuge to get possession, may constitute, where there is a subsequent conversion, as by going to a destination other than the one for which the horse was hired, or a sale of the horse; but a mere offer to sell is not a sufficient conversion: *Anonymous*, 1 Dec. Rep. 279, 6 W. L. J. 566.

II. JURISDICTION.

Where A steals a horse in Illinois and brings him into Ohio, he may be convicted of horse stealing in this state, since there is a constructive taking at the time he crosses the boundary: *Hamilton v. State*, 11 O. 435, I Longsdorf's Notes, 579.

The doctrine of constructive taking does not apply where the original taking is in a foreign country: *Stanley v. State*, 24 O. S. 166, III Longsdorf's Notes, 167.

III. INDICTMENT.

Counts for horse stealing and grand larceny of other property, when they arise out of the same transaction, may be joined in the same indictment: *Barton v. State*, 18 O. 221, I Longsdorf's Notes, 843.

An indictment for maliciously killing a horse under G. C., § 13361, is sustained by evidence showing the killing of a gelding, since a gelding is not specified in that statute: *State v. Divine*, 2 Dec. Rep. 80, 1 W. L. M. 331.

IV. EVIDENCE.

The presumption of guilt arising from the possession of the stolen animal may be rebutted by evidence of a contract of sale between the accused and a third person. Declarations of the parties, at the time of the alleged sale, are a part of the *res gestae*, and competent evidence for that purpose: *Leggett v. State*, 15 O. 283, I Longsdorf's Notes, 712.

Evidence that the accused associated with horse thieves, or subsequently planned with others to steal horses, is not admissible in a prosecution for stealing a specified horse: *Cheney v. State*, 7 O. (pt. 1) 222, I Longsdorf's Notes, 375.

Evidence that the accused committed a larceny the night previous to the day on

which he is charged to have stolen a horse is not admissible: *Barton v. State*, 18 O. 221, I Longsdorf's Notes, 843.

Prior to G. C., § 13582, a prisoner indicted for stealing a "gray horse" could not be convicted upon proof of stealing a gray gelding: *Hooker v. State*, 4 O. 348, I Longsdorf's Notes, 225.

V. VERDICT.

G. C., § 13691, applies to the offense of horse stealing, and the verdict should show the value of the property stolen: *Armstrong v. State*, 21 O. S. 357, III Longsdorf's Notes, 34.

Where the indictment contains a count for horse stealing and one for grand larceny of other property, a general verdict of guilty, assessing the value of the property in gross, is erroneous: *Barton v. State*, 18 O. 221, I Longsdorf's Notes, 843.

HOSPITAL.

For Cincinnati Hospital, see CINCINNATI.

G. C., § 4022, authorizing a city to contract with a hospital association for the care of sick, and to acquire a permanent interest therein, is not contrary to Art. VIII, § 6 of the constitution, which forbids a city to aid any corporation, etc.: *Zanesville v. Crossland*, 8 O. C. C. 652, 4 O. C. D. 363.

G. C., §§ 3148, *et seq.*, which provide for establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis, is a valid exercise of legislative power not repugnant to the constitution: *Brisel v. State, ex rel.*, 87 O. S. 154.

G. C., § 3148, provides for the creation of a specific subdivision of the state, and the formation therein, of a joint board for the purpose of establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis. When the joint board provided for in that section has been duly formed in accordance therewith and has thereafter proceeded with the performance of the duties imposed on it by the statute, each of the counties whose commissioners have joined in the formation of such joint board has obligations in connection with the matter which are fixed and defined by the statute and which can not be terminated at the will of such county: *Brisel v. State, ex rel.*, 87 O. S. 154.

A district tuberculosis hospital is within the police power of the state to establish. But G. C., § 3148, making a board of trustees, one from each county, who shall determine the necessity for the hospital and the amount of taxes, and requiring the county

commissioners to levy the same, makes the trustees superior to the commissioners, and is void under Const. Art. VII, § 10, which requires the commissioners to determine the necessity and amount of taxes: *State, ex rel., v. Sippel*, 11 O. N. P. (N.S.) 555, 21 O. D. (N.P.) 587.

Creating a board of trustees to govern a city hospital is neither a law creating a corporation, nor conferring corporate power on the city. Such governing body is not a corporation: *State, ex rel., v. Davis*, 23 O. S. 434, III Longsdorf's Notes, 132. See also CONSTITUTIONAL LAW.

The power to issue bonds to raise funds for the repair and extension of a hospital belonging to a city, and to levy a tax upon all the taxable property within such city, for their payment, is corporate power: *Cincinnati v. Trustees Cincinnati Hospital*, 66 O. S. 440, IV Longsdorf's Notes, 911 [distinguishing *Cincinnati v. Taft*, 63 O. S. 141, IV Longsdorf's Notes, 850].

Taxing several counties constituting a district for a hospital in proportion to the number of patients from each is void for inequality: *State, ex rel., v. Sippel*, 11 O. N. P. (N.S.) 555, 21 O. D. (N.P.) 587.

A public charitable hospital organized as such and open to all persons although conducted under private management is not liable for injuries to a patient of the hospital resulting from the negligence of a nurse employed by it: *Taylor v. Hospital Association*, 85 O. S. 90.

The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such a patient: *Taylor v. Hospital Association*, 85 O. S. 90.

A corporation not for profit maintaining a charity hospital is not liable to a pay patient for negligence of a nurse—here by using water bags so hot as to inflict a burn: *Conner v. Sisters of the Poor*, 7 O. N. P. 514, 10 O. D. (N.P.) 86, 43 Bull. 353.

A hospital incorporated, organized and conducted for purely charitable purposes, having no capital stock and declaring no dividends, and having no income except that derived from voluntary subscriptions and from the rent of a few rooms to patients who are able to pay some reasonable compensation for treatment and nursing, and exercising due care and caution in the selection of its physician and surgeon and nurses, is not liable for injuries sustained by a patient from the negligence of its servants and agents: *Johnson v. Hospital*, 12 O. D. (N. P.) 795 [distinguishing *Dunn v. Agricultural Society*, 46 O. S. 93, IV Longsdorf's Notes, 314].

HOSPITAL ASSOCIATIONS.

See HOSPITAL; CHARITABLE CORPORATIONS.

HOSPITAL FOR INSANE.

See INSANE, IMBECILES AND IDIOTS.

HOSPITAL, LONGVIEW.

See INSANE, IMBECILES AND IDIOTS.

HOSPITAL, MUNICIPAL.

See HOSPITAL; MUNICIPAL CORPORATIONS; CINCINNATI CHILDREN'S HOME.

HOSTILE POSSESSION.

See LIMITATIONS, STATUTE OF.

HOSTILE WITNESS.

See EVIDENCE; WITNESSES.

HOTEL.

For hotel, see INNKEEPERS.

HOURS OF LABOR.

See CONSTITUTIONAL LAW; LABOR.

HOUSEBREAKING.

See BURGLARY.

HOUSEHOLD GOODS.

The benefits of G. C., § 8566, regulating procedure in the foreclosure of a chattel mortgage on necessary household goods, wearing apparel and mechanics' tools are not limited to married persons or heads of families: *Building & Loan Co. v. Newman*, 7 O. C. C. (N.S.) 213, 18 O. C. D. 103 [affirmed, without opinion, *Building & Loan Co. v. Newman*, 76 O. S. 579].

Household goods, formerly used by the owner but temporarily stored by him with the intention of resuming their use within a reasonable time, do not lose their character as necessary household goods within the purview of G. C., § 8566: *Building & Loan Co. v. Newman*, 7 O. C. C. (N.S.) 213, 18 O. C. D. 103 [affirmed, without opinion, *Building & Loan Co. v. Newman*, 76 O. S. 579].

A tender of the amount due on a chattel mortgage of necessary household goods,

wrongfully sold by the mortgagee thereof without foreclosure in a court of record as required by G. C., § 8566, is not a prerequisite to the institution of an action in conversion to recover the value thereof: *Druck v. Storage Co.*, 12 O. D. (N.P.) 521.

While the right of a mortgagee to sell property on which he holds a chattel mortgage after it has come into his possession is taken away by G. C., § 8566, which provides that, in case of household goods, etc., he must resort to the courts to realize upon the mortgage debt, he is not compelled to foreclose his mortgage; he may, at his option, replevin the mortgaged property, and give time to redeem. When, however, he wishes to realize the mortgage debt out of the mortgaged property, then he must proceed through some court of record: *Money Co. v. Nagle*, 13 O. D. (N.P.) 145.

The fact that a chattel mortgage covering household goods contains a provision authorizing the mortgagee to sell the goods, provided payments are not made pursuant to the terms of the mortgage, does not take such property out of G. C., § 8566, requiring the mortgage to be foreclosed in a court of record: *Druck v. Storage Co.*, 12 O. D. (N.P.) 521.

Under G. C., § 8566, relating to the foreclosure of mortgages on household goods, etc., the right of seizure, either by replevin or peaceable recaption, existing at law before its passage, is not taken away wholly, but is limited. It can not be exercised by the mortgagee personally, nor for the breach of every condition in the mortgage, but only when the mortgage is due or when the mortgagor is in danger of losing his security, and then only upon an order of a court of record or justice of the peace upon affidavit filed, setting forth the requisite facts. The proceeding is similar to that when heirlooms are replevied: *Money Co. v. Nagle*, 13 O. D. (N.P.) 145.

In a suit for the foreclosure of a chattel mortgage, where the plaintiff desires to have the goods seized away from the defendant,

the proper method of obtaining that relief is by an interlocutory motion and order, rather than by a replevin suit under the provisions of G. C., § 8566, relating to household goods, etc. This is upon the broad grounds of equity forbidding the bringing of a second independent action to enforce rights in a pending action: *Money Co. v. Nagle*, 13 O. D. (N.P.) 145.

Merely giving possession of household goods under a chattel mortgage, the intention being to part with possession only temporarily, does not deprive the property of the character of "necessary household goods" within G. C., § 8566, if in fact the property is absolutely necessary for household purposes: *Druck v. Storage Co.*, 12 O. D. (N.P.) 521.

Notwithstanding the amount realized from a sale of household goods under a chattel mortgage is not sufficient to pay the amount due thereon together with interest, storage charges, etc., if it appear that the goods were sacrificed at private sale, and especially without complying with G. C., § 8566, as to foreclosure in a court of record, etc., the mortgagor, in an action for conversion thereof, is entitled to receive the value of the goods at the time of the sale less the balance due thereon including the expenses before mentioned: *Druck v. Storage Co.*, 12 O. D. (N.P.) 521. See also CHATTEL MORTGAGES.

If necessary household goods are sold by a mortgagee otherwise than by regular foreclosure proceedings in a court of record, such sale is a conversion of the property: *Druck v. Storage Co.*, 12 O. D. (N.P.) 521.

HOUSE OF ASSIGNATION.

For house of assignment, see HOUSE OF ILL FAME.

HOUSE OF CORRECTION.

See BOYS' INDUSTRIAL SCHOOL; HOUSE OF REFUGE; GIRLS' INDUSTRIAL HOME.

HOUSE OF ILL FAME.

Scope Note.—Includes owning, letting, keeping, etc., house for purposes of prostitution; decoying females under age to enter therein; and prosecution of such acts as public offenses. Excludes contributing to delinquency of female; offenses relating to sale of intoxicating liquors; nuisance; and responsibility of infants, insane etc., for offenses.

Cross References.

For general questions, see AFFIDAVIT; AIDERS, ABETTERS AND ACCOMPLICES; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; JURISDICTION; SENTENCE; VENUE; VERDICT.

For responsibility for crime in case of infants, insane persons, etc., see CORPORATIONS; DURESS; ENTRAPMENT; HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For contributing to delinquency of minor, see **DELINQUENCY**.

For questions relating to intoxicating liquors, see **INTOXICATING LIQUOR**.

For house of ill fame as a nuisance, see **NUISANCE**.

For rights of lessor where tenant uses premises for house of ill fame, see **LANDLORD AND TENANT**.

For equitable protection of partnership interests in a house of ill fame, see **PARTNERSHIP**.

For the right to collect tax for the sale of intoxicating liquor, from a keeper of a house of ill fame, see **INTOXICATING LIQUOR**.

For the joinder of separate claims for penalties for sale of liquor in houses of ill fame, see **PLEADINGS**.

For validity of statute in regard to examination of the inmates of houses of ill fame, see **HEALTH**.

ANALYTICAL OUTLINE.

- I. Definition and Nature.
- II. Constitutionality and Construction of Statutes.
- III. Decoying Females.
- IV. Liabilities of Owners, Lessors, etc.
- V. Procedure.
 - A. Indictment and affidavit.
 - B. Evidence.

I. DEFINITION AND NATURE.

G. C., § 6193, defines a house of ill fame as a building or place generally reputed, in the neighborhood where located, to be a building or place where persons of opposite sex meet for the purpose of prostitution. A house of ill fame is a house kept for a resort for persons desiring to engage in unlawful sexual intercourse: *State, ex rel, v. Maloney*, 4 O. N. P. 197, 6 O. D. (N.P.) 209; *State v. Allen*, 3 O. N. P. 201, 6 O. D. (N.P.) 43; *State v. Weston*, 1 O. N. P. 350, 3 O. D. (N. P.) 15.

It is not necessary that a house occasion annoyance to the neighbors or to residents of the vicinity, or be a nuisance in order to be unlawful: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210.

All houses of ill fame are declared to be public nuisances: *Crofton v. State*, 25 O. S. 249, III Longsdorf's Notes, 227.

II. CONSTITUTIONALITY AND CONSTRUCTION OF STATUTES.

G. C., § 13199, prohibiting the sale of intoxicating liquors in brothels is not in conflict with the constitution of this state, or with Art. XIV of the constitution of the United States: *Schmeltz v. State*, 8 O. C. C. 82, 4 O. C. D. 287.

G. C., §§ 6193, *et seq.*, relating to houses of ill fame are valid and constitutional: *State v. Weston*, 1 O. N. P. 350, 3 O. D. (N. P.) 15; *State v. Somerville*, 1 O. N. P. 422, 3 O. D. (N.P.) 422; *State v. Allen*, 3 O. N. P. 201, 6 O. D. (N.P.) 43.

G. C., §§ 6193, *et seq.*, are general in their terms; and the definition here given may be used in a prosecution for keeping a house of ill-fame under G. C., § 13031: *State v. Alt-offer*, 2 O. N. P. 97, 3 O. D. (N.P.) 288.

Under a statute similar to G. C., § 3660, relating to the suppressing of houses of ill fame, a municipal corporation could not enact an ordinance prohibiting walking, riding or conversing with any lewd female: *Cady v. Barnesville*, 4 Dec. Rep. 396, 2 Clev. L. Rep. 100.

III. DECOYING FEMALES.

Guilty knowledge that the female who was induced to enter a house of prostitution is under eighteen years of age is not an essential element of the crime punished by G. C., § 13027: *Studer v. State*, 9 O. C. C. (N.S.) 185, 19 O. C. D. 33 [affirmed, without opinion, *Studer v. State*, 74 O. S. 519].

Where the inducing, decoying or procuring is done in one county, but the house of ill fame which is entered is in another county, the venue of the prosecution is properly laid in the county where the inducing, decoying or procuring was done: *Studer v. State*, 9 O. C. C. (N.S.) 185, 19 O. C. D. 33 [affirmed, without opinion, *Studer v. State*, 74 O. S. 519].

IV. LIABILITIES OF OWNERS, LESSORS, ETC.

A lessor may avoid a lease during the term where the lessee uses the premises for pur-

poses of prostitution: *Crofton v. State*, 25 O. S. 249, III Longsdorf's Notes, 227.

The sale of liquor at a house of ill fame, although contrary to statute nevertheless renders the vendor liable for the tax: *Watson v. Biddle*, 12 O. C. C. (N.S.) 238, 21 O. C. D. 578; *DeMonte v. Pabst*, 14 O. D. (N.P.) 97; *King v. Richardson*, 9 O. N. P. (N.S.) 209, 19 O. D. (N.P.) 578.

As to the liability of the owner of the premises under the Winn law, see *State, ex rel., v. Maloney*, 4 O. N. P. 197, 6 O. D. (N.P.) 209.

Want of knowledge on the part of the landlord that his premises are being used as a house of ill fame where intoxicating liquor is sold, is not a defense to an action against him for recovery by the state of the forfeiture of \$350 for which provision is made in G. C., § 6195, unless it unequivocally appears that the owner in good faith had no knowledge and never learned that the place was being thus used: *State v. Reese*, 10 O. N. P. (N.S.) 612, 23 O. D. (N.P.) 19, 56 Bull. 174.

Where a person owns and conducts a house of ill repute, the duty is imposed on her to know that those whom she permits in her house and to act apparently as her servants, shall obey the law, and in case they do not she as principal and proprietor of the house in which the delinquency occurs is liable to pay the penalty of the statute: *Smith v. State*, 14 O. C. C. (N.S.) 257.

In an action against the owner to recover the penalty for sale of liquor in a house of ill fame the petition need not aver that the owner knew the house was used as one of ill fame, but the owner may, however, prove such want of knowledge in defense. But his want of knowledge that liquor was sold is no defense: *State v. Somerville*, 1 O. N. P. 422, 3 O. D. (N.P.) 422.

A conviction under an indictment for knowingly permitting a house to be used for purposes of prostitution, should be set aside where the only facts proved are that the defendant innocently and in good faith leased the premises and afterwards refused during the term to avoid the lease, upon being informed that the lessee was maintaining a house of ill fame: *Crofton v. State*, 25 O. S. 249, III Longsdorf's Notes, 227.

Injunction will lie in case of a saloon so near a school house as to be a nuisance: *In re Board of Education v. Saloon*, 7 O. N. P. 289.

V. PROCEDURE.

A. INDICTMENT AND AFFIDAVIT.

An indictment which contains an averment that the accused, who was the owner of a cer-

tain house, knowingly permitted one M to use and occupy the same for the purpose of prostitution, is sufficient, without an averment in so many words that the house was in fact so used and occupied by M: *Crofton v. State*, 25 O. S. 249, III Longsdorf's Notes, 227.

Prosecution under a city ordinance for keeping a disorderly house where the offense is charged in the *continuando* a specific time need not be stated: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210. See AFFIDAVIT.

In a prosecution under a city ordinance similar in effect to G. C., § 13031, punishing the keeping of a house of ill fame, the affidavit need not allege scienter, or that the disorder or noise occasioned discomfort to the people of the community in which such house is maintained: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210.

The affidavit charged the defendant with selling intoxicating liquors on a certain day named, at the city of Cincinnati, in a brothel. The first count of the information charged her with selling at the same time and place, intoxicating liquors, to-wit: beer, in a brothel. This was not such a substantial or prejudicial variation or departure from the offense charged in the affidavit as to make the said count subject to a demurrer: *Schmeltz v. State*, 8 O. C. C. 82, 4 O. C. D. 287.

B. EVIDENCE.

Evidence that a house is generally reputed in the community in which it is maintained, to be a place where persons of opposite sex meet for the purpose of prostitution makes a *prima facie* case: *State v. Altoffer*, 2 O. N. P. 97, 3 O. D. (N.P.) 288.

Under an indictment against a tavern-keeper for permitting J and W and divers others to the jurors unknown to get drunk and be disorderly in his house, the persons are so far as J and W material. If J and W were not there and disorderly, proof as to others is to be excluded; if they were there proof as to others would be competent: *State v. Mallory*, T. 74.

Under an indictment against a tavern-keeper for permitting persons to get drunk and be disorderly in his house, the names of those frequenting the house need not be set out, for its character may be proved by reputation: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210.

But reputation that the house is a house of ill fame is not conclusive that such is its character: *State, ex rel., v. Maloney*, 4 O. N. P. 197, 6 O. D. (N.P.) 209.

Evidence with reference to the character of a house instead of direct evidence of its reputation is sufficient to show that the person in question is the keeper of a house of

ill fame; especially if the memorandum slips attached to the reports made by the state's agents together with other testimony in the case sufficiently show the reputation thereof: *DeMonte v. Pabst*, 14 O. D. (N. P.) 97.

HOUSE OF PROSTITUTION.

For house of prostitution, see HOUSE OF ILL FAME.

HOUSE OF REFUGE.

Scope Note.—Includes statutory provisions governing commitment to, support of inmates, compensation of employes, and release from houses of refuge. Excludes state industrial schools and reformatories, juvenile courts and guardian's control over child.

Cross References.

For house of refuge, see also BOYS' INDUSTRIAL SCHOOL; COURTS; GIRLS' INDUSTRIAL HOME.

For the control of a guardian over a child, see GUARDIAN AND WARD.

ANALYTICAL OUTLINE.

- I. Statutory Provisions, 8557.
- II. Commitment, 8558.
- III. Support of Inmates, 8559.
- IV. Compensation of Employes, 8559.
- V. Release, 8559.

I. STATUTORY PROVISIONS.

Art. V of the amendments of the constitution of the United States has no bearing on the constitutionality of 54 v. 166, § 8, and statutes subsequently enacted authorizing commitments to houses of refuge and the "State Reform Farm": *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

54 v. 166, § 8 (R. S., § 2054; repealed by implication, 99 v. 192) authorizing the establishment of houses of refuge, and the statutes subsequently enacted enlarging the operation of that act so as to authorize commitments to the "State Reform Farm" from any county of the state, are not repugnant to either sections 5 or 10, of Art. I of the constitution, guaranteeing a jury trial, etc.: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

The statute (R. S., § 2087, repealed, 96 v. 96, § 231; for the present statutes see G. C., §§ 4097, *et seq.*), under which proceedings and commitment of homeless children were authorized without notice to parents, etc., was not repugnant to Art. I, §§ 14, 16, of the constitution, as the law provided a full and complete remedy by *habeas corpus* for any infringement of parental rights: *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905.

Under former statutes, houses of refuge and correction, which were established prior to May 7, 1869, were governed by certain

statutes (R. S., §§ 2083 to 2089, repealed, 96 v. 96, § 231, and 2090, executed) while those established since such date were governed by other statutes (R. S., §§ 2031 to 2082, repealed in part, 96 v. 96, § 231, and for present statutes see G. C., §§ 4097 to 4123): *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905.

Infants committed for incorrigible conduct are not committed for an offense against the law of the state, and hence their expenses are to be provided as in G. C., § 4117: *State v. Schlatterbeck*, 39 O. S. 268, III Longsdorf's Notes, 1025.

II. COMMITMENT.

Proceedings for commitment of an infant to the house of refuge or the reform farm is neither a criminal prosecution, nor a proceeding according to the course of the common law; it is a purely statutory proceeding and the commitment is not designed as a punishment for crime, but to place minors coming within the terms of the statute under the guardianship of the public authorities named: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

The proceedings and commitment of a minor, whose father is living, to the house of refuge, under R. S., § 2087, clause 3, as amended 77 v. 217 (repealed, 96 v. 96, § 231; for present statutes, see G. C., §§ 4097, *et seq.*), are not void for want of notice to the

father: *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905.

If an infant is committed to a house of refuge on a false or groundless charge, such infant or those entitled to his custody are not without remedy. The existence of a sufficient cause of detention may be inquired into by *habeas corpus* if the remedy provided by the statute is inadequate or not available. It was queried but not decided, whether 54 v. 169, § 19 (G. C., § 4118) as to sufficient return to writ of *habeas corpus* can restrict constitutional jurisdiction of court to inquire fully into the causes of detention: *Prescott v. State*, 19 O. S. 184, II Longsdorf's Notes, 938.

III. SUPPORT OF INMATES.

Infants committed to a house of refuge and correction under R. S., § 2050 (for present statute, see G. C., § 4097; part repealed, 99 v. 192), for "incurable conduct" are not committed "for offenses against a law of the state," within the meaning of G. C., § 4116; and hence they must be supported as provided in G. C., § 4117, and not by the county: *State v. Schlatterbeck*, 39 O. S. 268, III Longsdorf's Notes, 1025.

IV. COMPENSATION OF EMPLOYEES.

Compensation of employees of the house of refuge may be fixed by the directors and certified to the city auditor under R. S., § 2039 (repealed 96 v. 96, § 231), without approval or appropriation by the city council: *State v. Cleveland*, 10 Dec. Rep. 571, 22 Bull. 113.

R. S., § 1693 (repealed 96 v. 96, § 231), forbidding the incurring of obligations except by ordinance, etc., does not apply to the claims for compensation of employees of a house of refuge, for this is not an appropriation, but paying a debt out of the fund applicable: *State v. Cleveland*, 10 Dec. Rep. 571, 22 Bull. 113.

R. S., § 2034 (repealed 96 v. 96, § 231), requiring the approval of council to the compensation of officers, etc., appointed by board of directors of house of refuge applies only to those employed in the executive work of the board; it does not apply to subordinate officers, guards, teachers and others performing services necessary to the daily running of the institution: *State v. Cleveland*, 10 Dec. Rep. 571, 22 Bull. 113.

V. RELEASE.

On a hearing of *habeas corpus*, the father, if an unsuitable person, is not entitled to the custody of a child committed to the house of refuge, on the ground that he had no notice

of the proceedings under which the commitment was had: *House of Refuge v. Ryan*, 37 O. S. 197, III Longsdorf's Notes, 905.

In determining the custody of an infant upon proceedings in *habeas corpus*, the best interests of the infant must be regarded primarily: *State, ex rel., v. Madden*, 12 O. D. (N.P.) 83 [affirmed, without opinion, *Madden v. State, ex rel.*, 68 O. S. 691].

HOUSE OF REPRESENTATIVES.

For house of representatives, see LEGISLATURE.

HOUSE OF WORSHIP.

See CHURCH.

HOUSES, SCHOOL.

See SCHOOLS, PUBLIC.

HOWLAND ACT.

For the Howland act, see INSURANCE.

The Howland act, providing that any person who solicits insurance and procures an application therefor shall be held to be the agent of the company thereafter issuing a policy on such application, anything in the policy to the contrary notwithstanding, was not intended to give to a mere solicitor of insurance all the powers of a general agent, or to change the rules of the common law as to the authority of an agent to bind his principal: *McBee v. Insurance Co.*, 11 O. N. P. (N.S.) 75.

HUCKSTER.

See HAWKERS AND PEDDLERS.

HUMANE SOCIETY.

G. C., § 10062, and the statutes on the subject of cruelty to animals (G. C., § 13376) are always of a general nature, are uniform in operation throughout the state and do not conflict with Art. II, § 26, of the Ohio constitution; nor do they conflict with Art. VIII, §§ 1, 2, 3, 4, 5 or 6; with Art. X, §§ 1 or 2; nor with Art. XIII, § 1, of the constitution of Ohio: *Beamer v. State*, 21 O. C. C. 440, 12 O. C. D. 4.

A former statute (Bates § 3725a) which provided that certain officers might kill any negligent or abandoned animal which was neglected or diseased was held to be unconstitutional by virtue of Art. I, § 19, of the

Ohio constitution: *Brill v. Humane Society*, 4 O. C. C. 358, 2 O. C. D. 594.

A city ordinance passed under such statute which provided for the sale of dogs found running at large without a license was held to be unconstitutional: *Archer v. Baertschi*, 8 O. C. C. 12, 4 O. C. D. 416.

G. C., § 10070, is valid and constitutional; and its validity can not be attacked by one who is being prosecuted in the name of the state for cruelty to animals: *Beamer v. State*, 21 O. C. C. 440, 12 O. C. D. 4.

Questions as to the organization and power of humane societies as provided by G. C., §§ 10062, 10070, 13423, and their right to receive fines imposed under G. C., § 13376, can not be raised in a proceeding in error by a defendant duly and legally convicted in a prosecution in the name of the state, of cruelty to animals, and sentenced to pay a fine: *Beamer v. State*, 21 O. C. C. 440, 12 O. C. D. 4.

G. C., § 10070, gives to a justice of the peace power to proceed with the trial of one who is accused of cruelty to animals upon the filing of a proper affidavit and without the filing of an information: *Muhlhauser v. State*, 1 O. C. C. (N.S.) 273, 15 O. C. D. 81.

Where the owner provides sufficient help to properly care for the animals placed in their charge, and exercises reasonable care and prudence in so doing, and provides wholesome food and water in sufficient quantities, it is sufficient defense to a charge of cruelty against such owner to show that he did not know that they were not being properly fed and cared for: *Muhlhauser v. State*, 1 O. C. C. (N.S.) 273, 15 O. C. D. 81.

The provision found in G. C., § 8673, requiring that the books and records of corporations shall be open to the inspection of stockholders at all reasonable times, has no reference to corporations formed under the chapter relating to humane societies, they being not for profit: *Humane Society v. Biles*, 11 O. C. C. (N.S.) 384, 20 O. C. D. 833.

A petition on the relation of an agent of a humane society to compel a police court clerk to issue a warrant must show either that the society was incorporated—else it can not appoint agents to make arrests and prosecute—or it must show that the agent is beneficially interested; else, by G. C., § 12287, it can not stand on his relation as an individual: *State, ex rel., v. Winans*, 1 Dayton Term Rep. (Iddings) 72.

Where the clerk of the police court improperly refuses to issue a warrant for arrest on the application of a humane society, such society can not file a mandamus on its own relation, even though incorporated, and demurrer lies for want of legal capacity, for under G. C., §§ 4313 and 4314, the city solicitor on behalf of the city must do so, or a taxpayer if he refuses: *State, ex rel., v. Winans*, 1 Dayton Term Rep. (Iddings) 72. See also MANDAMUS.

HUMAN LIFE.

See DEATH BY WRONGFUL ACT; HOMICIDE.

HUMILIATION.

See DAMAGES.

HUNTING.

For hunting, see also FISH AND GAME.

R. S., § 409-1 (97 v. 473, §§ 16 and 17, repealed, 99 v. 381; for a similar statute, see G. C., § 1412), prohibiting hunting, shooting or having implements for such purposes in the open air on Sunday, is within the power of the state to provide for the protection, preservation and propagation of game, and is not in violation of the constitutional guaranty that "the right to keep and bear arms shall not be abridged": *Walter v. State*, 3 O. N. P. (N.S.) 13, 15 O. D. (N.P.) 464 [affirmed, no report].

HUSBAND AND WIFE.

Scope Note.—Includes definition and nature of relation; scope and effect of statutory provisions; rights, powers, duties and liabilities of married persons, as between themselves and others; property-rights arising from marriage relation; disabilities and privileges of married woman; and actions by and against married women. Excludes contracts to marry; dower; curtesy; alimony; divorce, separation and annulment of marriage; adultery; bigamy; and husband and wife as witnesses for or against each other.

Cross References.

For formality, validity and effect of marriage, see MARRIAGE.

For the validity and effect of foreign marriages, see CONFLICT OF LAWS.

For questions of bigamy, see BIGAMY.

For questions of divorce, alimony and custody of children, see DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

For the right to the custody of the children and the duty to support them, see **PARENT AND CHILD**.

For agreements for voluntary separation as affecting the rights of children, see also **PARENT AND CHILD**.

For husband or wife as guardian of children, see **GUARDIAN AND WARD**.

For fraudulent conveyances between husband and wife, see also **FRAUDULENT CONVEYANCES**.

For competency of husband and wife as witnesses for or against each other, see also **WITNESSES**.

For joint contracts by a husband and wife, see also **CONTRACTS; NEGOTIABLE INSTRUMENTS**.

For conveyances under antenuptial contracts, see **DEEDS**.

For the right of the surviving wife to a year's allowance, see **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES**.

For homestead exemptions and exemptions in lieu of homestead, see **EXECUTION, WRIT OF**.

For interests in dower, see **DOWER**.

For questions of jointure, see **DOWER**.

For questions of descent and distribution, see **DESCENT AND DISTRIBUTION**.

For questions of bequests, legacies and devises, see **WILLS, LEGACIES AND DEVISES**.

For questions as to the right of burial of the body of deceased consort, see **CORPSE**.

For the acknowledgment of a deed by a married woman under former statute, see **ACKNOWLEDGMENT; DEEDS**.

For reformation of a defective deed of a married woman, see **REFORMATION**.

For estoppel of a married woman, see **ESTOPPEL**.

For the right of a surviving wife in case of the death of the husband by unlawful act, see **DEATH BY WRONGFUL ACT**.

For questions of damages, see **DAMAGES**.

For husband or wife as agent of the other, see also **AGENCY**.

For the liability of a married woman as surety, see **SURETYSHIP**.

For negligence of husband or wife imputed to the other, see also **NEGLIGENCE**.

For the necessity of making husband or wife a party in an action against the other, see also **PARTIES**.

For questions involving the statute of limitations, see **LIMITATIONS, STATUTE OF**.

For a mechanic's lien upon the property of a married woman, see **MECHANIC'S LIEN**.

For insurance by husband or wife in favor of the other, see **INSURANCE**.

For purchase by husband or wife in the name of the other, see **TRUSTS**.

For contracts to marry, see **BREACH OF PROMISE; CONTRACTS**.

For contracts in consideration of marriage, see **FRAUDS, STATUTE OF**.

For curtesy, see **DOWER**.

For adultery, see **ADULTERY; DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**.

ANALYTICAL OUTLINE.

I. Definition and Nature of Relation, 8567.

II. Scope and Effect of Statutory Provisions, 8568.

III. Who is Head of Family, 8569.

IV. Duty to Support Family, 8570.

A. *Common-law liability*, 8570.

B. *Liability of husband*, 8570.

C. *Liability of wife*, 8571.

D. *Liability on separation or divorce*, 8572.

V. Burial, 8575.

VI. Liability of Husband, 8576.

A. *Torts*, 8576.

B. *Antenuptial debts*, 8577.

1. *Common law*, 8577.

2. *Under statute*, 8577.

C. *Postnuptial contract*, 8577.

VII. Property-rights, 8578.

- A. *Power to hold property*, 8578.
- B. *Interest in property of other under modern statute*, 8579.
- C. *Right of husband in wife's property at common law*, 8582.
 - 1. *Personalty*, 8582.
 - a. *In absence of specific agreement*, 8582.
 - aa. *Interest acquired*, 8582.
 - bb. *Reduction to possession*, 8582.
 - b. *Under specific agreement*, 8585.
 - 2. *Realty*, 8585.
 - a. *Curtesy*, 8585.
 - b. *Coverture*, 8589.
- D. *Dower*, 8589.
- E. *Separate estate*, 8590.
 - 1. *What constitutes*, 8590.
 - 2. *Incidents*, 8594.
 - 3. *Disposition*, 8597.
 - 4. *Contract for sale*, 8600.
 - 5. *Method of charging*, 8601.
 - 6. *Nature of liability created by charge*, 8607.
 - 7. *Action to recover*, 8609.
- F. *Conveyances to husband and wife*, 8610.

VIII. Power of Married Woman to Contract, 8610.

- A. *Modern statute*, 8610.
- B. *Common law*, 8611.
 - 1. *In general*, 8611.
 - 2. *Specific facts giving capacity*, 8614.

IX. Contracts and Transactions Between Husband and Wife, 8614.

- A. *Anfenuptial contracts*, 8614.
 - 1. *In general*, 8614.
 - 2. *Elements*, 8615.
 - a. *Capacity*, 8615.
 - b. *Consideration*, 8615.
 - c. *Disclosure*, 8615.
 - d. *Reasonable*, 8616.
 - e. *Fraud*, 8616.
 - f. *Necessity of performance*, 8616.
 - 3. *Effect*, 8616.
 - a. *Title*, 8616.
 - b. *Dower*, 8617.
 - c. *Year's allowance*, 8618.
 - 4. *Foreign agreement*, 8619.
 - 5. *Agreement as to religion*, 8619.
- B. *Postnuptial transaction*, 8620.
 - 1. *Contracts*, 8620.
 - a. *In general*, 8620.
 - b. *Loans*, 8621.
 - c. *Gifts*, 8622.
 - d. *Release of dower*, 8623.
 - 2. *Agency as between husband and wife*, 8623.
 - 3. *Conveyances*, 8624.
 - 4. *Contract for separation*, 8627.

X. Conveyances in Fraud of Rights of Spouse, 8629.**XI. Conveyances by Married Woman, 8631.**

- XII. Power of Married Woman to Make a Will, 8634.**
- XIII. Power to Sue and be Sued, 8635.**
 - A. *In general*, 8635.
 - B. *Power to sue*, 8636.
 - C. *Suits against married women*, 8638.
- XIV. Power to Act as Executrix, 8639.**
- XV. Criminal Liability, 8639.**
- XVI. Liability of Third Person, 8640.**
 - A. *Alienation of affections*, 8640.
 - B. *Sale of drugs, etc.*, 8642.
 - C. *Personal injury*, 8643.
- XVII. Action by and Against Married Woman, 8643.**
 - A. *Jurisdiction*, 8643.
 - 1. *Equity*, 8643.
 - 2. *Justice of peace*, 8644.
 - B. *Parties*, 8646.
 - C. *Pleading*, 8646.
 - D. *Evidence*, 8648.
 - E. *Summons*, 8648.
 - F. *Judgment*, 8649.
 - 1. *Charge upon separate estate*, 8649.
 - 2. *Personal liability*, 8651.
 - G. *Review*, 8652.

I. DEFINITION AND NATURE OF RELATION.

Marriage is a contract relation founded in the mutual consent of the parties: *Waymire v. Jetmore*, 22 O. S. 271, III Longsdorf's Notes, 73.

Marriage is a relation that is more than a contract; it is a status or institution: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

Marriage is a contract made in due form of law by which a man and woman reciprocally engage to live together during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife: *Miller v. Miller*, 31 Bull. 141.

It is no less a crime that the entrance was with the wife's permission for illicit intercourse. She is incapable of consenting to breaking into the husband's house for an unlawful purpose: *Forsythe v. State*, 6 O. 19, I Longsdorf's Notes, 318. See also BURGLARY AND OTHER BREAKINGS.

The common law doctrine of the unity of husband and wife is modified in Ohio only as far as it is done by specific statutory provisions: *State v. Phillips*, 85 O. S. 317.

The unity of husband and wife has not been so far dissolved in Ohio (by G. C., § 7995-8004, or the larceny statute, § 12447) as to abrogate the common law rule that neither can be prosecuted for larceny of the goods of the other. Intention of the legislature to

create a crime unknown to the common law must appear unmistakably: *State v. Phillips*, 85 O. S. 317. See also LARCENY.

II. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

Statutes in derogation of the common laws must be construed strictly: *State v. Phillips*, 85 O. S. 317.

The purpose of the legislature in enacting the chapter on husband and wife was to do away with the common law rules, with regard to the interests and rights of husband and wife in the property of each other: *Hart v. Sarvis*, 3 O. N. P. 316, 3 O. D. (N.P.) 708.

At common law, a husband has a right of action against one who wrongfully, or through negligence injures his wife, to recover for the resulting loss of her services, and for his necessary medical, surgical and other expenses in healing her injuries; and this right of action is not abridged or affected by the legislation embraced in G. C., § 7995, and the following sections: *Railroad v. Glenn*, 66 O. S. 395, IV Longsdorf's Notes, 910.

The chapter on husband and wife may apply to a marriage consummated more than thirty years before such statute was enacted. The rights and duties growing out of such relation are not contractual in character; and the constitutional provision forbidding a state to impair the obligation of contracts

does not render this legislation unconstitutional: *Baughman v. Baughman*, 7 O. N. P. 328, 7 O. D. (N.P.) 433.

Under G. C., § 7995, and the other sections of the chapter, a wife is liable for the support of her husband, if such support becomes necessary, just as he is liable for her support under ordinary circumstances: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

Where the facts in the case go to show that a divorced woman believed in good faith she had a right to marry again, and the facts upon which she obtained a divorce would have rendered her subsequent marriage legal in any state except New York, and she lived with her second husband for a period of seventeen years until his death, she is entitled to all the benefits and privileges of being considered the widow of said second husband: *Sharp v. Sharp*, 9 O. N. P. (N.S.) 461, 20 O. D. (N.P.) 255.

An ordinance requiring brokers engaged in making chattel mortgage or salary loans to secure a license as a condition precedent to doing business within the municipality, is not invalid because the license fee is fixed at as high a figure as \$250, or because said brokers are required to keep records of the name of each pledgor, the amount of the loan, the rate of interest charged, the date when the loan is payable, and a description of the articles pledged, which record shall be filed in the office of the city auditor and be open to inspection by the mayor and chief of police, but a provision requiring that if the pledgor is a married man his wife must sign the application for the loan is of no effect: *Chambers v. Cincinnati*, 11 O. C. C. (N.S.) 273, 21 O. C. D. 8. See also MUNICIPAL CORPORATIONS.

G. C., § 6346-4, relating to lenders on chattels and salaries is not void by reason of its restricting a married man's right to borrow without his wife joining; for her interest in his means of supporting the family is such that justifies protection against improvident disposition of them: *Cain v. Loan Co.*, 12 O. N. P. (N.S.) 441, 22 O. D. (N.P.) 377 [affirmed, *Loan Co. v. State*, 15 O. C. C. (N.S.) 173, 24 O. C. D. 115, which was affirmed, without opinion, *Cain v. Loan Co.*, 88 O. S. — and *Sharp v. State*, 88 O. S. —].

III. WHO IS HEAD OF FAMILY.

Upon the death of the husband the wife becomes the head of the family: *Wing v. Hibbert*, 7 O. N. P. 124, 8 O. D. (N.P.) 65.

If the husband becomes insane and is confined in an asylum, his wife becomes the head of the family and may change her place of residence to another state, although her husband remains in confinement in the state

of her former residence: *McKnight v. Dudley*, 148 Fed. 204, 78 C. C. A. 162, 15 O. F. D. 288.

A wife deserted by her husband may occupy the homestead and be entitled to homestead exemptions by reason of such occupancy: *Ditney v. Ellifritz*, 8 O. C. C. 278, 4 O. C. D. 465.

IV. DUTY TO SUPPORT FAMILY.

A. COMMON-LAW LIABILITY.

At common law as well as by express statutory provision, a wife has the right of support and maintenance. To that extent she is to be regarded as the creditor of her husband, and she can enforce such rights against his property unless the rights of others have intervened: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

B. LIABILITY OF HUSBAND.

A husband is liable to a physician for medical attendance upon his wife, in the absence of a special contract imposing a different liability: *Toledo v. Duffy*, 13 O. C. C. 482, 7 O. C. D. 113.

A husband is primarily liable for the funeral expenses of his wife; and if he pays them, he is not entitled to be reimbursed from her estate: *Phillips v. Tolerton*, 9 O. N. P. (N.S.) 565, 20 O. D. (N.P.) 249 [affirmed by circuit court on memorandum opinion (see 9 O. N. P. (N.S.) 565). The judgment of the circuit court was affirmed by the supreme court, without opinion, in *Phillips v. Tolerton*, 82 O. S. 403].

A husband is liable for the funeral expenses of his wife who was living separate and apart from him, and whose death occurred while an action for divorce was pending and after an allowance had been made to her of alimony *pendente lite*: *Eveland v. Sherman*, 9 O. N. P. (N.S.) 559, 21 O. D. (N.P.) 726.

A father who is earning enough to support himself and his children is bound to support them, even if they have property of their own; and in the absence of a great disparity between the means of the minor and the means of the parent, the parent who has paid the expenses of the minor can not be reimbursed out of the minor's estate: *In re Gould*, 2 O. D. (N.P.) 398.

If a husband by his cruelty drives his wife from home and fails to support her, a township which has furnished support for her may recover the value thereof from the husband: *Howard v. Trustees*, 10 O. 365, 1 Longsdorf's Notes, 519.

Where a wife has voluntarily separated from her husband he is not liable for purchases by her though he has not given notice

of the separation: *Skillito v. Dukme*, 3 Dec. Rep. 336, 1 Gaz. 345.

A person buying necessities, either food or medicine, for his wife and children, is presumably acting as husband or father, and not as mere agent, and evidence to rebut this presumption must be quite clear: *Davis v. Guarnieri*, 45 O. S. 470, IV Longsdorf's Notes, 289.

Where money is expended by the trustees of a township, in a county having a poorhouse, for the support, as a pauper, of a wife abandoned by her husband, the money may be recovered from him, in a suit by the trustees, without her removal to the county poorhouse: *Trustees v. Demott*, 13 O. 105, I Longsdorf's Notes, 626.

C. LIABILITY OF WIFE.

The father is primarily liable for the support of the family. On his death, the mother becomes the head of the family and is primarily liable for the support of the children: *Wing v. Hibbert*, 7 O. N. P. 124, 8 O. D. (N.P.) 65.

That the mother becomes the head of the family upon the death of the husband, being bound to support the minor children and also entitled to their earnings, see also, *Fulton v. Fulton*, 52 O. S. 229, IV Longsdorf's Notes, 571.

In order to hold a married woman for supplies used in the support of the family, while the husband is living, it must be alleged and proved that the husband is unable to support the family out of his property, or by his labor; or some express contract must be shown imposing a personal liability upon the wife. An allegation and proof that the husband is insolvent is not of itself sufficient: *Kelley & Son v. Mills*, 1 O. N. P. 382, 2 O. D. (N.P.) 265.

In the absence of a contract with a wife or circumstances which raise a presumption that she intended to charge her separate estate therefor, no legal liability arises against her even for necessities required by the family; and tuition fees for services rendered to her child under a contract entered into by her husband can not be made a charge against her individually: *Kruger v. Baumgarten*, 9 O. N. P. (N.S.) 332, 20 O. D. (N.P.) 434.

A married woman who purchases goods for the use of her family is not personally liable therefor, in the absence of some specific provision to that effect in the contract: *McMillan v. Auerbach*, 7 O. N. P. 376, 3 O. D. (N.P.) 688.

A wife's presumed agency to order goods for family use on her husband's credit is not altered by our statute, and she is not personally liable unless she expressly agrees, but

if she orders them to be charged to herself and statements are made to her and payments by her, this tends to prove an agreement to be personally liable: *McMillan v. Auerbach*, 7 O. N. P. 376, 3 O. D. (N.P.) 688.

If the parties to a contemplated marriage know that the woman has large property, and that the man has little or no property and is aged and infirm; and under such circumstances the woman agrees to support her prospective husband; and after marriage she excludes him from her dwelling house by cruel treatment, and refuses to assist in his support, she is liable for his support and to that extent he has an interest in her property; and her property may be subject to the payment of the amount found by the courts to be proper alimony for his support: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

G. C., § 7995, requiring a wife to support her husband applies to a marriage consummated before the statute was passed and does not violate a contract, for there is an implied agreement to conform to all requirements: *Baughman v. Baughman*, 7 O. N. P. 328, 7 O. D. (N.P.) 433.

If a household servant is employed by the husband, he and not the wife is liable for the wages, but the wife's express promise to pay will make her liable: *Hackman v. Cedar*, 13 O. C. C. 619, 5 O. C. D. 293.

G. C., § 7997, is declaratory of the common law, making it the duty of the husband to support the family, with a modern proviso casting that duty on the wife in case of his entire inability: *Davis v. Fossett*, 1 Hosea, 528.

A suit against a widow for a debt of her deceased husband, based upon G. C., § 7997, can not be maintained without showing that the deceased husband's estate has been exhausted, even where the debt is shown to have been created for family necessities: *Davis v. Fossett*, 1 Hosea, 528.

Where the home belongs to the wife, the husband in purchasing an article therefor may be held to have acted as the agent of his wife, notwithstanding the article was charged to him individually: *Heater Co. v. Meckel*, 9 O. N. P. (N.S.) 581, 21 O. D. (N.P.) 722.

In a husband's action for support under G. C., §§ 7995 to 7997, no allowance *pendente lite* can be made against the wife to enable the husband to prosecute his action. This can only be done under express statute as in divorce cases: *Scully v. Scully*, 1 Dayton Term Rep. (Iddings) 18.

D. LIABILITY ON SEPARATION OR DIVORCE.

If a husband and wife separate by agreement, and the children are placed in the custody of a third person, the husband still

remains liable for their support, regardless of the terms of the contract of their separation; *Quigley v. Murphy*, 4 O. N. P. 1, 5 O. D. (N.P.) 680 [affirmed, *Murphy v. Quigley*, 21 O. C. C. 313, 11 O. C. D. 638, and affirmed, without opinion, *Murphy v. Quigley*, 85 O. S. 598].

It is not a defense to a prosecution under the act of April 16, 1890 (87 v. 216), that an agreement of separation was entered into by the accused and his wife, by which the latter, who was given the custody of their minor children, agreed for a valuable consideration to furnish them all proper support, and that after the mother became unable to support the children the accused offered to support them if she would surrender their custody to him which she refused to do: *Bowen v. State*, 56 O. S. 235, IV Longsdorf's Notes, 689.

The obligation of the father to provide reasonably for the support of his minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo*, on account of the husband's misconduct, gives to her the custody, care and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support. The mother may recover a reasonable compensation from the father, for the necessities furnished by her to the child after such decree, and may maintain an original action for such compensation against the father, in a court other than that in which the divorce was granted: *Pretzinger v. Pretzinger*, 45 O. S. 452, IV Longsdorf's Notes, 287.

Where a divorce, *a vinculo*, has been granted to a husband on account of the aggression of the wife, and the minor children of the parties assigned to the custody of the divorced wife, without an order respecting their maintenance, and while so in her custody she furnishes them necessities, she can not recover against her former husband, their father, for her expenditures in this behalf, in the absence of proof of a promise by him to pay for such necessities or of a request that they should be furnished to the children: *Fulton v. Fulton*, 52 O. S. 229, IV Longsdorf's Notes, 571 [distinguished, *Pretzinger v. Pretzinger*, 45 O. S. 452, IV Longsdorf's Notes, 287].

In an action brought by a divorced wife against her former husband for the support of their minor child, a charge to the jury which gives the impression that the father and mother are jointly liable for the support is erroneous. The primary liability rests upon the father; and the divorced wife may recover from her former husband for the necessary time spent in taking care of the child:

Young v. Young, 7 O. C. C. (N.S.) 419, 18 O. C. D. 179.

Alimony is not due and payable as debt, damages or penalty; but is an award by the court upon consideration of equity and public policy and is founded upon the obligation, which grows out of the marriage relation, that the husband must support his wife, which obligation continues after legal separation without her fault: *Fickel v. Granger*, 83 O. S. 101.

Alimony *pendente lite* releases a husband from further obligation to the support, and he can not be held for any debts contracted in that behalf: *Eveland v. Sherman*, 9 O. N. P. (N.S.) 559, 21 O. D. (N.P.) 726.

When one dies intestate leaving a widow, who, having separated from him, is permanently residing elsewhere, and the property on which he resided is brought to sale for the payment of a mortgage lien thereon and for the payment of his debts, she is not entitled to an allowance out of the proceeds in lieu of homestead, the widow's right in that regard being fixed by G. C., § 11732, which confines the right to "a widow composing a part of the decedent's family at the time of his death": *Nichols v. French*, 83 O. S. 162 [approving and following *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159].

If a husband procures a divorce for the wife's fault, but the custody of the child is awarded to her, but for no unfitness of his, he is not liable to her for the expenses of its support: *Christoff v. Christoff*, 6 O. C. C. 512, 3 O. C. D. 562.

An allowance in a divorce decree to the mother of a monthly sum for support of the children is not alimony, and accordingly is not appealable under G. C., § 12002: *Rogers v. Rogers*, 51 O. S. 1, IV Longsdorf's Notes, 527.

No liability for necessities exists after alimony *pendente lite* has been allowed and is not in arrears. It is the limit of the husband's liability: *Hare v. Gibson*, 32 O. S. 33, III Longsdorf's Notes, 619; *Knagge v. Pfeiffer*, 8 Dec. Rep. 122, 5 Bull. 794; *Sherer v. Price*, 3 O. C. C. 107, 2 O. C. D. 61.

The act of 1811 for the support of families abandoned by their husbands does not render void a deed by a man to provide for younger children made to members of the Shaker community, which his wife had already joined. Nor is a son thirty years old supporting himself within the protection of the statute: *Patterson v. Pease*, 5 O. 190, I Longsdorf's Notes, 262.

Where a husband and wife have separated, and the husband fails to make proper provision for the children, their mother has the right to remove them to some proper place and provide for their support and maintain-

ance, and for the reasonable expense of so doing the husband would be liable to the person who furnished the same at the request of the mother: *Quigley v. Murphy*, 4 O. N. P. 1, 5 O. D. (N.P.) 680.

An unacknowledged five-year lease by a husband and wife of her farm, being void as to her, is not a valid reduction into possession of the rents by him as against her, accordingly, his creditors can not reach the rents. Nor would a valid lease, unless the rents be expressly payable to the husband, be a reduction to possession: *McLeary v. Snider*, 2 Dec. Rep. 59, 1 W. L. M. 270. See also EXECUTION, WRIT OF.

A husband may be allowed alimony *pendente lite* where he is old and without means of support and the wife has a small income from real estate: *Scully v. Scully*, 1 Dayton Term Rep. (Iddings) 10.

A husband who is meritorious will be allowed alimony out of the estate of a wife, which she is squandering, to secure a part of the children: *Bingaman v. Bingaman*, 8 O. D. (N. P.) 692, 37 Bull. 37.

A husband will not be allowed alimony out of his wife's estate on a divorce being granted her where he has not shown his money or labor has enhanced its value, and that it has cost him something to live with her: *Lidy v. Lidy*, 8 O. D. (N. P.) 699, 35 Bull. 358. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

V. BURIAL.

Where both a husband and his wife are possessed of ample estates, and the husband pays out of his own funds the funeral expenses of his wife, he is not entitled to reimbursement from her estate: *Phillips v. Tolerton*, 9 O. N. P. (N. S.) 565, 20 O. D. (N. P.) 249 [which was affirmed, without opinion, *Phillips v. Tolerton*, 82 O. S. 403].

A husband is liable for the funeral expenses of his wife who was living separate and apart from him and whose death occurred while an action for divorce was pending and after an allowance had been made to her of alimony *pendente lite*: *Eveland v. Sherman*, 9 O. N. P. (N.S.) 559, 21 O. D. (N.P.) 726.

If the executor of a deceased married woman pays the funeral expenses he may have credit therefor, although her husband has property and the executor has not taken any steps to recover such expenses from such husband: *McClellan v. Filson*, 44 O. S. 184, IV Longsdorf's Notes, 203.

Under statutes of Ohio prior to G. C. § 7997, a husband who had paid the funeral expenses of his wife could not be reimbursed out of her estate, even if, by will, she directed the payment of her funeral expenses out of

her estate: *Richter v. Richter*, 11 Dec. Rep. 377, 26 Bull. 201.

It is the duty of a widow as the heir or next of kin of her deceased husband to dispose of his body in a reasonable and sanitary manner, and where in conformity with his expressed desire she elects to cremate his body, injunction will not lie against that method of disposal, where based only on sentimental objections to cremation on the part of other near relatives: *Evans v. Evans*, 12 O. N. P. (N.S.) 619, 23 O. D. (N.P.) 375.

VI. LIABILITY OF HUSBAND.

A. TORTS.

Prior to the enactment of a statute specifically relieving a husband from liability for the torts of his wife, the other changes in statutes with reference to the property of married women and their powers to make contracts, did not relieve the husband from such liability: *Fowler v. Chichester*, 26 O. S. 9, III Longsdorf's Notes, 280; *Holtz v. Dick*, 42 O. S. 23, IV Longsdorf's Notes, 86.

A husband is liable for his wife's torts, though innocent; thus both are liable for her acts unknown to her husband and not encouraged by him in inducing plaintiff's wife to abandon him: *Holtz v. Dick*, 42 O. S. 23, IV Longsdorf's Notes, 86.

For a tort by husband and wife jointly, the action should be against him alone; accordingly, if he is found not guilty, the action fails, for there is no use in taking a verdict against the wife: *Sisco v. Cheeney*, W. 9, I Longsdorf's Notes, 1.

If the action is against both for a tort not susceptible of joint commission, or is against him alone for her separate act, and this appears on the face of the pleadings, the defendant may demur, move in arrest, or take error: *Sisco v. Cheeney*, W. 9, I Longsdorf's Notes, 1.

If husband and wife are jointly sued for assault and battery by her, she can not control her defense or a compromise against his wishes, and his confession of judgment for both will not be interfered with: *Graf v. Wirthweine*, 12 Dec. Rep. 4, 1 H. 19.

G. C., § 11246, that she may defend for her own right, refers to cases which involve her separate rights and property as distinct from his: *Coolidge v. Harris*, 8 O. S. 594, II Longsdorf's Notes, 369.

In suing for the tort of a married woman her husband must be joined as defendant. Accordingly, charging a joint wrong is not demurrable on the presumption that her act was under coercion, but she must rely on coercion by answer: *Clark v. Beyer*, 32 O. S. 299, III Longsdorf's Notes, 634.

For a conversion by a married woman of plaintiff's property, the action should join her husband as codefendant, G. C., § 11245, but a general demurrer does not reach the objection: *Dunning v. Choate*, 8 Dec. Rep. 316, 7 Bull. 77.

If a woman who seduced plaintiff's husband from her is married to him after plaintiff has obtained a divorce, both may be sued for the loss of consortium, because a husband is liable for his wife's antenuptial torts as well as debts: *Scheurer v. Scheurer*, 4 Dec. Rep. 297, 1 Clev. L. Rep. 233, 3 Bull. 689.

B. ANTENUPTIAL DEBTS.

1. Common Law.

Prior to the legislation specifically relieving a husband from liability for his wife's antenuptial debts, such common law liability remained; and it was not destroyed by implication by the statutes on the subject of the separate property rights of married women: *Alexander v. Morgan*, 31 O. S. 546, III Longsdorf's Notes, 604; *Bruder v. Biehl*, 1 O. C. C. 85, 1 O. C. D. 51.

The law in force at the time of marriage governs the husband's liability for antenuptial debts, and a joint judgment against both could be rendered thereon before the act of 1884: *Bruder v. Biehl*, 1 O. C. C. 85, 1 O. C. D. 51.

2. Under Statute.

Under an earlier form of G. C., § 7997, a husband was not liable for his wife's antenuptial debts, by reason of the fact that she devised certain property to him: *Hina v. Rath*, 9 Dec. Rep. 586, 15 Bull. 183.

R. S., § 3110, as amended in 1884 (for present form, see G. C., § 7997), that a husband shall not be liable for antenuptial debts except to the extent of property acquired by him, was not intended to create a liability; hence, as his liability at common law was only during coverture, becoming her devisee does not make him liable for an antenuptial debt except as he takes the property subject to debts: *Hina v. Rath*, 9 Dec. Rep. 586, 15 Bull. 183 [affirmed by circuit court; see *Hina v. Rath*, 15 Bull. 249 (editorial)].

C. POSTNUPTIAL CONTRACT.

A husband is not liable on the wife's contract retaining a lawyer to prosecute her divorce: *Dorsey v. Goodenow*, W. 120, I Longsdorf's Notes, 10.

The wife's attorney can not recover an additional sum as attorney's fees, and after dismissal of the case by consent of the parties, who live together again, the husband is

not liable in a further sum: *Sherer v. Price*, 3 O. C. C. 107, 2 O. C. D. 61. See also *DIVORCE, ALIMONY AND CUSTODY OF CHILDREN*.

Where a wife is living separate and apart from her husband, and, in a suit against him for divorce and alimony, has obtained a decree fixing the amount of alimony to be paid by the husband for her sustenance, during the pendency of her petition, and husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessities subsequently furnished at her request during the pendency of her petition. Persons dealing with the wife under these circumstances do so at their own peril, and are chargeable with knowledge of the allotment and payment of the alimony: *Hare v. Gibson*, 32 O. S. 33, III Longsdorf's Notes, 619.

The husband is bound to provide his wife with necessities during coverture, and if he refused to do it, and she contracts debts for such necessities, even during cohabitation, he is obliged to pay those debts; but for anything beyond necessities he is not chargeable. 2 Kent Com. 146. And if he turn her out of doors, or if she receive such treatment from him as renders it unsafe for her to cohabit with him, he will be bound by her contracts for necessities suitable to her condition and standing in life. And although he may have given notice that he will not be answerable for debts of her contracting, and this notice is brought home to the knowledge of the individual furnishing her with necessities he will still be liable: *Howard v. Trustees*, 10 O. 365, I Longsdorf's Notes, 519.

The liability of a husband for necessities or care furnished to his wife is not affected by the fact that he is insane or mentally incompetent to transact business, and an action for recovery for services or necessities so furnished may be maintained against the administrator of such husband notwithstanding the indebtedness was incurred during the lifetime of the husband and was not approved by his guardian: *Badger v. Orr*, 1 O. C. C. A. 49.

For duty of husband to support family, see *DUTY TO SUPPORT FAMILY*, IV, herein.

VII. PROPERTY-RIGHTS.

A. POWER TO HOLD PROPERTY.

If an equitable estate is conveyed to a husband and wife jointly, there is no survivorship therein: *Wilson v. Fleming*, 13 O. 68, I Longsdorf's Notes, 624.

A wife does not have a separate estate since the act of 1887. The wife's rights in her property are now the same as if she were single: *Kelley & Son v. Mills*, 1 O. N. P. 382, 2 O. D. (N.P.) 265.

If title is taken in the wife's name the presumption of a trust arising from buying property in another's name is rebutted, and a trust must be proved by clear and satisfactory evidence: *Duvelmeyer v. Duvelmeyer*, 5 O. N. P. 89, 7 O. D. (N.P.) 426. See also TRUSTS.

B. INTEREST IN PROPERTY OF OTHER UNDER MODERN STATUTE.

A married woman's rights with reference to her husband's property are not enlarged by G. C., §11591: *Banking Co. v. Hoffman*, 1 O. N. P. (N.S.) 349, 14 O. D. (N.P.) 225.

Even our present statutory provisions do not make it legally possible for the wife to commit larceny by converting the property of her husband: *State v. Phillips*, 85 O. S. 317.

Larceny is not committed by a husband in stealing his wife's separate property, though they were living apart. The separate property acts do not dissolve the unity of the spouses, and a wife at common law was not guilty of larceny if she appropriated the husband's property: *State v. Parker*, 3 Dec. Rep. 551, Ohio L. J. 551.

Under former statutes the marriage of a woman with the debtor extinguished the debt and she can not sue her husband's estate after his death. The act of 1861 only made her property separate, taking away the husband's control, but did not create new rights: *Smiley v. Smiley*, 18 O. S. 543, II Longsdorf's Notes, 916.

Debts due to a woman are not extinguished by her marriage with the debtor: *Hart v. Sarvis*, 3 O. N. P. 316, 3 O. D. (N.P.) 708.

The property rights of a married woman in Ohio are fixed by statute, and she may maintain an action in her own name to recover a money judgment against her husband: *Brenneman v. Brenneman*, 1 O. N. P. 332, 3 O. D. (N.P.) 392.

A person's individual creditors do not derive the right to subject the earnings of a business to the payment of his debts, from the facts that he negotiated a loan for and signed a note with his wife and others to enable her to raise money to carry on a business, in which his wife and son and a third person were partners; that he received the money and deposited it in his own name in the bank, and subsequently drew it out for the payment of the purchase price, and other expenses of the partnership business; that later, upon the incorporation of the business, he nominally became a stockholder and director and president of the concern, and represented his wife's and son's interest; that he deposited the earnings of his wife and son in their names; that he loaned money so

deposited to the bank as agent of his wife and son; that his wife and son approved and ratified his control of the money, the payment of certain of his individual debts with it, and the payment of household expenses out of the earnings of the business: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

Although at a wife's request her husband attended to the management and control of a corporation in which she was interested, and by his skill and labor helped to produce valuable results, real estate purchased by her with money arising out of her share of the profits of the corporation, can not upon that ground be subjected to the payment of her husband's debts: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

A deed of a farm from an old man, possessed of considerable property, and having no children, to his niece, she agreeing to pay him a certain amount of cash and an annuity for his life, the income of the farm being sufficient to pay the latter, and on his death to pay certain amounts to other heirs, the niece going upon the land, paying for and improving the same, is a valid transfer to the niece, and the creditors of her husband have no rights therein because of his being employed by his wife to look after her business, the profits of which went to pay for such farm: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

Real estate owned by a member of a corporation and conveyed for value to the grantor's father-in-law, in satisfaction of money loaned to the grantor, and part due, and which is subsequently deeded by the father-in-law to his daughter, the wife of the first grantor as a deed of gift and advancement, can not be subjected to the payment of the debts of the first grantor: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121 [distinguishing *Glidden Co. v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796; *Quigley v. Graham*, 18 O. S. 42, II Longsdorf's Notes, 864].

When a married woman is named as a beneficiary in a policy of insurance on the life of her husband she is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death: *Overhiser v. Overhiser*, 63 O. S. 77, IV Longsdorf's Notes, 849 [affirming *Overhiser v. Insurance Co.*, 7 O. N. P. 527, 5 O. D. (N. P.) 561]. See also INSURANCE.

A wife has no vested interest in a certificate of insurance issued by a fraternal order, and another beneficiary may be substituted for her without her consent; but if it appear that premiums on the policy were paid by her out of her personal earnings either regularly or occasionally, a court will order that the amounts so paid by her be returned to her out of the proceeds of the policy: *Na-*

tional Union v. Shaw, 9 O. N. P. (N.S.) 474, 20 O. D. (N.P.) 255.

The fact that a husband and wife separate, and live apart for a number of years, does not destroy the wife's right of allowance from the estate as widow; unless divorced, the wife at his death is entitled to a year's support and the articles of personal property mentioned in the statute: *In re McMillan*, 8 O. C. C. (N.S.) 294, 18 O. C. D. 645. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

A testator, by disposing of all his personalty to the exclusion of his wife, can not deprive her of her distributive share under G. C., § 8592: *Doyle v. Doyle*, 50 O. S. 330, IV Longsdorf's Notes, 500 [reversing *Doyle v. Doyle*, 27 Bull. 378]. See also DESCENT AND DISTRIBUTION.

The husband has absolute dominion over his personal property during his lifetime; and he may deprive his wife of her distributive interest in the same by a *bona fide* gift *inter vivos*. The fact that this gift was made in order to prevent his wife from receiving a distributive share of such personal property does not amount to a fraud upon her rights: *Brodt v. Rannells*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

A jointure made and accepted during coverture, in full of all claims as widow including dower, does not bar the year's allowance: *Spangler v. Dukes*, 39 O. S. 642, III Longsdorf's Notes, 1056.

Under the laws of Ohio a widow is entitled to have an allowance for a year's support made by appraisers, notwithstanding a fair agreement of separation between the husband and wife: *Knese v. Hake*, 16 O. D. (N.P.) 466, 3 O. L. R. 610.

Where a wife joins in the granting clause of a mortgage on her husband's property, and also in the testatum clause releasing her dower, in the absence of fraud, accident or mistake, she thereby releases any and all right, title or interest, whether legal, equitable, vested or inchoate, she may have in the premises: *Whiting v. Jeffords*, 14 O. D. (N.P.) 11.

A clause in a will provided: "In no instance shall the husband of any such children have any power or control over the principal or interest of such share." The term "husband" can not be limited in its application to the husband then living, but will be held to apply to any husband: *Robbins v. Smith*, 72 O. S. 1, IV Longsdorf's Notes, 987 [affirming *Robbins v. Smith*, 5 O. C. C. (N.S.) 545, 17 O. C. D. 91]. See also WILLS, LEGACIES AND DEVISES.

By the common law as well as express statute a wife has the right as against her husband to support and maintenance. She

is to that extent a creditor of the husband, and can enforce such right against his property unless the rights of others have intervened to exclude her: *Chittenden v. Chittenden*, 22 O. C. C. 489, 12 O. C. D. 504.

A mortgage by A and wife of his land, the certificate of acknowledgment omitting his name by mistake, was held to have been properly recorded as to her and to bind her interest: *Stramann v. Recktime*, 58 O. S. 443, IV Longsdorf's Notes, 744.

C. RIGHT OF HUSBAND IN WIFE'S PROPERTY AT COMMON LAW.

1. Personalty.

(a) In Absence of Specific Agreement.

(aa) Interest Acquired.

In the absence of specific statutory provision or of valid agreement to the contrary, the husband upon marriage became the owner of his wife's choses in possession; and of such choses in action, belonging to her, as he reduced to possession: *Ramsdall v. Craighill*, 9 O. 197, I Longsdorf's Notes, 476; *Walden v. Chambers*, 7 O. S. 30, II Longsdorf's Notes, 267.

Choses in action belonging to the wife at the time of marriage, and not reduced to possession during coverture, will go to her representatives, charged with her debts *dum sola*: *Dixon v. Dixon*, 18 O. 113, I Longsdorf's Notes, 839.

If a husband has not reduced to possession during coverture a legacy which belongs to his wife, he can not, after her death, collect such legacy in his own name: *Curry v. Fulkinson*, 14 O. 100, I Longsdorf's Notes, 658.

If the husband makes no attempt to reduce to his possession a note given to his wife either before or after coverture, such note remains her property: *Hoop v. Plummer*, 14 O. S. 448, II Longsdorf's Notes, 674.

(bb) Reduction to Possession.

To constitute reduction to possession by a husband of his wife's personalty there must be an intent to appropriate to his own use as well as an appropriation and the mere fact that wife lets the husband have her money to use in his business is not sufficient and may constitute a valuable consideration for a subsequent conveyance to her: *Douglass v. Miller*, 3 O. N. P. 220, 4 O. D. (N.P.) 414.

The act of 1871 (68 v. 48), that a wife's separate property delivered to her husband is not deemed reduced to his possession except by her express assent, applied to money delivered by her to him in 1879, and the burden is on him when sued by her adminis-

trator for it to show her express assent: *Yocum v. Allen*, 58 O. S. 280, IV Longsdorf's Notes, 738.

A reduction to possession did not make it the husband's property if the contrary was agreed, as where a husband bought lands with his wife's money, under an antenuptial agreement to invest it for her benefit, but took the title in his own name, a trust will result in her favor, although the money was received before the act of 1861: *Sessions v. Trevitt*, 39 O. S. 259, III Longsdorf's Notes, 1025.

The proceeds of the wife's separate property, or of a mortgage on it, are not reduced to possession of the husband by passing through his hands for reinvestment, so that his creditors can reach it. The wife's assent is necessary: *Newton v. Clark*, 12 Dec. Rep. 613, 1 D. 265.

Where a husband appropriates notes and money belonging to his wife to his own use, and during the remainder of his life covering a period of nearly thirty years renders no account to her as to either principal or interest, and she requested none, but repeatedly said there was but one pocketbook in the family, and after his death she elected to take under his will, which disposed of all property standing in his name without acknowledging any indebtedness to her, and the declaration was made by her that all her property had been given to him to dispose of as he saw fit, there is a clear reduction of the wife's property by the husband into his possession: *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

If husband and wife joined in selling her real property at common law; and he received such money and bought real property therewith in his own name, this amounts to a reduction to his possession, and such real property belonged to the husband: *Ramsdall v. Craighill*, 9 O. 197, I Longsdorf's Notes, 476.

At common law a husband is liable for his wife's antenuptial debts and support during coverture, and her choses in action reduced into possession, and also her personal chattel rest in him absolutely: *Walden v. Walden*, 7 O. S. 30, II Longsdorf's Notes, 267.

If a man, who is an executor, marries a woman who is one of the beneficiaries of the estate, and after an order of distribution he retains the amount of her legacy in his hands, this is a reduction thereof to his possession, and vests the title thereof in the husband: *Walden v. Chambers*, 7 O. S. 30, II Longsdorf's Notes, 267.

Money obtained by a husband as his wife's share of her father's estate thirty-five years

ago in 1858 and invested by him in land in his own name is reduced to possession and became his property if there was no agreement to hold the land in trust for her. And his mere statement that the land was bought with his wife's money is not sufficient to show a trust, for convincing proof is required: *Boyer v. Davis*, 17 O. C. C. 191, 9 O. C. D. 526.

If a husband brings an action as trustee for his wife for her sole benefit, and at her request, the fact that he brings such suit in his name for her separate property, and that he obtains judgment in such action is not conclusive that he has reduced such property to his possession: *Pierson v. Smith*, 9 O. S. 554, II Longsdorf's Notes, 398.

A married woman's right in choses in action, immediately reducible into possession, may be barred in various ways; among them is assignment or transfer of them by the husband. But his assignment or transfer of her reversionary interest, or in expectancy, is not a substantial reduction into possession, for the interest is not capable of immediate possession, and the assignee gets no better right than the assignor: *Needles v. Needles*, 7 O. S. 432, II Longsdorf's Notes, 310.

Receiving interest, or a part of the principal, during coverture, is not a reduction to possession. Nor is recovering judgment in their joint names, if not collected: *Buckingham v. Carter*, 12 Dec. Rep. 26, 2 D. 41 [affirming *Carter v. Buckingham*, 12 Dec. Rep. 202, 1 H. 395].

A man who has squandered all his wife's disposable means and left her destitute can not get the aid of equity to reach any money coming to her, but will be left to his legal remedies: *Nevitt v. McAroy*, W. 289, 1 Longsdorf's Notes, 23.

Debts due to a woman were extinguished by her intermarriage with the debtor, and the statute of April 3, 1861 (58 v. 54), did not enable her to recover the same from his estate after his death: *Smiley v. Smiley*, 18 O. S. 543, II Longsdorf's Notes, 916.

If a husband borrowed money from his wife, and gave a note therefor, such note was regarded as a valid obligation in equity: *Huber v. Huber*, 10 O. 371, I Longsdorf's Notes, 520.

Choses in action of a wife will be deemed reduced to the husband's possession either by his obtaining payment, or by getting judgment on them in his own name, or by assigning them to third persons, or by substituting other securities taken in his own name. If not reduced into his possession in one of these ways before her death they will descend to her administrator charged with her debts. His mere possession of a note payable to her or bearer *dum sola*, is not a

reduction to possession: *Dixon v. Dixon*, 18 O. 113, I Longsdorf's Notes, 839.

Creditors of the husband can not reach choses in action of the wife not reduced to his possession before divorce: *Heikes v. Peepaugh*, 1 Dec. Rep. 223, 4 W. L. J. 544 [supreme court].

A husband can not reduce to possession after the wife's death a legacy accruing to her during coverture, but her administrator must collect it: *Curry v. Fulkinson*, 14 O. 100, I Longsdorf's Notes, 658; *Dixon v. Dixon*, 18 O. 113, I Longsdorf's Notes, 839.

After the wife's death it is too late to reduce her choses to possession: *Buckingham v. Carter*, 12 Dec. Rep. 26, 2 D. 41.

(b) *Under Specific Agreement.*

An agreement before marriage between the prospective parties thereto that the husband will invest certain money belonging to the wife for her benefit, operates to make such money her separate estate: *Sessions v. Trevitt*, 39 O. S. 259, III Longsdorf's Notes, 1025.

If a husband receives money from his wife under an antenuptial agreement whereby he is to invest it to her benefit, and he purchases land therewith taking title in his own name, a resulting trust in her favor exists; and the husband holds the legal title thereto as trustee: *Sessions v. Trevitt*, 39 O. S. 259, IV Longsdorf's Notes, 1025.

If the husband obtains money under an agreement to buy land therewith in his wife's name, and he takes title to such land thus purchased in his own name, an implied trust exists, and the husband holds as trustee for his wife: *Newton v. Taylor*, 32 O. S. 399, III Longsdorf's Notes, 640.

An antenuptial agreement whereby the woman is to have the right to deal with her portion of her father's estate "in as full and perfect a manner as she could if of full age and sole" excluded the husband from the interest in the control over his wife's property, which would otherwise at common law have been vested in him by marriage; and it gave a married woman a separate estate in such legacy with reference to which a court of equity will treat her as a *feme sole*: *Hardy v. Van Harlinger*, 7 O. S. 209, II Longsdorf's Notes, 291.

2. *Realty.*

(a) *Curtsey.*

Under a former section (R. S., § 3108, prior to the repeal and re-enactment of April 14, 1884; 81 v. 209), a creditor of the husband who had obtained a judgment might levy an execution upon the estate by curtesy, which

belonged to the husband in the property of his wife; but the lien of such judgment and execution could not be enforced by sale during the life of any heir of the body of the wife. With the repeal and re-enactment of this statute such judgment creditor had the right to enforce the lien of such judgment: *Hulick v. Higdon*, 1 O. C. C. 332, 1 O. C. D. 184.

The statute of February 28, 1846, forbade the sale of the estate by curtesy belonging to the husband during the life of the wife; and under this statute such realty could not be sold to satisfy a mechanic's lien against the husband: *Spinning v. Blackburn*, 13 O. S. 131, II Longsdorf's Notes, 601.

Under the act of March 27, 1861, § 1, which was amended March 23, 1866 (S. & S. 391) a mortgage of the estate by curtesy belonging to the husband given by him could not be enforced while any children, heirs of the body of his wife, survived: *Robert v. Sliffe*, 41 O. S. 225, IV Longsdorf's Notes, 58.

Before the act of February 28, 1846, the husband on marriage acquired a legal estate in the fee simple of his wife. This was a freehold during the joint lives of himself and wife, with remainder to himself for life as tenant by the curtesy and remainder to the wife and her heirs in fee. It was the land of the husband and liable for his debts: *Canby v. Porter*, 12 O. 79, I Longsdorf's Notes, 597.

The fact that the real property of the wife was held adversely did not deprive the husband of his curtesy: *Borland v. Marshall*, 2 O. S. 308, I Longsdorf's Notes, 1054; *Merritt v. Horne*, 5 O. S. 307, II Longsdorf's Notes, 188; *Murdock v. Reed*, 12 Dec. Rep. 618, 1 D. 274.

In order to entitle the husband to curtesy, the wife must have had a right to immediate possession: *Watkins v. Thornton*, 11 O. S. 367, II Longsdorf's Notes, 510.

If the wife holds a remainder, the husband is not entitled to curtesy therein, unless the prior life estate terminates during coverture: *Watkins v. Thornton*, 11 O. S. 367, II Longsdorf's Notes, 510.

The fact that a woman before marriage conveys her property for seventy-five years in trust for her own benefit, does not convey the freehold to the trustee; and accordingly such conveyance does not deprive her husband of curtesy: *Lowry v. Steele*, 4 O. 170, I Longsdorf's Notes, 214.

The common law rule requiring birth of issue capable of inheriting as a necessary element of curtesy was abolished by statute. Permanent leaseholds renewable forever are within the meaning of this rule: *Murdock v. Reed*, 12 Dec. Rep. 618, 1 D. 274.

The effect of the act of 1853, was to abolish curtesy initiate as it existed at common law. Curtesy in Ohio was after the enactment of such statute regulated thereby; was conferred only upon surviving husbands in the estates of which their wives died seized, and was not a vested estate until the death of the wife: *Hershizer v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045.

When the estate by coverture and the estate by curtesy initiate were abolished, a husband had no estate in the separate property of his wife during coverture; and accordingly by uniting with her in a mortgage he contributed no part of the indemnity; and in case of contribution he was not entitled to recover any part of the amount of such indemnity: *Leggett v. McClelland*, 39 O. S. 624, III Longsdorf's Notes, 1054.

The statutory provision restricting the entailment of real property (G. C., § 8622) did not change the interest of the first donee to a life estate; and did not deprive her husband of curtesy therein: *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181.

The act of March 1, 1869 (66 v. 21) provided "Nothing in this act shall be so construed as to affect the right which any person may have to any estate by the curtesy or in dower, in any estate of any deceased person; and surviving husbands, whether there be issue born during the coverture or not, shall be entitled to the estate of their deceased wives by the curtesy; provided, however, that if any deceased wife shall leave issue or legal representative of such issue by a former marriage, her surviving husband shall not be entitled to an estate by the curtesy in the interest of such issue or the legal representatives of such issue in her estate, unless the estate came to the deceased wife by deed of gift from the surviving husband, or by devise or deed of gift from his ancestors": *Denny v. McCabe*, 35 O. S. 576, III Longsdorf's Notes, 810.

The act of March 1, 1869 (66 v. 21) was applicable to cases where the marriage took place before the enactment of such statute, but the married woman did not die until after such statute was enacted: *Denny v. McCabe*, 35 O. S. 576, III Longsdorf's Notes, 810.

If no children are born to the second marriage, and if the real property did not come to the wife by deed of gift from the surviving husband or by devise or gift from his ancestors, he was not entitled under the act of March 1, 1869 (66 v. 21), to curtesy therein: *Denny v. McCabe*, 35 O. S. 576, III Longsdorf's Notes, 810.

Illegitimate children, although capable of inheriting from the mother, were not issue by a "former marriage" and their existence

did not limit the husband's curtesy: *Bruner v. Briggs*, 39 O. S. 478, III Longsdorf's Notes, 1042.

Section 17 of the act of March 14, 1853 (S. & C. 504), as amended March 1, 1869 (66 v. 21, R. S., § 4176; for present statute, see G. C., § 8592), restricted the husband's right of curtesy, even though the deceased wife had devised such property to her grandchildren to the exclusion of such children by her former marriage: *Tilden v. Barker*, 40 O. S. 411, I Longsdorf's Notes, 35.

The statute which prevented a husband from having curtesy against the children of a former marriage applied, although the former marriage was a marriage with such husband. Accordingly a man who married, was divorced, and remarried the same woman, could not have curtesy as against her children of the said first marriage. The words "former marriage" in such statute are not to be construed as meaning "former husband": *Blum v. Blum*, 60 O. S. 41, IV Longsdorf's Notes, 777.

Under a former statute (R. S., § 3108; act of 1869; for present form of statute, see G. C., § 7995) a husband could not encumber his estate by curtesy while any of the children survived; and accordingly if he gave a mortgage upon such interest, such mortgage could not be foreclosed while any of such children lived: *Robert v. Sliffe*, 41 O. S. 225, IV Longsdorf's Notes, 58.

In 1884 the statute, which prevented a life tenant by the curtesy from encumbering or disposing of his interests, was repealed. In some cases this amendment was held to be valid as not affecting any existing right; and under such amendment a former execution levied upon such estate could be enforced: *Hulick v. Higdon*, 1 O. C. C. 332, 1 O. C. D. 184.

The opposite view has been held, and such statute has been said to be invalid, as interfering with the vested rights of the children: *Cameron v. Goebel*, 20 O. C. C. 268, 11 O. C. D. 118.

The act limiting the entail of real property (G. C., § 8622) did not convert the interest of the first taker into a life estate, and accordingly did not bar the curtesy of the husband of the first taker, whether such interest was created by a will: *Harkness v. Corning*, 24 O. S. 416, III Longsdorf's Notes, 181; or by a deed, *Broadstone v. Brown*, 24 O. S. 430, III Longsdorf's Notes, 182.

A husband who survives his wife has a vested estate by curtesy in the separate real property of his wife, of which she owns a fee at the time of her death; and if such land is in the possession of another, the husband may maintain ejectment therefor: *Hall v.*

Hall, 32 O. S. 184, III Longsdorf's Notes, 626.

For a discussion of the common law theory of curtesy, and of the Ohio legislation upon the subject, see *Denny v. McCabe*, 35 O. S. 576, III Longsdorf's Notes, 810.

The statutory provision which abolished the necessity of birth of issue as a requisite to curtesy did not give to the husband upon marriage an estate by curtesy initiate. Such statute applied only to the rights of surviving husbands: *Denny v. McCabe*, 35 O. S. 576, III Longsdorf's Notes, 810.

A husband's contract to convey his wife's land would not be enforced, even as to his life estate, on grounds of public policy. What he can not enforce, his creditors can not: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

(b) *Cverture.*

Upon marriage, the husband acquired an interest in the land of his wife, at common law; and accordingly until his death no right of action accrued in her favor to recover possession thereof from one who had during such coverture taken possession thereof unlawfully: *Westlake v. Youngstown*, 62 O. S. 249, IV Longsdorf's Notes, 832.

The act of 1861 did not change the wife's authority over or the husband's interest in lands previously vested in her and they were subject to his possession during his life: *Westlake v. Youngstown*, 62 O. S. 249, IV Longsdorf's Notes, 832.

A husband in 1852 rented part of his wife's land to J, on a cropping lease, for a year. Afterwards the wife obtained a divorce for the husband's aggression and sold the land to G before harvest. J harvested the crop and G sued him for it. It was held that the husband's lease to J was absolutely void, under the act of 1846. The doctrine of emblements did not apply, for J had no better title than the husband. The statute was not limited to attempts by a husband to convey the entire interest. The husband's lease was an "incumbrance," within the statute: *Jenney v. Gray*, 5 O. S. 45, II Longsdorf's Notes, 156.

Nonjoinder of the husband in proceedings for the partition of the wife's land leaves his life estate untouched, but partition against the wife without the husband will bind her unless reversed: *Pillsbury v. Dugan*, 9 O. 118, I Longsdorf's Notes, 466.

D. DOWER.

For dower rights, see DOWER.

E. SEPARATE ESTATE.

1. *What Constitutes.*

A gift of money made and executed to a married woman living with her husband, prior to the taking effect of the act of April 3, 1861 (58 v. 54), was controlled by the rules of the common law; and if such executed gift was general and unqualified, the money so given vested, *eo instanti*, in the husband. It was otherwise, however, where, by any instrument conveying or evidencing such gift, or by an unequivocal declaration of the donor accompanying the making of such gift, it was made clearly manifest that it was the intention of the donor that the gift should be to the separate use of the wife, free from the control of her husband: *Quigley v. Graham*, 18 O. S. 42, II Longsdorf's Notes, 864.

Prior to the act of April 3, 1861 (58 v. 54) land which was bought by a married woman with her separate property, and for which a deed was given to her in her own name, without any provision to indicate that it was for her separate use, was her general property; and the fact that she executed a note together with her husband after such property was conveyed to her did not subject such property to the payment of such note: *Logan v. Thrift*, 20 O. S. 62, II Longsdorf's Notes, 979.

Lands conveyed to a married woman prior to the taking effect of the act of April 3, 1861, "concerning the rights and liabilities of married women," by deed containing no words importing her separate estate therein, did not by virtue of said act become the separate estate of the wife. During coverture the right of possession of such lands was in the husband, and the wife could not maintain an action to recover the same from a stranger. In such action by the wife, the husband, being made a mere nominal defendant therein, could not, by his answer in the case, disclaiming title, and admitting the plaintiff's right of possession, divest himself of title, and thus enable her to recover in the action: *Clark v. Clark*, 20 O. S. 128, II Longsdorf's Notes, 983.

Money which was given to a married woman, before the act of April 3, 1861 (58 v. 54) with the statement at the time of such gift that it was for a home, was her separate property; especially if the husband never asserted any title thereto. Money paid or given to her without any direction as to its use tending to show that it was for her separate estate became the property of her husband: *In re Wood*, 5 Fed. 443, 4 O. F. D. 684.

If a married woman conducted business in her own name, the good will of such

business was her separate estate; and she might enter into a valid contract to sell such business and good will, and not to compete by engaging in such business in the same town: *Morgan v. Perhamus*, 36 O. S. 517, III Longsdorf's Notes, 873.

A permit to trade within the lines of the federal army during the civil war was not property; and accordingly even under the act of 1861 (S. & S. 389) a married woman could not enter into a partnership with her husband for carrying on business under such permit; and the promises and liabilities of such attempted partnership were in law the contracts and liabilities of the husband: *Stoasey v. Antram*, 24 O. S. 87, III Longsdorf's Notes, 163.

The act of 1861 did not make previously acquired property separate, thus disturbing acquired rights, but only that subsequently acquired: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796.

The distinctive character of separate estate in the absence of a statute must be imparted to it by the instrument or title by which it is held: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796; *Logan v. Thrift*, 20 O. S. 62, II Longsdorf's Notes, 979; *Clark v. Clark*, 20 O. S. 128, II Longsdorf's Notes, 983.

A husband who had failed in a manufacturing business, commenced business anew with the money of his wife, with her consent, and carried on the business, professedly as her agent, for years, making large profits therefrom. A principal source of the profits was the personal services and skill of the husband. The wife gave no personal attention to the business. There was no contract between her and her husband as to his compensation; and no accounts were kept between the parties. Part of the proceeds of the business was applied to the support of the family, part used by the husband, and part invested in real and personal property, in the name of the wife. In a suit by the creditors of the husband, to subject the property so purchased to the payment of his debts, it was held, first, that the wife could not claim the whole of the property as profits arising from her separate money and, second, where she thus suffered her money to be employed by the husband, and blended with his earnings, so that it could not be separated, the most favorable position she could be allowed to assume was that of a preferred creditor in equity, and, as such, entitled to her money and interest: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796.

Necessary and suitable clothing furnished by a husband to his wife, or purchased by her with money or means given to her by her husband for that purpose, did not become

her separate property within the meaning of the statute concerning the rights and liabilities of married women; but articles of personal clothing purchased by a wife with her separate money or means were made her separate property by the act of March 30, 1871 (68 v. 48): *Pratt v. State*, 35 O. S. 514, III Longsdorf's Notes, 803.

An injury to the person of a married woman, by an assault and battery, was a violation of her personal rights, and a right of action accrued to her for such an injury, which was, by the act of 1861, concerning the rights and liabilities of married women (S. & S. 389), and by subsequent amendments, the separate property of the wife, and under her sole control: *Stevenson v. Morris*, 37 O. S. 10, III Longsdorf's Notes, 887.

A cause of action for slander is separate property of the wife: *Ashley v. Rockwell*, 43 O. S. 386, IV Longsdorf's Notes, 172.

A chose in action in the nature of a right of action against a railroad company for damages for personal injuries sustained by a married woman, is not such property as against which debts could attach: *Railway Co. v. Harber*, 12 O. C. D. 648.

A right of action for damages for personal injuries can not be considered such separate estate as to give her the right to sue for care and physicians' bills on account of such injuries, particularly where it does not appear that she expressly contracted and intended to charge her own estate therewith: *Railway Co. v. Harber*, 12 O. C. D. 648.

As the law stood in 1876, a contingent interest of a married woman in an insurance policy on the life of her husband, at the time she, with her husband, executed a written instrument acknowledging the loan of a sum of money which they promised to repay, did not constitute her separate property, chargeable in equity with the payment of that instrument; nor did the money thereafter collected on the policy, by relation, become so chargeable: *Sticken v. Schmidt*, 64 O. S. 355, IV Longsdorf's Notes, 872.

The act of 1861 retroacted so as to convert her general property—as real estate bought with her means—into separate property, subject, however, to vested rights. The property was not thereby subjected to her previous debts, nor divested of the husband's freehold *jure uxoris*: *Hershizer v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045 [reversing *Hershizer v. Florence*, 5 Dec. Rep. 551, 6 Am. L. Rec. 500].

A judgment against a person who had wrongfully lost or destroyed separate property of a wife is her separate property, and protected against her husband's creditors, the same as was the lost property: *Pierson v. Smith*, 9 O. S. 554, II Longsdorf's Notes,

398 [affirming *Pierson v. Smith*, 12 Dec. Rep. 637, 2 Gaz. 104, 1 D. 305].

The general as well as separate estate of a married woman and all thereafter acquired or earned, and its rents and profits are made her separate property, free from her husband's common law rights: *Levi v. Earl*, 30 O. S. 147, III Longsdorf's Notes, 521.

A mere finding that a wife "was the owner in fee simple" of the premises in controversy is too general to enable a reviewing court to say it was separate estate and not general: *Riley v. Rice*, 40 O. S. 441, IV Longsdorf's Notes, 36.

Since the act of 1887 there is no longer any separate estate. The wife's rights in her property is the legal estate of a *feme sole*: *Kelley v. Mills*, 1 O. N. P. 382, 2 O. D. (N. P.) 265.

K having sent an employe to board with the family of S, a tenant of K, the wife of S sued K for the value of board, washing and mending for such employe. It was held that such services being household work, and the husband being entitled to her household services, she could not recover without proof: (1) That she had an understanding with her husband that the pay therefor should be hers; (2) that K knew of such understanding and agreed to pay her for the services: *Spayne v. King*, 4 O. N. P. 299, 7 O. D. (N.P.) 158 [affirmed, without opinion, *King v. Spayne*, 55 O. S. 606].

Where a farmer has become insolvent and lost all he had, and his wife with her own means rents and stocks another farm and employs him at wages upon it, but she keeps control and superintends everything, and it is evident that her skill and not his makes it a success, and she invests the savings in real estate in her own name, this real estate is her separate property, and the husband's creditors can not reach it, and so although his wages contributed partly to support the family: *Lanning v. Fogler*, 16 O. C. C. 151, 8 O. C. D. 780.

Property acquired by a married woman subsequent to the creation of a liability as surety for her husband may be subjected, under the statutes before 1884, to the payment of such liability: *Howland v. Buckland*, 33 Bull. 214.

The act of April 3, 1861, constituting the real and personal property of a married woman her separate estate, and the provisions of § 28 of the civil code, now § 11245, authorizing her to sue and be sued alone, did not repeal by implication the saving clause of the statute of limitations securing to married women the right to maintain actions after the removal of the disability:

Ashley v. Rockwell, 43 O. S. 386, IV Longsdorf's Notes, 172.

Prior to the act of 1884, a married woman could by contract only charge the separate estate owned by her at the time of entering into the contract, and after-acquired property could not be reached under such contract: *Manahan v. Hart*, 2 O. C. C. (N. S.) 606, 14 O. C. D. 527.

Where a wife and husband execute a written instrument to the lender, and there is an insurance policy on the life of the husband, payable to the wife, and at the death of the husband the wife received and invested the amount in a house, the holder of the note, having brought suit against the wife when the wife's liability was only on her separate estate, it was held that the property subsequently acquired was not liable, and the contingent interest of the wife in the policy was not chargeable with the payment of the note: *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872.

A wife's clothing, bought by her husband or with his means is not her separate property, and should not be laid as hers. Clothing bought with her separate means is her separate property, and should not be laid as the husband's, although stolen from the dwelling: *Pratt v. State*, 35 O. S. 514, III Longsdorf's Notes, 803.

2. Incidents.

Where the real estate of the wife, held by her as her "separate property," under the act of March 23, 1866 (S. & S. 391) was occupied by the husband as a family homestead, he was not the owner of such homestead within the meaning of the statutes relating to the exemption of property from execution: *Davis v. Dodds*, 20 O. S. 473, II Longsdorf's Notes, 1012.

The opposite result was reached under the homestead act of May 1, 1871 (68 v. 106): *Dwinell v. Edwards*, 23 O. S. 603, III Longsdorf's Notes, 149.

A wife could transmit her separate real estate, through a trustee, to her husband: *Lewis v. Baldwin*, 11 O. 352, I Longsdorf's Notes, 565.

That money belonging to a married woman which was drawn by her husband from a building and loan association, and with her approval and consent, and which was used by him in his affairs, was not to be regarded as a debt of his owing to her, in the absence of specific agreement to that effect, see *In re Koch*, 10 Dec. Rep. 523, 21 Bull. 366.

A wife may appoint her husband her agent to sell and reinvest her property. If, therefore, she has a separate estate given her by him when out of debt, and they sell

it, and reinvest in other property for her, the latter is not subject to his intervening debts: *Young v. Ross*, 3 Dec. Rep. 141, 3 Gaz. 349.

If the husband, at the wife's instance, recovers judgment in his own name for the loss of her trunk and contents, and his creditor garnishees the fund, she can come into the case by counterclaim and obtain an injunction, treating the husband as a trustee: *Pierson v. Smith*, 12 Dec. Rep. 637, 2 Gaz. 104, 1 D. 305 [affirmed, *Pierson v. Smith*, 9 O. S. 554, II Longsdorf's Notes, 398].

Indemnity held by one surety, if proceeding from a stranger and not from the principal, does not inure to the cosureties. Thus, a wife's mortgage of her real estate for the exclusive benefit of one of her husband's sureties can not be shared by the others. As the husband has no interest in her separate estate, he contributes nothing by joining in the mortgage; his curtesy is that of surviving husband in property owned by her at her death: *Leggett v. McClelland*, 39 O. S. 624, III Longsdorf's Notes, 1054. See also BONDS, SURETY.

By the act of March 30, 1871 (68 v. 48), concerning the rights and liabilities of married women, the wife was given sole control of her separate property. And where, in a case coming within the scope of a former statute, R. S., § 3109, a husband had received of the wife money which was her separate property, and claimed it as his own, the burden was upon him to show her express assent that he could have used the same for his own benefit. R. S., § 3109, applied to a cause accruing in the year 1879 to a wife against her husband for money had and received: *Yocum v. Allen*, 58 O. S. 280, IV Longsdorf's Notes, 738.

A right of action for money had and received, which accrued to a married woman in the year 1879, being controlled by the statute of limitations in force at that time, was not affected by the act of March 26, 1883 (R. S., § 4986, in an earlier form; for present statute, see G. C., § 11229), removing the disability of coverture as to rights of action concerning a married woman's separate property. That act applied only to causes of action accruing after its passage: *Yocum v. Allen*, 58 O. S. 280, IV Longsdorf's Notes, 738 [approving and following, *Ham v. Kunzi*, 56 O. S. 531, IV Longsdorf's Notes, 697].

Under a former statute, R. S., § 3109, the husband was, during coverture, regarded as a stranger to the wife with reference to her separate estate: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

In the wife's absence the husband is her agent for the care of her property, but not

as against her or her guardian: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

Where the home belongs to the wife, the husband in purchasing an article therefor may be held to have acted as the agent of his wife, notwithstanding the article was charged to him individually: *Water Heater Co. v. Meckel*, 9 O. N. P. (N.S.) 581, 21 O. D. (N.P.) 722.

A husband in debt began business on his wife's money in her name, as her agent, making large profits, principally from his services and skill, without contract as to his compensation or account with his wife. Part of the profits was invested in property in her name. It was held the wife could not claim the whole as profits from her money. If a wife suffers her money to be blended with the products of the husband's skill and industry, she can at most stand as a preferred creditor in equity, and get back her money and interest: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796.

Where the husband and wife work the land of the wife, and she pockets the proceeds, he acquiescing though reluctantly, he can not afterwards claim that any part of such proceeds was held in trust for himself: *Duvelmeyer v. Duvelmeyer*, 5 O. N. P. 89, 7 O. D. (N.P.) 426.

Real estate of a wife, though paid for in part from the husband's monthly wages, can not be subjected to his debts, for the wages were exempt: *Stump v. Frary*, 13 O. C. C. 619, 6 O. C. D. 357.

A wife's savings out of money received from her husband, and accumulated by her in a building association in her own name, are her property, and if she loans it to her husband and he secures this by a chattel mortgage to her, the mortgage is valid against his assignment for creditors: *In re Heil*, 6 O. D. (N.P.) 526.

Where a husband secured possession of his wife's separate property, the statute of limitations did not begin to run against her during coverture: *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628 [reversed, *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64].

Where a husband, who has possession and control of his wife's separate estate, provides for her in his will, and she elects to take under the will, she is not barred from asserting her claim to her separate property, as her election to take under the will is as widow and not as creditor, and affects only her interest in the husband's property: *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N. P.) 628 [reversed, *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64].

The meaning and effect of the act of 58 v. 54 and its modification in 68 v. 48 was to provide a shield for a *feme covert* and give her a separate estate: *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628 [reversed, *Miller v. McLean*, 11 O. C. C. (N. S.) 424, 21 O. C. D. 64].

A wife's control over her own property may be enlarged by the legislature. It might authorize her to convey or incur it without the husband's consent, leaving his vested rights unaffected. It could enlarge her general property into separate property: *Hershizer v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045.

A married woman's ground being platted with a lot marked depot of O. & P. R. R., acts of hers tending to show an agreement to give it to the railroad on which she acted will not estop her to claim it: *Todd v. Railroad Co.*, 19 O. S. 514, II Longsdorf's Notes, 964. See also *ESTOPPEL*.

Where no personal money judgment can be had there can be no attachment, as in a suit to subject a married woman's separate property in 1873: *Hoover v. Gibson*, 24 O. S. 389, III Longsdorf's Notes, 180. See also *ATTACHMENT*.

3. Disposition.

Married women who were tenants in common, owning their shares as separate property, could unite with persons *sui juris* in renting to their cotenants, and could without joining their husbands, unite in an action to recover the rent due: *Cahoon v. Kinen*, 42 O. S. 190, IV Longsdorf's Notes, 104.

A married woman owning real estate, as her separate property, had legal capacity, her husband joining, to convey the same to her vendee, and she could stipulate for such terms of payment of the purchase money as she thought best. After her conveyance was executed and delivered, her grantee was legally bound to pay the consideration money in the manner stipulated, the same as if she had been a *feme sole*: *Brewer v. Maurer*, 38 O. S. 543, III Longsdorf's Notes, 992.

If a wife, when asked to permit her husband to apply a specified part of her separate estate in payment of his debt, delivered said property to him, and he, with her knowledge and without objection by her, transferred it to his creditor for said purpose, she thereby made her express assent that her husband could dispose of said property for his own use and benefit: *Frano v. Nirdlinger*, 41 O. S. 298, IV Longsdorf's Notes, 62.

Dedication to the public by a married woman of land which was part of her general estate could not be made prior to the

married woman's act of 1887, except in the statutory mode, that is, by deed or plat: *Westlake v. Youngstown*, 62 O. S. 249, IV Longsdorf's Notes, 832.

In an action by a wife, or a guardian in her behalf, to have declared null and void a conveyance of her land on the ground that she was induced to make it by undue influence, or that she was not conscious of her act in executing the same, and it appearing on its face that it was duly executed and acknowledged in the manner and form prescribed by the statute, the burden is upon the plaintiff to establish one of said grounds by clear and convincing proof, and a mere preponderance of the evidence is not sufficient: *Willis v. Baker*, 75 O. S. 291, IV Longsdorf's Notes, 1016.

On the trial of said action, it appeared from the evidence that in December, 1900, the wife owned fifty acres of land, and that her husband owned ten acres immediately adjoining; that they were of advanced years and childless; were in ill health, and had been considering and contemplating a testamentary disposition of their lands to certain nephews and nieces, and a foster daughter, and for that purpose secured the advice and services of a justice of the peace, who informed them that to carry out their plan, it was necessary for the wife to convey her lands to the husband in order that he might dispose of all the lands by his will, and such deed was drafted by the justice, and she was assisted in signing her name thereto, which deed was duly witnessed, and a certificate of acknowledgment made thereon by the justice in conformity to the statute. Thereupon, as a part of the same transaction, the will of the husband was prepared, by the terms of which he devised all the lands to said nephews and nieces and foster daughter, and this will was executed according to the forms of law, and each of said instruments was then delivered to the husband with instructions by the justice to have the deed recorded and the will deposited with the probate judge; but the husband retained possession of the same without record during his life, and at his death they passed into the custody of the wife or widow. The will was afterwards probated by order of the probate court. The foster daughter, who claimed to have been present when the deed and will were executed, testified at the trial that the wife was unconscious when her name was signed to the deed, but there was little evidence to corroborate her, and her statements were contradicted by the justice, and three other witnesses who were present at the same time. About ten years after the death of the husband, the widow, who was then of sound mind and memory, also made a will

in which she recalled and recited the execution of her said deed and her husband's will, and the substance of their contents, and in which she also recited the purpose for which they were executed, and that she desired to carry out said purpose by her will, and then devised the same lands to the same persons named in the husband's will. It was held that in declaring the deed of the wife null and void on such evidence, and in quieting her title to the fifty acres against the provisions of the husband's will, the court disregarded the above rule requiring clear and convincing proof, and its decree should be set aside: *Willis v. Baker*, 75 O. S. 291, IV Longsdorf's Notes, 1016.

If the wife only joins in the testatum clause releasing dower, this releases dower in the husband's share but does not pass her separate share: *Foster v. Dennison*, 9 O. 121, I Longsdorf's Notes, 467; *Cincinnati v. Newell*, 7 O. S. 37, II Longsdorf's Notes, 267.

A contract to convey the wife's land after delivery by them of their deed to a third person, to be delivered to the buyer on payment, is not void for want of mutuality for the deed. The authority to deliver it is irrevocable, even by her death. No further delivery is necessary after performance of the condition. Hence specific performance against the buyer will lie: *Farley v. Palmer*, 20 O. S. 223, II Longsdorf's Notes, 991.

An agreement in 1848 between M and her husband R and one H, whereby a legacy due her was to be put into H's hands as trustee, (1) to pay her the income for her separate use; (2) when either M or R die, H is to pay the interest to M if living, and if dead, to her children, provided that M can, during her husband's life, direct a different appropriation after her death. It was held this settlement was for the children as well as for her, and gave her no power to dispose of the fund during the life of herself and R, and on her death before her husband, without appointing a different appropriation, the children take: *Woodbury v. Parish*, 11 O. S. 434, II Longsdorf's Notes, 518.

A married woman's deed without her husband joining is void: *Gillespie v. Johnston*, W. 231, I Longsdorf's Notes, 20; *Lefevre v. Murdock*, W. 205, I Longsdorf's Notes, 18.

A married woman can not convey her separate estate without her husband joining: *Henry v. Henry*, 27 O. S. 121, III Longsdorf's Notes, 347.

Where a wife allows her husband and his partner to construct and operate oil wells on her land, without charging them royalty for the oil produced, and the husband afterwards conveys his right and title in and to such wells to a creditor in satisfaction of

his debt, such assignee is justified in believing that his assignor owned the entire oil produced from such wells; and the assignment having been made with the knowledge and acquiescence of the wife, she is estopped from afterwards asserting any claim for royalty against such assignee: *Simmons v. Supply Co.*, 21 O. C. C. 455, 11 O. C. D. 690.

The fact that as between the owner on the one part and her husband and his partner on the other part, there was an understanding that she was to receive a rental, affords foundation for a claim against them, but does not in any way affect the rights of mortgagees of the partners without notice or their successors in interest, or the title acquired by estoppel: *Simmons v. Supply Co.*, 21 O. C. C. 455, 11 O. C. D. 690. See also OIL AND GAS.

A lease by husband and wife of the wife's estate not acknowledged by her is not available against her after his death. It is void and not voidable: *Worthington v. Young*, 6 O. 313, I Longsdorf's Notes, 340. See also ACKNOWLEDGMENT.

A wife may by gift *causa mortis* dispose of her entire personal property, to the exclusion of her surviving husband who had abandoned her: *South v. Fair*, 41 Bull. 343 [affirmed, without opinion, by the supreme court]. See also DESCENT AND DISTRIBUTION.

4. Contract for Sale.

In 1870, a written contract executed by a married woman together with her husband to exchange her land for other property was void, even if possession was taken thereunder: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

Where a married woman induced a buyer to purchase lands owned in her own right, by verbally agreeing that he could deduct from the price a debt due to him from her husband, thus paying the husband's debt, she could not, after the execution of the agreement by a conveyance of the land, by herself and husband, repudiate the agreement as to the husband's debt, and compel the purchaser to pay her the entire contract price of the lands: *Meiley v. Butler*, 26 O. S. 535, III Longsdorf's Notes, 327.

If a married woman and her husband agreed to sell her land and executed a deed therefor in due form, which deed was placed in the hands of the third person to deliver upon the payment of the purchase price, such contract could be enforced by such married woman and her husband in a suit in equity for specific performance: *Farley v. Palmer*, 20 O. S. 223, II Longsdorf's Notes, 991.

The bond of a married woman was void, and could not be enforced against her; but when the wife with her husband's consent, sold land, and received the purchase money, and put the purchaser into possession, and husband and wife afterward conveyed to a third person, with notice of the first sale, who gave his note for the purchase money, the latter was deemed to hold for the first purchaser, and required to convey, and his note was canceled: *Warner v. Sickles*, W. 81, I Longsdorf's Notes, 6.

Where a married woman buys goods and in payment gives a deed of mortgaged property, her husband joining, covenanting to pay the mortgage, she is liable on the covenant although she has turned over other land as security: *Hubbard v. Harris*, 4 Dec. Rep. 577, 2 Clev. L. Rep. 403, 4 Bull. 994 [denying *Hamilton v. Leaman*, 7 Dec. Rep. 675, 4 Bull. 911].

5. Method of Charging.

In order to charge the separate estate of a married woman, it was necessary that at the time of making such charge, she had a separate estate: *Jenz v. Gugel*, 26 O. S. 527, III Longsdorf's Notes, 326; *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872.

The separate estate of a married woman was chargeable with the performance of her engagements or obligations made or incurred upon its credit or for its benefit; and an agreement by her to pay for services which were to be rendered in procuring a loan of money to remove a mortgage from such estate, was an agreement made upon its account, and for its benefit: *Patrick v. Littell*, 36 O. S. 79, III Longsdorf's Notes, 831.

The contrary had been ruled in *Hills v. Lambert*, 4 Dec. Rep. 520, 2 Clev. L. Rep. 305.

Under the act of May 1, 1861 (S. & S. 389), as amended March 23, 1866 (S. & S. 391), the separate property of the wife was primarily liable, as between her and the husband, for the satisfaction of judgments recovered in actions brought against them upon causes existing against her at their marriage; and the husband, when compelled to pay any such judgment, became, in equity, a creditor of the wife to the amount paid, and entitled to charge the same upon her separate property, and for that purpose to set aside fraudulent conveyances thereof made in contemplation of marriage: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256.

An oral contract by a married woman, as a part of a purchase by her of land, whereby she agreed to assume and pay a mortgage debt upon such land as a part of the pur-

chase price thereof, was enforceable against her separate estate after the amendment of 1879: *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386.

A covenant against incumbrances in a conveyance by a married woman of her separate estate charged her separate estate with the removal thereof; and the grantee who had been obliged to remove such incumbrance could deduct from the unpaid purchase price the amount thus paid to remove them: *Gerlach v. Redinger*, 40 O. S. 388, IV Longsdorf's Notes, 33.

A married woman was not liable upon her covenants of warranty in an action at law: *Morgan v. Myers*, 2 O. C. C. 196, 1 O. C. D. 440.

While a mortgage upon the separate estate of a married woman to secure the debt of the husband was a charge thereon, her separate estate was, in legal effect, a surety; and a binding contract for the extension of time upon such debt operated as a discharge of such surety: *Eisenberg v. Albert*, 40 O. S. 631, IV Longsdorf's Notes, 45.

A married woman, possessed of a separate estate in real or personal property, could charge the same with her debts, at least to the extent that such debts could have been incurred for the benefit of her separate estate, or for her own benefit, upon the credit of her separate property; such power was incident to the absolute ownership of property, and was limited only by the terms of the instrument creating the separate estate, or by implication arising therefrom. Her intention to charge her separate property, at the time the debt was incurred, could have either been express or implied, and such intention could have been inferred from the fact that she executed a note or obligation for the indebtedness. Courts of equity enforced payment of such charges against her separate estate through a receiver, first, by appropriating the personal property; second, by sequestering the rents and profits of the realty; and, third, by sale of the realty when the same was necessary: *Phillips v. Graves*, 20 O. S. 371, II Longsdorf's Notes, 1002.

When a married woman acquired the title to property by purchase, and executed her promissory note therefor, an implication arose, in the absence of proof of a different understanding, that she thereby intended to charge her separate estate with its payment, and such implication was not affected by the fact that she, with her husband, executed a mortgage of the property purchased, to secure the payment of such note. In such case, the wife was not permitted to testify that she had no intention to charge her separate estate with the payment of such note: *Avery v. Vansickle*, 35 O. S. 270, III Longsdorf's

Notes, 780. *Contra, Hamilton v. Leaman*, 7 Dec. Rep. 675, 4 Bull. 911.

Where a married woman, having a separate estate, executed a promissory note as surety for the principal maker, a presumption arose that she thereby intended to charge her separate estate with its payment; and a court of equity could carry such intention into effect by subjecting such estate to the payment of the debt, in the mode prescribed by the statute [*Levi v. Earl*, 30 O. 147, III Longsdorf's Notes, 521, and *Rice v. Railroad*, 32 O. S. 380, III Longsdorf's Notes, 639, in so far as they conflicted with the decision in this case, were overruled]: *Williams v. Urmston*, 35 O. S. 296, III Longsdorf's Notes, 784.

Merely incurring an obligation, if not evidenced by writing, is not sufficient to bind the separate estate: *Levi v. Earl*, 30 O. 147, III Longsdorf's Notes, 521; *Williams v. Urmston*, 35 O. S. 296, III Longsdorf's Notes, 784.

The former cases herein overruled held that a note given by a married woman did not raise the presumption that she intended thereby to charge her separate estate: *Levi v. Earl*, 30 O. S. 147, III Longsdorf's Notes, 521; *Rice v. Railroad*, 32 O. S. 380, III Longsdorf's Notes, 639.

A wife can make contracts for improving, repairing, etc., her real estate, or leasing it not over three years, and on these contracts is suable at law, and this applies also to general property made separate by statute: *Levi v. Earl*, 30 O. S. 147, III Longsdorf's Notes, 521.

A married woman, having a separate estate, who signed a promissory note as surety for her husband, was presumed without further proof to intend thereby to charge her separate estate: *Hershizer v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045.

The fact that a married woman gave a mortgage on specific property, as a security for the payment of her note, did not rebut the presumption that she intended by giving such note to charge her separate estate: *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339.

In an action upon a promissory note, signed by a married woman together with her husband, brought for the purpose of charging her separate estate, the petition averred among other things that she "then and thereby intended and agreed that her said separate property should be liable for the money named in said promissory note, and that she promised then and there that her said separate property was and should be held bound and liable for the payment thereof." As her first defense in her answer, she denied "that by the execution of the

note she intended or agreed that her separate property should be liable for the money named in the note, if the same was not or should not be paid by her husband," and denied "that she promised then and there, or at all, that her separate property was, or should be held liable for the payment of the note." It was held that a demurrer to this defense was properly overruled: *Harris v. Wilson*, 40 O. S. 300, IV Longsdorf's Notes, 24.

G. C., §§ 7995, *et seq.*, expressly declares that the husband shall support his wife and provide her with necessaries, and though the wife may enter into contracts for her own benefit, or in regard to her separate property, she can only do so when it is shown that at the time of entering into the contract, she so intended, and had a separate estate to charge: *Railroad Co. v. Harber*, 12 O. C. D. 648.

Where the mortgage covers both the wife's separate property and property of the husband, the fact that the mortgage secures the husband's note is sufficient to put any one dealing with husband's property covered by said mortgage on inquiry as to the true relation sustained by the wife's property, and to put the burden of proof on the one dealing with such property of the husband to show that the true relation of the wife's property is different from that indicated by the record: *Insurance Co. v. Miller*, 1 O. C. C. (N.S.) 397, 14 O. C. D. 667.

The foregoing is especially true as to one who purchases such property of the husband, where the only consideration is the husband's past due indebtedness: *Insurance Co. v. Miller*, 1 O. C. C. (N.S.) 397, 14 O. C. D. 667.

Where it appears from the record that the wife's separate property has been mortgaged to secure her husband's note, it is evidence tending to show that her property sustains the relation of surety to his debt: *Insurance Co. v. Miller*, 1 O. C. C. (N.S.) 397, 14 O. C. D. 667.

A married woman does not bind her general estate by signing a note, but only her separate estate, nor are her debts chargeable on it: *Logan v. Thrift*, 20 O. S. 62, II Longsdorf's Notes, 979.

A contract charging separate estate—as here for services—need not be in writing: *Elliott v. Lauchhead*, 43 O. S. 171, IV Longsdorf's Notes, 156.

But such intent may be presumed if the debt is for the benefit of herself or property: *Rice v. Railroad*, 32 O. S. 380, III Longsdorf's Notes, 639.

A subscription to railroad stock or agreement to take and pay for it does not raise a presumption that it was on the credit of the separate estate, and unless this is shown,

does not bind her: *Rice v. Railroad*, 32 O. S. 380, III Longsdorf's Notes, 639.

If she signs as surety for her husband it is no defense that she received no consideration: *Biedinger v. Goebel*, 5 Dec. Rep. 492, 6 Am. L. Rec. 282, 2 Bull. 245; *Hershiser v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045.

A married woman's allegation in seeking injunction against a judgment on her note that "she was ignorant of what she was signing," may under the reasonable construction of the code be deemed to be that she was not informed as to the nature and extent of her obligation on the note, if in connection with other parts of the pleading such appears to be the fair meaning: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149.

As the intent presumed from signing is not rebuttable an averment of want of knowledge that the note contained a clause "to be binding on the separate property of," etc., or her ignorance of the legal consequences of signing, is no defense: *Corwin v. Cook*, 8 Dec. Rep. 432, 9 Dec. Rep. 321, 8 Bull. 4, 12 Bull. 157.

A devise by a wife to her husband of land owned as general and not separate property, first directing that all her debts be paid out of her estate, is held by him subject to her business debts as well as any others, she having given notes in a business conducted by her in her own name. Her administrator in an action in which he, the husband, a mortgagee of the husband, and the creditors are parties, is entitled from the proceeds of sale to sufficient to pay the debts, and a distribution ordered to creditors is not prejudicial to the mortgagee: *McCullough v. Copeland*, 40 O. S. 329, IV Longsdorf's Notes, 26.

If she buys goods for her grocery business it is a conclusion of law that she intended to bind her estate to pay for them, and her denial of such intent is demurrable: *Sand v. Sirl*, 4 Dec. Rep. 533, 2 Clev. L. Rep. 329, 4 Bull. 834.

Separate property is liable for rent of a store in which she carries on her business, rented on the faith of it: *Plumb v. Dee*, 6 Dec. Rep. 996, 9 Am. L. Rec. 413, 5 Bull. 817.

Separate property is liable for rent under a lease assigned to her before marriage, she and her husband continuing the possession: *Poor v. Scanlan*, 8 Dec. Rep. 275, 7 Bull. 15.

Separate property is liable for a bill of goods sold to her and her husband for a grocery run by them: *Fisher v. McMahon*, 4 Dec. Rep. 93, 1 Clev. L. Rep. 22, 3 Bull. 51.

The indorsement over of a note belonging to her imports an intent to charge her prop-

erty for its payment: *Hinman v. Williams*, 7 Dec. Rep. 709, 4 Bull. 1079.

A married woman's contract for the benefit of part of her estate will be a charge on the whole of it, and it is not necessary to describe any of it unless it was intended to create a specific lien: *Decamp v. Gaskill*, 13 Dec. Rep. 584, 1 C. S. C. R. 337.

A wife, prior to the act of 1884 (81 v. 65), mortgaged her property as surety for her husband, and it having been sold on foreclosure without paying off the debt, the husband assigned to her certain claims to pay the loss of the property. It was held the mortgagee could collect the unpaid balance by subjecting such claims in her hands: *Howland v. Buckland*, 33 Bull. 214 [without opinion in the supreme court].

A judgment against a married woman and others as members of a firm, rendered in 1879, bound only her then separate estate, and when that was exhausted no further remedy against her could be had: *Raymond v. Breckenridge*, 7 O. N. P. 377, 5 O. D. (N.P.) 156.

A married woman's real estate is not subject to improvements made on a contract with her husband. The statute forbidding sale of his interest by the curtesy for his debts applies to prevent sale of it to satisfy the lien: *Spinning v. Blackburn*, 13 O. S. 131, II Longsdorf's Notes, 601.

A married woman can not be held for the value of grading and sodding her lot on a contract by her husband in her name, of which she had no knowledge. G. C., § 8323, does not apply, for such work is not an appurtenance to any building nor subject to a mechanic's lien, nor does her admission in her answer that she had made a partial payment estop her to deny liability: *Stichtenoth v. Rife*, 6 O. C. C. 540, 3 O. C. D. 575.

If a husband and wife go together to buy materials for a house on her property, saying nothing about the ownership, and the sale is made to him in her presence and charged to him, this does not show a sale on his credit, and a lien may be taken: *Building Association v. Hayes*, 2 O. C. C. 225, 1 O. C. D. 456.

Where a person in possession under an equitable title, as by a contract to purchase, has improvements made, the lien will not be prejudiced by his having the title conveyed to his wife: *Smith v. Woodruff*, 12 Dec. Rep. 140, 1 H. 276. See also MECHANIC'S LIEN.

Where the owner of lands permitted her husband and his partner to enter into possession of the premises, without written lease, reservation of rent or royalty, and operate the same for oil, being permitted to receive the entire product, such firm was not merely a tenant at will, but acquired a right in equity to compel the owner of such property

to execute a lease or grant, conveying the usual rights and interest which are conveyed by such instruments and a mortgagee of such firm succeeds to the rights thus acquired: *Simmons v. Supply Co.*, 21 O. C. C. 455, 11 O. C. D. 690. See also OIL AND GAS.

As the law stood in 1876, the ownership by a married woman of separate property when the contract was entered into, was essential to the establishment of an intent to create a charge thereon. Property thereafter acquired did not become bound for the previous engagement, nor did such acquisition give validity to a promise made when the defendant was not the owner of separate property: *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872.

6. Nature of Liability Created by Charge.

A charge upon her separate estate by a married woman did not create a general personal obligation upon her part. Such charge could be enforced against the separate estate which she owned when such charge was made; but it could not be enforced against property subsequently acquired by her: *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872. See to the same effect, *Ankeny v. Hannon*, 147 U. S. 118, 7 O. F. D. 425.

Real estate inherited by a married woman, since the passage of the act of 1861 (S. & S. 391), which declared such inheritance to be her separate property, could not be charged in equity for the payment of a liability incurred by her prior to the passage of the statute: *Fallis v. Keys*, 35 O. S. 265, III Longsdorf's Notes, 779. See also upon this question, *Ankeny v. Hannon*, 147 U. S. 118, 7 O. F. D. 425.

A deed in fee to a married woman put in the hands of a third person not in escrow, but to await some contingency or event, and then to be delivered, vests sufficient interest to constitute a separate estate from the first delivery, so as to authorize a personal judgment on a contract made on the credit of her separate estate: *Cook v. Niehaus*, 8 Dec. Rep. 505, 8 Bull. 259.

Under the act of March 23, 1866 (S. & S. 391), a married woman could bind her property under the mechanic's lien law by a contract for improvement upon her property; but only to the extent of the cost and expense of such improvement: *Edwards v. Edwards*, 24 O. S. 402, III Longsdorf's Notes, 180.

A married woman, unless restrained by the terms of the instrument of settlement, could, by her contract, and without the consent of trustees in whom the legal title was vested, charge her separate estate, at least

to the extent of rents, issues and profits thereof, with the cost of reasonable repairs and improvements for the benefit of the estate; and, to that extent, a mechanic's lien could attach under the statute: *Machir v. Burroughs*, 14 O. S. 519, II Longsdorf's Notes, 682.

The liability created by charging the separate estate of a married woman was not a common law liability, and could not be enforced in a proceeding before a justice of the peace: *Jens v. Gugel*, 26 O. S. 527, III Longsdorf's Notes, 326; *Allison v. Porter*, 29 O. S. 136, III Longsdorf's Notes, 456.

If a married woman permitted a default judgment at law to be taken against her, she could not subsequently in an action at law upon such judgment interpose the defense that such action should have been in equity to charge her separate estate, and that a personal judgment against her should not have been rendered; since such personal judgment was erroneous but not void: *Hart v. Manahan*, 70 O. S. 189, IV Longsdorf's Notes, 972 [reversing *Manahan v. Hart*, 2 O. C. C. (N.S.) 606, 14 O. C. D. 527].

If a married woman made a contract to convey land for a certain consideration, to be paid upon condition that the vendors would convey a right of way to a certain railway corporation, and she conveyed such right of way so that rescission of the contract would not place her in *statu quo*; and she thereupon tendered full performance by offering a deed for such property duly executed, she could have specific performance of such contract: *Richards v. Doyle*, 36 O. S. 37, III Longsdorf's Notes, 829.

A conveyance of property by a married woman with covenants of warranty or against incumbrances, did not impose a personal liability upon her, enforceable at law: *Morgan v. Myers*, 2 O. C. C. 196, 1 O. C. D. 440.

Such liability existed in equity, and could be enforced against her separate estate: *Gerlach v. Redinger*, 40 O. S. 388, IV Longsdorf's Notes, 33.

The joint note of husband and wife was the valid obligation of the husband alone, although the wife was not liable at law thereon: *McClelland v. Bishop*, 42 O. S. 113, IV Longsdorf's Notes, 96.

In 1884, a married woman who had signed a note as surety for her husband was not personally liable therefor: *Drake v. Birdsall Co.*, 10 Dec. Rep. 56, 18 Bull. 243.

If a married woman sell a piece of her separate property pending a suit to subject it to a debt for its improvements, the buyer takes it *cum onere*: *Decamp v. Gaskill*, 13 Dec. Rep. 584, 1 C. S. C. R. 337.

Since the enactment of G. C., § 8001, a married woman may make any contract with any person which she might make if unmarried, and for any debt contracted by her thereafter, her property acquired after that time, and while a *feme sole*, is liable as her general property for her debts. Therefore the proceeds of an insurance policy in the hands of a widow as the beneficiary thereof is not exempt from the payment of a debt arising out of a contract as to her separate estate in 1896, and for which she pledged her entire separate estate, upon the ground of its being an after acquired separate estate: *Brewing Co. v. Cassman*, 21 O. C. C. 465, 12 O. C. D. 141.

Where a husband orders repairs on his wife's property by a carpenter, who believes him to be owner, and does the work, and takes his note, and the wife knew of the order and the work being begun and done, she is personally liable. G. C., § 8323, is not confined to mechanic's liens, but makes her liable on the contract: *Heller v. Hohman*, 12 O. C. C. 216, 5 O. C. D. 338.

A purchase-money mortgage by a married woman without her husband joining, the vendor supposing her unmarried, is enforceable as a trust, and her subsequent vendees, with notice, took title in trust to pay the notes: *Ogle v. Ogle*, 41 O. S. 359, IV Longsdorf's Notes, 65.

The remedy against the separate property of a married woman is the same as if the woman were unmarried under present statutes: *Card Co. v. Stanage*, 50 O. S. 417, IV Longsdorf's Notes, 505; *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386; *Sanders v. Shepherd*, 17 O. C. C. 503, 9 O. C. D. 406.

A married woman's funeral and last sickness expenses are debts of her estate under G. C., § 10714, although her surviving husband has property, and the executor may properly allow and pay them: *McClellan v. Filson*, 44 O. S. 184, IV Longsdorf's Notes, 403; *Helmkamp v. Kater*, 8 Dec. Rep. 667, 9 Bull. 160.

7. Action to Recover.

Where a wife is living separate from her husband on account of his ill treatment, which is not denied, and sues him to recover her separate property, which he denies having, the court may order him to pay her an allowance to enable her to prosecute her suit, although it be a court such as the superior court, which has no jurisdiction to give alimony: *O'Donnell v. O'Donnell*, 12 Dec. Rep. 633, 1 D. 299. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

F. CONVEYANCES TO HUSBAND AND WIFE.

Realty which is conveyed to the husband and wife is held by them as tenants in common, and not as tenants by the entirety, as at common law: *Wilson v. Fleming*, 13 O. 68, I Longsdorf's Notes, 624; *Bank v. Wallace*, 45 O. S. 152, IV Longsdorf's Notes, 266.

Estates in joint tenancy do not exist in Ohio; the parties are tenants in common. Hence, under a devise to husband and wife, and their heirs, the children on the wife's death become tenants in common with their father: *Sergeant v. Steinberger*, 2 O. 305, I Longsdorf's Notes, 128; *Wilson v. Fleming*, 13 O. 68, I Longsdorf's Notes, 624; *Penn v. Cow*, 16 O. 30, I Longsdorf's Notes, 747.

VIII. POWER OF MARRIED WOMAN TO CONTRACT.

A. MODERN STATUTE.

A married woman may contract to the same extent as if she were unmarried; or to the same extent as her husband may bind himself: *Bank v. Holden*, 9 Dec. Rep. 546, 14 Bull. 399.

G. C., § 7999, impliedly gives the husband or wife a right to maintain an action to enforce contract made between husband and wife: *Hart v. Sarvis*, 3 O. N. P. 316, 3 O. D. (N.P.) 708.

An agreement on the part of a wife to refrain from bringing an action against her husband for divorce and alimony constitutes a sufficient consideration for a conveyance of property by him to her, and such conveyance will not be set aside for want of consideration where the wife was not aware at the time the conveyance was made of any fraudulent intent on the part of the husband with respect to creditors: *Whitacre v. Redmond*, 8 O. L. R. 165.

A married woman may enter into a partnership with her son and a stranger; and such partnership may employ the husband of such married woman to manage the business; the relations of a husband and wife do not prevent such a transaction: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

In *Buning v. Berteling*, 5 O. N. P. 167, 7 O. D. (N.P.) 129, the effect of G. C., § 7999, seems to have been ignored, and it was said in an action against a married woman on notes given in 1889 and 1892 that she could not be held personally liable, but only her separate estate could be charged with such notes.

The common law rule of the unity of interest between husband and wife preventing the application of the statute of limitations to claims existing in favor of the wife against the husband during coverture, on grounds

of public policy, has been abrogated in Ohio by statute: *Liggett v. Liggett*, 3 O. N. P. (N.S.) 518, 51 Bull. 59.

G. C., § 8000, does not in any way limit or modify the right conferred by G. C., § 7999, by which the husband and wife are permitted to contract with each other: *Brenneman v. Brenneman*, 1 O. N. P. 332, 3 O. D. (N.P.) 392.

Since the amendment of 1884 a married woman can bind herself by contract in the same manner and to the same extent as if unmarried: *Koch v. Seifert*, 9 Dec. Rep. 411, 13 Bull. 15; *Bank v. Holden*, 9 Dec. Rep. 446, 14 Bull. 399; *Stagge v. Nichols*, 1 O. C. C. 408, 1 O. C. D. 228.

Contra, that the consideration must refer to her separate estate: *Drake v. Birdsall*, 10 Dec. Rep. 56, 18 Bull. 243.

Under a former statute, R. S., § 3109, as amended April 14, 1884 (81 v. 209), a married woman could be compelled to execute a contract in writing, made jointly with her husband, to convey her separate real estate, though the contract was not in the form of a deed, and there was no acknowledgement by her separate and apart from her husband: *Stagge v. Nichols*, 1 O. C. C. 408, 1 O. C. D. 228.

A note executed by husband and wife, the proceeds of which were largely used in perfecting the wife's musical education and whereby she was subsequently enabled to earn large sums of money, is good against the wife; there is no want of consideration: *Smith v. Smith*, 10 O. D. (N.P.) 439.

B. COMMON LAW.

1. In General.

A wife has no capacity to become a partner in a firm not connected with her separate property, and if she does so with the husband's consent, he is the partner, and liable for its debts: *Swasey v. Antram*, 24 O. S. 87, III Longsdorf's Notes, 163.

If she buys out her partners and assumes all the debts with the husband's concurrence, it is a sale to him, and if the two sell the effects to another who assumes the debts, he is liable as garnishee in a suit against the husband and the other parties, though the wife is not joined: *Swasey v. Antram*, 24 O. S. 87, III Longsdorf's Notes, 163.

Prior to 1884 a married woman had no legal capacity to form a partnership with her husband. Whether she could since is not considered: *Payne v. Thompson*, 44 O. S. 192, IV Longsdorf's Notes, 203.

A married woman bought land, agreeing to pay a mortgage on it as part of the purchase-money. She and her husband sold it to F, and he to defendant, the successive

grantees agreeing to pay the mortgage. The mortgagee now sues the defendant for personal judgment for deficiency after foreclosure. It was held a married woman had power to stipulate for such terms of sale and her grantee was bound to pay as agreed the same as if she were a *feme sole*, and was liable in this action: *Brewer v. Maurer*, 38 O. S. 543, III Longsdorf's Notes, 992 [reversing *Maurer v. Brewer*, 4 Dec. Rep. 345, 1 Clev. L. Rep. 348; *Brewer v. Maurer*, 4 Dec. Rep. 433, 2 Clev. L. Rep. 155].

A contract to buy real estate (being her bid at assignee's sale) can not be enforced against a married woman purchaser: *Starbuck v. Hynod*, 7 Dec. Rep. 132, 1 Bull. 140.

Where a married woman contracts to buy real estate and is in possession, but has ceased to make the agreed payments, equity will give a remedy to the vendor's executor: *Brooker v. Grossman*, 4 Dec. Rep. 258, 1 Clev. L. Rep. 177.

A married woman's signature to her husband's agreement to sell his real estate, where her only interest is contingent dower, does not bind her, and if this appears on a petition against them to compel specific performance, demurrer lies: *Graf v. Wirthweine*, 12 Dec. Rep. 4, 1 H. 19.

A wife's contract to convey her land is void, but if the vendee has paid and gone into possession, and she then duly conveys to a third person, she has nothing to protect, and if the third person has notice, he takes subject to the first buyer's equity and will be compelled to convey to him: *Warner v. Sickles*, W. 81, I Longsdorf's Notes, 6.

Where a man has the title of his wife's lands, or holds title in trust for her, and at her request agrees to sell it, his deed without her joining would carry the entire interest; hence, if he refuses to convey, specific performance will be enforced, though she joins in resisting it: *Rostetter v. Grant*, 18 O. S. 126, II Longsdorf's Notes, 873.

A married woman who induces a person to buy her real property by a verbal promise that he may deduct from the price a debt owed him by her husband, can not, after conveyance, repudiate the promise and demand the entire price: *Meiley v. Butler*, 26 O. S. 535, III Longsdorf's Notes, 327 [affirming *Butler v. Hughes*, 7 Dec. Rep. 92, 1 Bull. 104].

Specific performance of a married woman's contract to convey her separate real estate, executed in conjunction with her husband, though not in the form of a deed nor separately acknowledged by her, may be enforced: *Stagge v. Nichols*, 1 O. C. C. 408, 1 O. C. D. 228.

A married woman, who has, without her husband, contracted to convey, and her

grantee has made valuable improvements, can not, on repudiating, deprive him of compensation as an occupying claimant. This is not enforcing her contracts, and her disability is a shield and not an instrument for fraud: *Preston v. Brown*, 35 O. S. 18, III Longsdorf's Notes, 753.

A married woman's deed by her, in conjunction with her husband's attorney in fact, binds her. Although the statute allows release of dower by her joining in her husband's deed, or in his power of attorney to convey, this combination of the two is valid: *Glenn v. Bank*, 8 O. 72, I Longsdorf's Notes, 414.

Where a married woman, seized in fee of an ancestral estate, joins with her husband in a written agreement to exchange it for other property, and dies before the execution of deeds of conveyance, leaving her husband and brothers and sisters, but no children, surviving her, the ancestral estate will pass to, and vest in the brothers and sisters, subject to the life estate of the husband, even though possession had been taken: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

By reason of her coverture, the agreement, in writing, of a married woman joining with her husband to exchange her ancestral real estate is absolutely void: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

A surviving husband succeeds to no interest or estate in property agreed to be conveyed to the wife, in exchange for her ancestral estate, which his creditors can subject to the payment of his debts, where the wife died before the execution of deeds of conveyance: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

Proceedings, under 29 v. 258, § 5 (G. C., § 11922), to complete real estate contracts are unauthorized and void for want of jurisdiction in case of the written agreement of a married woman joining with her husband for the exchange of her ancestral estate: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

Proceedings to complete real estate contract of a married woman, which are void for want of jurisdiction, do not as matter in pais estop the parties thereto, who acted under mutual mistake as to their rights, from claiming their inheritances under the statute of descents: *Murdock v. Lantz*, 34 O. S. 589, III Longsdorf's Notes, 740.

Husband and wife's joint note is the valid note of the husband alone, she not being liable at law on it: *McClelland v. Bishop*, 42 O. S. 113, IV Longsdorf's Notes, 96. See also NEGOTIABLE INSTRUMENTS.

Where a married woman has so far performed her side of a contract that rescission

would not put her in *statu quo* and the other party can be made secure, equity will not allow him to say that he is not bound to perform: *Richards v. Doyle*, 36 O. S. 37, III Longsdorf's Notes, 829. See also SPECIFIC PERFORMANCE.

A married woman having made a contract and having fulfilled her part, so that she can not be put in *statu quo*, can compel specific performance from the other party. Her coverture is then no defense on the ground of want of mutuality. It was so held where D agreed to buy a lot of a married woman and others, on condition they would give a right of way to a railroad, which they did, and then are able and willing to convey to D, but he failed to pay: *Richards v. Doyle*, 36 O. S. 37, III Longsdorf's Notes, 829. See also CONTRACTS.

2. Specific Facts Giving Capacity.

If a husband abandons his family and is unheard of for seven years, until a presumption of death arises, his wife may contract as a *feme sole*. And perhaps under such facts, would even have implied authority to sell or encumber the husband's property for support of family: *Rosenthal v. Mayhugh*, 33 O. S. 155, III Longsdorf's Notes, 663.

If the husband and wife are separated and living permanently apart, she can contract as a *feme sole*: *Wagg v. Gibbons*, 5 O. S. 580, II Longsdorf's Notes, 205; *Layton v. Conover*, 1 Dec. Rep. 186, 3 W. L. J. 364.

A married woman can contract as to real estate in one way only, and that is under the statutory guards against marital influence: *Needles v. Needles*, 7 O. S. 432, II Longsdorf's Notes, 310.

A married woman's purchase of land, she agreeing as part of the consideration to pay a mortgage on it, shows that she has a separate estate, that the contract was for its benefit and that she intended to charge it, and the mortgagee may take a personal judgment against her for a deficiency on foreclosure, she having bought in the land at the foreclosure: *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386.

IX. CONTRACTS AND TRANSACTIONS BETWEEN HUSBAND AND WIFE.

A. ANTENUPTIAL CONTRACTS.

1. In General.

Our statute, G. C., § 8608, as to jointure is adopted from the Act 27, Henry VIII, c. 1056: *Grogan v. Garrison*, 27 O. S. 50, III Longsdorf's Notes, 344.

The requisites of a jointure need not be possessed by an antenuptial contract. If it

be *bona fide* and reasonable it will be enforced: *Stilley v. Folger*, 14 O. 610, I Longsdorf's Notes, 691.

2. Elements.

(a) Capacity.

Persons who are engaged to be married occupy relations of trust and confidence to each other: *Mettler v. Warner*, 11 O. N. P. (N.S.) 363, 21 O. D. (N.P.) 184.

(b) Consideration.

The intended marriage is always part of the consideration of the settlement: *Ross v. Ross*, 2 Dec. Rep. 181, 2 W. L. M. 17.

(c) Disclosure.

An antenuptial agreement to pay two thousand five hundred dollars made by a man possessed of real estate to the value of twenty thousand dollars and personal property to the value of thirty-five thousand dollars, is *prima facie* disproportionate to the amount which the wife would receive by law, as dower in the real estate and as a distributee of the personal estate, and puts upon the husband's heirs the burden of proving that he acted with the utmost good faith and made a full disclosure of his property. Failure to show any such disclosure will defeat the agreement and entitle the widow to dower: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 736.

The relation existing between persons who have entered into an agreement to marry is of a confidential character, and an antenuptial agreement entered into between them while such relation exists is to be tested by the rules which determine the validity of contracts made by persons standing in confidential relation to each other: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 736.

A mere reputation for wealth known to a contemplated wife will not relieve the contemplated husband from full disclosure of his property in making an antenuptial contract. The fact that the wife was a forewoman in her husband's shoe factory and knew that he had an interest therein and that he had other property, is not notice sufficient to sustain an antenuptial agreement for an amount greatly disproportionate to his means: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 736.

To constitute a verbal antenuptial agreement in consideration of marriage there must be a clear, definite, complete and mutual understanding between the parties: *Drewitz v. Drewitz*, 8 O. N. P. (N.S.) 261, 20 O. D. (N.P.) 62.

(d) Reasonable.

A woman about to marry a man seventy-seven years old, in feeble health, and with nine children, and owning three hundred and sixty-six acres of land of no great value, agreed to receive seven hundred dollars in case she survived him, in lieu of dower. It was held not to bar dower: *Johnson v. Johnson*, 1 O. C. C. 521, 1 O. C. D. 291.

(e) Fraud.

Where a man was worth as much as \$131,000 executed an antenuptial contract with a girl without means or business experience, or knowledge of the value of his property, by the terms of which she is to receive an annuity of five hundred dollars and ten thousand dollars at his death, the disproportion between the amount stipulated in the contract and the amount which she would receive under the law as his widow is so great as to stamp the contract as a fraud upon her, and does not bar her right to dower in his real estate as his widow: *Mettler v. Warner*, 11 O. N. P. (N.S.) 363, 21 O. D. (N.P.) 184.

(f) Necessity of Performance.

Unless the antenuptial contract relinquishing all share in the husband's estate has been fairly performed in favor of the wife, it will not bar her: *Phillips v. Phillips*, 14 O. S. 308, II Longsdorf's Notes, 660.

An answer that the contract has always been and still is a valid and subsisting contract and binding on the widow, can not be construed as an averment of performance, and is demurrable: *Phillips v. Phillips*, 14 O. S. 308, II Longsdorf's Notes, 660.

3. Effect.

(a) Title.

A and B, about to intermarry, agreed that a legacy coming to B should be her separate property, to draw as she saw fit from time to time, and invest as she pleased, and at her death to go to her heirs on her father's side unless she bequeathed it otherwise. She drew most of the money, put it into A's hands, and he invested it in lands in his own name with her approbation. It was held (1) she was a *feme sole* as to this legacy; (2) her interest was not a life estate, but unqualified, and she could dispose of it in other ways than by will; (3) the husband had no right in it, but could become a donee of the power of disposition. (4) Undue influence is not presumed, but must be proved. (5) The undrawn part of the legacy not

being disposed of goes to the heirs mentioned in the agreement: *Hardy v. Van Harlingen*, 9 O. S. 208, II Longsdorf's Notes, 291.

(b) *Dower.*

In order to bar a widow of dower by reason of a marriage contract or antenuptial agreement, facts should be pleaded and proved showing that the terms and provisions of the contract were fair, reasonable and just to the wife under all the circumstances existing at the time the agreement was entered into: *Binkley v. Binkley*, 3 O. N. P. (N.S.) 33, 50 Bull. 58.

Where a woman of very mature age makes a marriage of convenience, and her judgment is not merged in sentiments of affection or delicacy, and the agreement was that each spouse should keep his or her own property, and not claim dower or curtesy on surviving, and the wife should receive a certain sum if she survived, the agreement is valid and bars dower: *Stilley v. Folger*, 14 O. 610, I Longsdorf's Notes, 691.

A woman's antenuptial covenant not to claim dower will not bar her dower unless it is either a legal or equitable bar: *Grogan v. Garrison*, 27 O. S. 50, III Longsdorf's Notes, 344 [affirming *Garrison v. Grogan*, 13 Dec. Rep. 563, 1 C. S. C. R. 302].

If the jointure conveys an undivided interest it is not a good statutory bar of dower (G. C., § 8608). It must be such an interest that she could take possession of in severalty without resorting to an action for an assignment by metes and bounds: *Grogan v. Garrison*, 27 O. S. 50, III Longsdorf's Notes, 344.

A jointure is not an equitable bar to dower where it is for an undivided interest for life of less than a third of the husband's lands, without proof that it is fair and reasonable, or of acts estopping the widow: *Grogan v. Garrison*, 27 O. S. 50, III Longsdorf's Notes, 344.

An equitable jointure reasonable and fully executed bars dower, as where a couple owning about equal properties, by antenuptial contract agreed to enjoy the whole during coverture, and at the death of either the survivor and the estate should resume their respective realty and divide the personalty, and neither have any claim on the other's share, this bars dower: *Murphy v. Murphy*, 12 O. S. 407, II Longsdorf's Notes, 573.

A reasonable antenuptial contract in bar of dower, if between parties of mature age, without imposition and in good faith, given full effect during life by the husband, will be enforced: *Mintier v. Mintier*, 28 O. S. 307, III Longsdorf's Notes, 407.

If both parties are of full age, and have a reasonable knowledge of each other's circum-

stances, and there is no fraud, the adequacy of the provisions for the wife does not depend on its proportion to the husband's estate to bar dower: *Ross v. Ross*, 2 Dec. Rep. 181, 2 W. L. M. 17.

If an antenuptial settlement secures to a wife in lieu of dower a sum payable after her husband's death, and his will provides for paying his debts, and for a support to his wife, with a declaration that he intended to give her this provision, she may claim this and also the amount secured by the settlement. The intention of the will decides whether she must elect or can have both: *Bowen v. Bowen*, 34 O. S. 164, III Longsdorf's Notes, 707.

Where a legal jointure bars dower no election is necessary to entitle the widow to take a devise, but this was questioned but not decided if the bar is by equitable jointure or settlement: *Bowen v. Bowen*, 34 O. S. 164, III Longsdorf's Notes, 707.

Where a testator makes the same provision in his will for his widow that she would be entitled to by the terms of an antenuptial contract, and stipulates that it shall be in lieu of dower and in lieu of her rights under the antenuptial contract, the widow by electing to take under the will waives her right to dower and her rights under the antenuptial contract, and can not afterwards claim either: *Krigbaum v. Irvine*, 8 O. N. P. 174, 10 O. D. (N.P.) 226. See also WILLS, LEGACIES AND DEVISES.

(c) *Year's Allowance.*

The year's allowance may be barred by antenuptial agreement to that effect in consideration of marriage where each party has sufficient property for support and desires to keep it separate and each agrees to make no claim of curtesy, dower, year's allowance, etc., and there are no children of the marriage, and neither had minor children living at the time of the husband's death: *Broadstone v. Balduin*, 5 O. N. P. 39, 8 O. D. (N.P.) 236.

It was questioned but not decided if the year's allowance to a widow is barred by her antenuptial contract relinquishing all claim to a share in the personalty: *Phillips v. Phillips*, 14 O. S. 308, II Longsdorf's Notes, 660.

It was questioned but not decided whether the probate court has power to decide whether the year's allowance is barred by antenuptial agreement: *Heck v. Heck*, 34 O. S. 369, III Longsdorf's Notes, 722.

The probate court refused to set aside a year's allowance to a widow as barred by an antenuptial contract, holding that it had no jurisdiction to determine the validity and

effect of such contract, and it was also urged that such allowance is a debt which can not be barred by prior contract, either as to herself or her children. The ruling was affirmed: *Baldwin v. Broadstone*, 35 Bull. 161 [without opinion, in the supreme court]. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

4. Foreign Agreement.

The validity of an antenuptial agreement made and executed outside of the state, both parties being residents of this state and continuing to reside therein, and property owned by both parties being in this state, is to be determined by the law of this state: *Duttenhofer v. Duttenhofer*, 12 O. D. (N.P.) 736.

The decision of a court of another state is conclusive on the courts of this state, in which land involved in the controversy is situated, when the title to the land is only indirectly or incidentally involved in the case determined in the foreign court; and the determination of an Illinois court as to the validity of an antenuptial contract in which the right to dower in Ohio real estate is involved is, therefore, conclusive when pleaded in an action here for the assignment of dower, and the same question between the same parties can not be relitigated here: *Mettler v. Warner*, 11 O. N. P. (N.S.) 363, 21 O. D. (N.P.) 184.

While the courts of one state can not adjudicate directly upon the title to lands in another state, yet if the title is only incidentally involved the adjudication is binding. Accordingly, where an Illinois court holds an antenuptial contract barring dower to be void, this is conclusive in a dower case in Ohio between the same parties: *Mettler v. Warner*, 11 O. N. P. (N.S.) 363, 21 O. D. (N.P.) 184. See also CONFLICT OF LAWS.

An antenuptial contract is governed by the law of the matrimonial domicile. Such contract made in Germany, by which the husband, for valuable consideration, agreed that all property then owned by the intended wife, or mutually acquired thereafter, should be hers, is not contrary to our policy, and being valid there, will be enforced here. Such property can not be levied on for the husband's debts, and a levy will be enjoined on bill by the wife by next friend: *Scheferling v. Huffman*, 4 O. S. 241, II Longsdorf's Notes, 90. See also CONFLICT OF LAWS.

5. Agreement as to Religion.

Where by antenuptial agreement it is provided that any children should be brought up in a particular religious faith, and after both parents are dead, relatives on each side

contend for the guardianship, the court, other things being equal, must appoint the relative of the agreed faith: *In re Luck*, 7 O. N. P. 49, 10 O. D. (N.P.) 1. See also GUARDIAN AND WARD.

B. POSTNUPTIAL TRANSACTION.

1. Contracts.

(a) In General.

A promise by a wife to thereafter conduct herself toward her husband as a wife should, is simply a promise to do what she was already obligated to do, and does not constitute a valid consideration for a release by him of all his rights present and prospective in her property; but inasmuch as such a contract is purely executory, and ground does not exist for an application of the principles of *quia timet*, a court of equity will refuse to rescind it upon the petition of the husband: *Drewitz v. Drewitz*, 8 O. N. P. (N.S.) 261, 20 O. D. (N.P.) 62.

The wife during coverture has no power to bind herself to assent to a change in a settlement, otherwise she would not be protected; accordingly, if she unites with the husband in conveying away land to be secured to her, he agreeing to give her a legacy in lieu thereof, she can take the legacy or hold his estate for damages for breach of contract, but she must elect. She can not treat the whole settlement as abandoned and claim dower: *Ross v. Ross*, 2 Dec. Rep. 181, 2 W. L. M. 17.

Jointure, under the act of 27 H. VIII, c. 1056, from which our statute is almost literally borrowed, is a competent livelihood of freehold for the wife of lands or tenements, to take effect presently in possession or profit after decease of the husband. (1) It is to take effect for her life presently after the husband's decease. (2) It must be for her own life, or for a greater estate. (3) It must be made to herself and to no other for her. (4) It must be in satisfaction of her whole dower and not part of it. (5) It must be expressed to be in satisfaction of dower. (6) It may be made either before or after marriage: *Grogan v. Garrison*, 27 O. S. 50, III Longsdorf's Notes, 344.

Prior to the legislation of 1884 (81 v. 65, 209), a married woman did not possess legal capacity to enter into a copartnership with her husband: *Payne v. Thompson*, 44 O. S. 192, IV Longsdorf's Notes, 203.

An agreement between a husband and wife, and a trustee, as to a legacy to her not yet collected, was sustained, in *Woodbury v. Parish*, 11 O. S. 434, II Longsdorf's Notes, 518.

(b) *Loans.*

Where money is saved by the frugality of a wife, or earned by her, and is borrowed by her husband, who gives her a note for it, this note, though void at law, will be sustained in chancery, and will be enforced against his estate, even if the earnings and savings belonged to the husband, yet the giving of the note showed his intention to appropriate them to her separate use, and this will be sustained as a postnuptial agreement, no rights of creditors interfering: *Wood v. Warden*, 20 O. 518, I Longsdorf's Notes, 922.

A note of a husband held by his wife for money borrowed by him of her, will, after her death, be regarded as an equitable claim against him, and a release of it by her will is a provision beneficial to him: *Huston v. Cone*, 24 O. S. 11, III Longsdorf's Notes, 156.

If a husband borrows his wife's money and gives her a note for it, this shows his intent to make it her separate property; a trustee is not necessary for this, and she may compel his administrators by suit in chancery to pay it: *Huber v. Huber*, 10 O. 371, I Longsdorf's Notes, 520.

A mortgage by a husband direct to his wife to secure a debt is void as a grant, but enforceable as an equitable lien simply. She does not release or postpone her equitable lien by joining in his later mortgage to a creditor with warranty by both after due record and condition broken of her own mortgage. A mortgage is mere security in Ohio except as between mortgagor and mortgagee: *Bank v. Singer*, 12 Bull. 324, 16 Bull. 179 [without opinion, in the supreme court].

A postnuptial parol promise of a husband to his wife to induce her to pay money for his benefit, that she should have a lien on his estate for the amount, and that the survivor should have the property of both for life, will be specifically enforced in favor of the wife surviving: *Seelmeyer v. Seelmeyer*, 6 Dec. Rep. 1021, 9 Am. L. Rec. 551, 6 Bull. 67.

Where a wife furnishes her husband with money to make a payment on his indebtedness to a creditor to whom he owed two overdue debts on one of which his wife was surety, equity will require the creditor to apply the payment on the debt on which the wife is surety, if he knows that payment was made with money of the wife, notwithstanding the husband at the time of payment neglected to direct that the payment be so made: *Banking Co. v. Pelton*, 1 O. C. C. A. 100, 24 O. C. D. 172 [affirmed, without opinion, *Banking Co. v. Pelton*, 88 O. S. —].

(c) *Gifts.*

A wife has absolute power of disposition over separate property, except as restricted in the instrument creating it, and not merely no power except as conferred: *Hardy v. Van Harlingen*, 7 O. S. 208, II Longsdorf's Notes, 291.

Delivery of a specified part of the separate property to the husband on request to permit him to pay a debt with it, and his transfer of it to his creditor for the purpose, with her knowledge and without objection, is an express assent that he may dispose of it for his own use: *Franc v. Nirdlinger*, 41 O. S. 208, IV Longsdorf's Notes, 62.

Mere indorsement and delivery of a draft by her to her husband is not an assent to his appropriation of it, though an express assent is not necessary: *Franc v. Nirdlinger*, 41 O. S. 298, IV Longsdorf's Notes, 62.

The presumption that where the debt of a wife is paid by her husband with his own money, a gift is intended, does not apply where the debt was to a firm of which the husband was a member, and was a balance due for the construction of a building on a lot owned by the wife, which was soon afterward sold and the proceeds retained by the husband until his death: *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

If there be any weakness in testimony as to declarations of a deceased wife of her assent to the use by her husband for his benefit of her property then in his possession, it lies in the source and not in the substance of the declarations: *Miller v. McLean*, 11 O. C. C. (N.S.) 489, 21 O. C. D. 80 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

Where a wife has full knowledge that her husband is using her property as his own, investing part of it in real estate, taking title in his own name, selling part and re-investing the proceeds without in any way recognizing her as a creditor or beneficiary, her assent thereto during more than thirty years of harmonious and affectionate married life is clearly corroborative of declarations that a gift was intended: *Miller v. McLean*, 11 O. C. C. (N.S.) 489, 21 O. C. D. 80 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628].

A transfer by a husband to his wife of stocks for the protection of himself and family against the vicissitudes of life and fortune, with the expectation on his part that he was to be permitted to use the dividends, and that the wife was to make a will bequeathing such stock to him, and an intention on the part of the wife so to do, does not engraft an enforceable trust on such stock in

favor of the husband: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13. [For opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91, which was affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. —, and *Stevens v. Robinson*, 88 O. S. —]. See also TRUSTS.

(d) *Release of Dower.*

A contract releasing the right to the year's allowance may be made by a woman with her husband while living, provided he leaves no minor children: *In re Roth's Estate*, 6 O. N. P. 498, 9 O. D. (N.P.) 429.

2. *Agency as Between Husband and Wife.*

A married woman's lease of her husband's land is void. If he could ratify it, it must be declared on (the action was for rent) as his contract: *Tullis v. Young*, 6 O. 294, I Longsdorf's Notes, 337.

Whether a wife giving a bill of sale in the husband's presence of his property binds him can not be charged as matter of law, but is for the jury to determine as matter of estoppel: *Hicks v. Cubbon*, 4 Dec. Rep. 408, 2 Clev. L. Rep. 121.

In an action for money had and received, if the evidence only shows that when money was in the house the wife kept the key of the coffers and refused her husband money at his request, that does not constitute her his general agent in money matters: *Thomas v. Hargrave*, W. 595, I Longsdorf's Notes, 47.

If a wife injured in an accident sends for a physician, she does so as agent of her husband, and he alone is liable for the bill in the absence of special contract to the contrary; accordingly this item can not be included in her recovery of damages for the accident, but a remittitur in the reviewing court will be allowed: *Toledo v. Duffy*, 13 O. C. C. 482, 7 O. C. D. 113. See also DAMAGES.

Where the home belongs to the wife, the husband in purchasing an article therefor may be held to have acted as the agent of his wife, notwithstanding the article was charged to him individually: *Heater Co. v. Meckel*, 9 O. N. P. (N.S.) 581, 21 O. D. (N.P.) 722.

A wife in simply making known to her husband her desire for certain medicine, by reason of which he obtained it, does not constitute the husband her agent in such sense as that his contributory negligence in making the purchase can be imputed to her: *Davis v. Guarnieri*, 45 O. S. 470, IV Longsdorf's Notes, 289.

Courts of equity will permit a husband to become trustee or agent of his wife, but they have invariably had a scrupulous regard to the rights of creditors, and if the character

of agent be assumed, in an improper case, equity disregards it: *Glidden v. Taylor*, 16 O. S. 509, II Longsdorf's Notes, 796.

Notices of the amount of premium due being sent to the insured, whose wife is the beneficiary, and he pays, the law will treat him as her agent in so paying. But after they have separated, and his letters to the company show notice of this, he is not her agent either to receive notice or to surrender the policy. His attempt to surrender the policy does not impair his wife's rights: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200. See also INSURANCE.

A person buying necessities, either food or medicine, for his wife and children, is presumably acting as husband or father, and not as mere agent, and evidence to rebut this presumption must be quite clear: *Davis v. Guarnieri*, 45 O. S. 470, IV Longsdorf's Notes, 289. See also AGENCY.

Under G. C., §§ 7998 and 7999, a wife has the right to enter into a partnership with her son and a stranger, and to employ her husband to manage the business, the relations of husband and wife not interfering with such an arrangement: *Bank v. Rice*, 22 O. C. C. 183, 12 O. C. D. 121.

A wife may join with her husband in the execution of a deed and the placing of such deed in the hands of a third person to be held until purchase price is paid. The party holding the deed becomes the agent of both husband and wife: *Farley v. Palmer*, 20 O. S. 223, II Longsdorf's Notes, 991.

3. *Conveyances.*

A transfer by a husband to his wife of stocks for the protection of himself and family against the vicissitudes of life and fortune, with the expectation on his part that he was to be permitted to use the dividends and that the wife was to make a will bequeathing such stock to him, and an intention on the part of the wife so to do, does not engraft an enforceable trust on such stock in favor of the husband: *Lamkin v. Robinson*, 10 O. N. P. (N.S.) 1, 21 O. D. (N.P.) 13 [for opinion on appeal, see *Lamkin v. Robinson*, 15 O. C. C. (N.S.) 126, 24 O. C. D. 91; and affirmed, without opinion, *Lamkin v. Robinson*, 88 O. S. —, and *Stevens v. Robinson*, 88 O. S. —].

A resulting trust exists in favor of a wife whose earnings have been invested in realty in her husband's name under the understanding that the property is to be hers: *Leibig v. Grosskopp*, 20 O. D. (N.P.) 38.

A conveyance by husband to wife to secure a debt does not extinguish her dower, and will, in favor of his creditors, be treated as

a mortgage: *Bank v. Gunther*, 3 O. N. P. 311, 3 O. D. (N.P.) 686.

One who buys property in his wife's name, intending it to be held for him, and to return to him at her death, is entitled, if she devises to him merely a life estate, to a reconveyance: *Stopplekamp v. Stopplekamp*, 8 O. D. (N.P.) 699.

A conveyance direct from husband and wife if without consideration is a nullity both at law and equity: *Fowler v. Trebein*, 16 O. S. 493, II Longsdorf's Notes, 795.

But such conveyance will be sustained in equity though the consideration be merely meritorious as a suitable provision. But on such consideration equity will not sustain it to the prejudice of creditors or children unprovided for. The burden is on the children complaining to show that they are without provision: *Crooks v. Crooks*, 34 O. S. 610, III Longsdorf's Notes, 743.

A conveyance of land worth \$1,000 by a husband direct to his wife in consideration of her release of dower in other lands conveyed worth \$20,000 will be supported against his subsequent creditors: *Williams v. Williams*, 2 Dec. Rep. 467, 3 W. L. M. 157.

A mortgage directly to a wife as a provision conditioned to be void if the mortgagor, or his representatives in case of death, pay her out of the premises a certain sum, will be enforced as against the heirs in the absence of opposing equities. It is not executory nor testamentary, but is a conditional conveyance: *Allen v. Allen*, 6 Dec. Rep. 1223, 13 Am. L. Rec. 215, 12 Bull. 89.

If a husband mortgages his farm direct to his wife for valuable consideration, and both afterwards make an absolute deed to a third person, she joining in the granting clause and releasing dower in the testatum clause, this discharges her mortgage and gives the grantee her entire interest: *Gregory v. Gregory*, 16 O. S. 560, II Longsdorf's Notes, 801.

A husband and wife may convey her separate estate to a trustee in trust to reconvey to the husband, or to him and herself jointly. He is not like a guardian over her: *Lewis v. Baldwin*, 11 O. 352, I Longsdorf's Notes, 565.

If a husband has received and used property of his wife it is a sufficient consideration for a conveyance to her use, no creditor's rights opposing: *Hill v. Wcst*, 8 O. 222, I Longsdorf's Notes, 427.

A husband conveyed land to his wife at her earnest solicitation through a trustee. She afterwards left him and the children, and confessed a judgment on which the land was sold, and he seeks to set aside the conveyance before the sheriff has made a deed or distributed the purchase money. It was held the presumption of an absolute gift was not conclusive, and if the circumstances rebut it,

the claimant has the burden to show absence of undue influence, or an abuse of the relation of trust between husband and wife: *Rankin v. Rankin*, 10 Dec. Rep. 430, 21 Bull. 126.

Canceling unrecorded deeds does not revest title, and if such deeds were by a husband as jointure for his wife in lieu of dower, her right of election is not divested, though the destruction was with intent to restore the title to him: *Spangler v. Dukes*, 39 O. S. 642, III Longsdorf's Notes, 1056. See also DEEDS.

A conveyance by a husband to his wife through a trustee, in consideration that she make no claims against his estate as widow, may be waived and dower claimed after his death, but she can not claim both (G. C., § 8608): *Spangler v. Dukes*, 39 O. S. 642, III Longsdorf's Notes, 1056. See also WILLS, LEGACIES AND DEVISES.

Where A, a debtor, conveyed his property to one B who at once reconveyed to A's wife, and the creditor then brought suit to subject it, making A and B parties, but not A's wife, and pending this suit A's wife, with her husband, mortgaged the property for value, the mortgagee's title is good against a buyer at sheriff's sale under the suit. A person is not obliged to look for pending cases against a former owner brought after he has parted with his title: *Detwiler v. Louison*, 18 O. C. 434, 10 O. C. D. 95.

A mortgage by a failing debtor to a trustee to convey to the wife in full payment of a debt inures to all creditors, for it is now legal to have made it to her direct. There is no difference between a mortgage to secure a debt, and one to pay a debt: *Building Association v. Hyndman*, 6 O. N. P. 197, 8 O. D. (N.P.) 573.

A mortgage by a failing debtor to a trustee for the use of his wife to secure a debt due her must now be held to inure to all creditors, for it is now legal to have made the mortgage to the wife direct: *Bank v. Miller*, 9 O. C. C. 111, 6 O. C. D. 1.

An agreement on the part of a wife to refrain from bringing an action against her husband for divorce and alimony may constitute a sufficient consideration for a conveyance of property by him to her and an allegation setting up such consideration is not open to demurrer for its adequacy is a question of proof, depending upon circumstances. Such a conveyance will not be set aside where the wife was not aware at the time the conveyance was made of any fraudulent intent on the part of the husband with respect to creditors: *Whitacre v. Redmond*, 8 O. L. R. 165.

Where S sues F for breach of promise of marriage, and thereupon F marries W, who had knowledge of the suit, and having first,

in consideration of W's consent, transferred to her all his property, worth about \$25,000, it was held that the marriage settlement was grossly disproportionate to F's circumstances, and therefore fraudulent as against S, and the property will be subjected to her judgment: *Fisher v. Schlosser*, 41 O. S. 147, IV Longsdorf's Notes, 56. See also FRAUDULENT CONVEYANCES.

4. Contract for Separation.

An agreement between husband and wife providing for separation by the terms of which the wife agrees to provide for the children, does not relieve the husband from the duty of supporting such children; and if support is not furnished to them by either father or mother, a third person who furnishes such support may recover from the husband therefor: *Quigley v. Murphy*, 4 O. N. P. 1, 5 O. D. (N.P.) 680.

It is not a defense to a prosecution under G. C., § 13008, that an agreement of separation was entered into by the accused and his wife, by which the latter, who was given the custody of their minor children, agreed for a valuable consideration to furnish them all proper support, and that after the mother became unable to support the children the accused offered to support them if she would surrender their custody to him, which she refused to do: *Bowen v. State*, 56 O. S. 235, IV Longsdorf's Notes, 689.

Where a post-nuptial agreement, reasonable in itself, is fairly made between husband and wife, whereby it was agreed that they should thenceforward live separate from each other, that she should not claim dower in his lands, and would support herself and three of their children without charge to him, in consideration whereof he should cause to be conveyed to her in fee simple, for her separate use, a specified portion of his farm, and such agreement has been executed by the wife, and no rights of creditors or of bona fide purchasers without notice intervene, and he dies without causing the conveyance to be made, such conveyance will be decreed in equity to be made, as against the heirs of the husband and those claiming under them with a notice of her rights: *Thomas v. Brown*, 10 O. S. 247, II Longsdorf's Notes, 431.

Even prior to the enactment of G. C., § 8000, a parol post-nuptial agreement between husband and wife, made in view of a voluntary separation, and fully executed on the part of the husband, whereby, for a consideration which, in the light of all the circumstances of the parties at the time the contract was made, was fair, reasonable, and just, the wife relinquished all claim to a distributive share of the husband's personal estate in case she

survived him, was upheld and enforced in equity; and the intervention between them of a trustee, was unnecessary. But it was essential, that the terms of the contract should be fair, reasonable, and just to the wife, in view of all the circumstances of the parties at the time when it was made; and such contract could be made available, in pleading, as a full defense to an action by the wife for a distributive share of her deceased husband's estate, only when accompanied by such averments as showed it to have been fair, reasonable and just to her. Where, by the terms of a post-nuptial contract between husband and wife, made in contemplation of a separation of the parties, the husband agreed to pay the wife a gross sum of money in hand, in consideration of which she agreed to relinquish all claim to a distributive share of his personal estate in case she survived him; and the stipulated sum was paid, and received, accordingly, and the parties ever afterward lived separate from each other; and, after the death of the husband, the wife brought an action for the recovery of a distributive share of his personal estate, under the statute, it was held that the facts above stated constituted, *prima facie*, a good defense, in equity, to the action as to the amount so received by the wife, under the contract: *Garver v. Miller*, 16 O. S. 527, II Longsdorf's Notes, 798.

An agreement of separation whereby the husband is to pay the wife \$75, and \$50 per annum so long as they both live is just and equitable, where the husband, thirty-four years of age, and possessed of about \$3,300 in personal property has become blind and is afflicted with other bodily disease, and the wife is nineteen years of age, and their only child eighteen months old, has been adopted by the husband's relatives: *Knese v. Hake*, 16 O. D. (N.P.) 466, 3 O. L. R. 610.

While post-nuptial contracts of separation are recognized in Ohio, neither husband nor wife will be aided by the courts in the enforcement of claims arising out of them if the contracts bear the appearance of irregularity or unfairness: *Thoms v. Thoms*, 1 Hosea, 185 [affirmed, without opinion, *Thoms v. Thoms*, 73 O. S. 333].

Release of all right in real property "vested or contingent" in articles of separation and division of property reasonably and fairly made, will not affect the wife's inheriting real estate if the husband dies intestate. The chance of inheriting real estate, unlike personalty, is a mere possibility or expectancy and is neither a vested or contingent interest under the contract, for he could have cut it off by will: *Smith v. Smith*, 57 O. S. 27, IV Longsdorf's Notes, 706.

Articles of separation and the covenants therein are not void as against public policy: *Bettie v. Wilson*, 14 O. 257, 1 Longsdorf's Notes, 662.

Death of the wife does not release the husband's covenant to pay a certain sum for her support because not needed, the payments not being from time to time, but were absolute and once for all: *Bettie v. Wilson*, 14 O. 257, 1 Longsdorf's Notes, 665.

Where a wife, plaintiff in a divorce case, finding her evidence probably inadequate, agrees out of court to accept a certain sum as alimony, and releases all further claim on her husband's estate in consideration of his ceasing to resist the case, and the settlement is approved by her father and counsel, and her petition shows that she had a good idea of the value of the husband's estate, and she takes a divorce, a case of deception and over-persuasion is not made out, and she can not, after the husband's death, set aside the settlement, nor will equity assist her to undo a fraud on the court: *Sturdevant v. Sturdevant*, 11 O. N. P. (N.S.) 412. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

X. CONVEYANCES IN FRAUD OF RIGHTS OF SPOUSE.

Under the circumstances of this case, mortgages executed by the husband on part of his property, to his father, before his marriage, and four years before the separation from his wife took place, will not be set aside as far as the wife's right to alimony is concerned, although these mortgages were executed voluntarily without request therefor from his father and although it seems probable that in executing them he was looking forward to a time when he might be expected to respond in alimony to his intended wife: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where a husband contemplating to abandon his wife executes a mortgage covering all his property, to secure a pretended indebtedness, but in fact without consideration and for the purpose of defeating any judgment for alimony she might recover in a suit for divorce and alimony which she might subsequently institute on the ground of his abandonment of her, such mortgage is a fraud on her rights; and the rights of no innocent parties intervening, it will be set aside as against her claim for alimony, although the husband by false representations had induced his wife to join him in the execution of such mortgage: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

Where in such case the mortgage was executed by the husband to his brother-in-law,

the consideration being a pretended indebtedness to his father to whom the mortgage was then assigned, who, however, did not know of, nor request the execution of such mortgage, it was held that the son was acting in the transaction as the agent of his father, and whether the father's claim was valid or not, he was bound by the fraud thus committed by his son on the rights of his wife whether he had knowledge of his son's intentions or not, and the mortgage in the father's hands would be set aside as against the rights of his son's wife for alimony: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

A husband conveyed to his wife the homestead property which thereafter was always treated and spoken of by him as her property, but four years later, and a week before he separated from his wife, he filed for record a quitclaim deed by his wife to himself for the same property, claiming that the quitclaim deed was executed by her simultaneously with his deed to her for the property, but she denied the execution of such quitclaim deed and knew nothing of it. It was held that she never having knowingly signed and executed such deed, it would be set aside and canceled: *Chittenden v. Chittenden*, 22 O. C. C. 498, 12 O. C. D. 526.

A husband's conveyance of personalty in trust for his grandchildren, made on his deathbed, in lieu of a will, with the declared intent of excluding the wife from her distributive share of his personalty is void as to her: *McCammon v. Summons*, 13 Dec. Rep. 364, 4 Gaz. 289, 2 D. 596.

A husband compelled to pay antenuptial debts of the wife reduced to judgment is in equity her creditor, for her property is primarily liable, and he can pursue her separate property and set aside fraudulent conveyances of it made in contemplation of marriage: *Westerman v. Westerman*, 25 O. S. 500, III Longsdorf's Notes, 256 [affirming *Westerman v. Westerman*, 3 Dec. Rep. 501, 9 Am. L. Reg. 690].

A conveyance by a man who has entered into a contract of marriage which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 O. S. 125, IV Longsdorf's Notes, 850.

A husband may by gift *inter vivos* of all his property deprive his wife of any share therein at his death although done for the purpose of excluding her from inheriting anything from him for his dominion over his personalty is absolute and she is not a quasi

creditor: *Brodt v. Rannells*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

Though such gift was made during the last sickness yet if absolute and not revocable on recovery or conditioned on dying it is not a gift *causa mortis* or testamentary and excludes the wife: *Brodt v. Rannells*, 7 O. N. P. 79, 9 O. D. (N.P.) 503.

Under the law of Kentucky which gives to the husband all the wife's personal property after payment of debts her administrator and not the husband can bring suit to recover personalty which she had conveyed without his consent: *Reed v. Jordan*, 12 O. C. C. 161, 5 O. C. D. 527.

Where a husband voluntarily and without consideration, disposes of his interest in real estate, though it be only an equity therein, during coverture, without the knowledge or consent of his wife, it is a fraud on her marital rights, and she, at his death is entitled to dower in such property: *Fast v. Umbaugh*, 22 O. C. C. 409, 12 O. C. D. 434. See also HUSBAND AND WIFE.

A *bona fide* purchaser of such property at judicial sale, without any knowledge or notice of this equitable claim of dower by the widow, would hold it free from such claim of dower: *Fast v. Umbaugh*, 22 O. C. C. 409, 12 O. C. D. 434. See also DOWER.

A wife who purchases property by her husband's negotiations is chargeable with his knowledge that the grantor is conveying to defraud his wife of prospective alimony: *Tate v. Tate*, 19 O. C. C. 532, 10 O. C. D. 321.

XI. CONVEYANCES BY MARRIED WOMAN.

A married woman's covenant of warranty in her deed duly executed estops her to set up an after-acquired title, though she can not be held in damages upon it: *Hill v. West*, 8 O. 222, I Longsdorf's Notes, 427. See also ESTOPPEL.

A wife's mortgage of her own property to secure her husband's note for his own debt occupies the place of a surety, and is released by a definite contract of extension: *Eisenberg v. Albert*, 40 O. S. 631, IV Longsdorf's Notes, 45.

The husband's answer, disclaiming title and admitting her right, does not divest his title and enable her to recover. It is not a form of conveyance known to the law: *Clark v. Clark*, 20 O. S. 128, II Longsdorf's Notes, 983. See also EJECTMENT.

Where S, in 1852, for full value sold real estate to P, and conveyed it by warranty deed in which S's wife "released and forever quit-claimed all her interest by way of dower or otherwise," and S has been in possession ever since, and in 1893 discovered that the land

stood in S's wife's name, it was held that it appearing to have been the intention of all parties to convey a fee, the deed would be reformed: *Poag v. Shaw*, 10 O. C. C. 448, 6 O. C. D. 523. See also DEEDS.

Rule of no new title acquired by partition does not apply to amicable partition deeds, especially if on independent consideration. Accordingly, if a husband and wife partition lands held in common, by mutual deeds through a trustee for valuable consideration, her rights are to be determined by the law as it then was: *Herzhiser v. Florence*, 39 O. S. 516, III Longsdorf's Notes, 1045. See also PARTITION.

If a husband buys land agreeing to assume an outstanding incumbrance, and the deed is for his convenience made to his wife without consideration on her part, she holds subject to his covenant in the contract to assume the incumbrance, and if evicted on it can not recover from the grantor: *Reid v. Sycks*, 27 O. S. 285, III Longsdorf's Notes, 356. See also VENDOR AND PURCHASER.

A defective deed of husband and wife can not be rectified as against the wife. If the defect is clerical only it is not necessary to rectify it. It was questioned but not decided whether omission of names in the granting clause is clerical: *Carr v. Williams*, 10 O. 305, I Longsdorf's Notes, 512.

A deed of a married woman's land made by her husband, she merely releasing dower in the testatum clause, and not joining in the granting clause, does not convey her fee. Although it was intended to convey her fee the mistake is not a clerical one because not on the face of the deed. To correct it would be making a new deed, and this can not be decreed against a married woman. Such decree can not be distinguished from enforcing specific performance: *Purcell v. Goshorn*, 17 O. 105, I Longsdorf's Notes, 798.

Where a mortgage by a man and his wife covering land he never owned and omitted the intended land, was executed prior to the act of 1849, "to give additional security to land titles," it can not be reformed as against the wife, but only as to the husband, and the land is subject to her dower: *Davenport v. Sovil*, 6 O. S. 459, II Longsdorf's Notes, 247.

The constitution, Art. II, § 28, and G. C., § 12210, are permissive and not mandatory, and the courts may determine when they will effectuate an invalid instrument. They will not do so as against a party equal in merit, as a defective deed by a father to one son, on merely meritorious consideration, leaving another son unprovided for: *Hout v. Hout*, 20 O. S. 119, II Longsdorf's Notes, 983.

A retrospective act curing defective certificates of acknowledgment is valid and does not create a title, but makes that a good title

which the parties meant to make good: *Barton v. Morris*, 15 O. 408, I Longsdorf's Notes, 717.

The act of 1835, curing defects in acknowledgments of deeds, though retrospective, does not divest vested rights nor assume judicial powers and is valid: *Chesnut v. Shane*, 16 O. 599, I Longsdorf's Notes, 787 [overruling *Silliman v. Cummins*, 13 O. 116, I Longsdorf's Notes, 627; *Connell v. Connell*, 6 O. 353, I Longsdorf's Notes, 341; *Good v. Zercher*, 12 O. 364, I Longsdorf's Notes, 613].

The constitutional right to pass retroactive laws curing errors (Art. II, § 28), sustains a statute to permit courts to correct mistakes in the deeds of married women, theretofore executed, as where her name is omitted in the granting clause of a deed of her land. The omission extends to correcting mistakes in the body of the deed as well as on the execution—omission by parties as well as by officers: *Goshorn v. Purcell*, 11 O. S. 641, II Longsdorf's Notes, 537 [affirming *Purcell v. Goshorn*, 13 Dec. Rep. 56, 2 D. 90].

A married woman's deed without her husband joining is a nullity, both as a conveyance and as a contract to convey (*infra*, 33). And this is not an "omission" under constitution, Art. II, § 28, which can be cured by a judgment. Only an imperfect deed can be cured and not a void one: *Miller v. Hine*, 13 O. S. 565, II Longsdorf's Notes, 628 [following *Goshorn v. Purcell*, 11 O. S. 641, II Longsdorf's Notes, 537].

Where the deed of a husband and wife was intended to convey the entirety of land owned by them in common, but by mistake only conveys the husband's share, and the wife's dower therein, the court can, under the act of 1857, correct the mistake, for here is a deed to correct, and the question is to what extent, unlike former cases, where the deed was a nullity: *Smith v. Turpin*, 20 O. S. 478, II Longsdorf's Notes, 1012.

G. C., § 12215, permits curing a conveyance of husband and wife, defective by reason of an error, defect or mistake, but does not authorize compelling a married woman to specifically perform a contract. Hence, if she did not sign or seal the deed it is not her conveyance, though she acknowledged it before an officer, and though the husband duly executed it. Nor is it her instrument in writing under G. C., § 11643: *Koltenbrock v. Cracraft*, 36 O. S. 584, III Longsdorf's Notes, 876 [affirming, *Cracraft v. Roach*, 6 Am. L. Rec. 83, 2 Bull. 101].

If the acknowledgment fails to state separate examination of and explanation to a married woman, the court can not correct it under the act of 1857 without evidence that the statute was complied with, or at least that she signed voluntarily and understand-

ingly: *Carney v. Hopple*, 17 O. S. 39, II Longsdorf's Notes, 812.

The act applies to mistakes in the acknowledgment as well as in the body of the deed; hence, the omission to certify the separate examination of the wife can be corrected: *Kilbourn v. Fury*, 26 O. S. 153, III Longsdorf's Notes, 293.

A conveyance of a wife's land duly attested, but acknowledged defectively by the wife, and not at all by the husband, is a deed or conveyance within the curative statutes (G. C., § 12215): *Dengenhart v. Cracraft*, 35 O. S. 549, III Longsdorf's Notes, 875.

If they manifestly intended to convey her lands, but failed by acknowledging the deed before an officer not authorized, or because his certificate is defective in form, the conveyance is curable under such statute: *Dengenhart v. Cracraft*, 36 O. S. 549, III Longsdorf's Notes, 875.

In such actions the wife's acts and declarations at and after executing the deed are admissible: *Kilbourn v. Fury*, 26 O. S. 153, III Longsdorf's Notes, 293. See also REFORMATION.

A married woman can not show that the acknowledgment was certified before she signed, as against an innocent party: *Ford v. Osborne*, 45 O. S. 1, IV Longsdorf's Notes, 247. See also ACKNOWLEDGMENT.

A wife's mortgage was made to secure her husband's note, given to raise money to pay the debt of a company of which he was president, the money being raised on the note of the company with the mortgage as collateral, the lender knowing the mortgage was designed as security for the loan. The company's note was renewed without the mortgagor's consent, and was soon after surrendered and marked "paid" on the lender's books and a new note substituted. It was held that the mortgage was released: *Insurance Co. v. McDonnell*, 41 O. S. 650, IV Longsdorf's Notes, 81 [affirming *Insurance Co. v. McDonnell*, 8 Dec. Rep. 302, 7 Bull. 53].

XII. POWER OF MARRIED WOMAN TO MAKE A WILL.

Under the statutes of Ohio, a married woman can make a will devising real estate held in her own right: *Allen v. Little*, 5 O. 66, I Longsdorf's Notes, 248.

The fact that a married woman lives separate and apart from her husband does not preclude her from making a will: *Allen v. Little*, 5 O. 66, I Longsdorf's Notes, 248.

Neither the provision in the ordinance for the government of the territory of the United States northwest of the river Ohio (Land Laws of Ohio, 252), the act of June 19, 1795, nor the act of January 5, 1805, which were

the earliest enactments in this state relating to wills, expressly authorized a married woman to make a will. It was by the act of February 18, 1808, that this power was first expressly conferred upon married women: *Allen v. Little*, 5 O. 66, I Longsdorf's Notes, 248.

At common law, real estate could not pass by will. By the statute of 32 Henry VIII, cap. 1, it is enacted, "that all and every person or persons having, or which shall hereafter have, any manors, lands, tenements, or hereditaments, holden in socage, or in the nature of socage tenures, shall have power to give, dispose of, will, and devise the same, by his last will or testament." This statute contains no clause of restriction as to the person who might devise. It is general in its terms—"all and every person or persons." In giving a construction to it, the courts seem to have been inclined to limit the power of devising to those persons who, by the principles of the common law, were enabled to bind themselves by contract. That doubts existed as to the propriety of this construction, is apparent from the fact that at the very next session of parliament it was deemed necessary to pass an explanatory act. Section 14 of the 34 and 35 Henry VIII, cap. 5, enacts, "that no wills or testaments made of any manors, lands, tenements, or hereditaments, by any woman covert or person within the age of twenty-one years, or by idiots, or by any person of non-sane memory, shall be taken to be good and effectual at law": *Allen v. Little*, 5 O. 66, I Longsdorf's Notes, 248.

XIII. POWER TO SUE AND BE SUED.

A. IN GENERAL.

A right of action by a married woman is determined by the statute in force when the right accrued: *Ham v. Kunzi*, 56 O. S. 531, IV Longsdorf's Notes, 697; *Yocum v. Allen*, 58 O. S. 280, IV Longsdorf's Notes, 738; *Bunning v. Berteling*, 5 O. N. P. 167, 7 O. D. (N.P.) 129.

Removal of a married woman's disability to sue in 1883 (for present statute, see G. C., § 11229), did not cause the statute to begin to run. An earlier form of G. C., §§ 11236 and 26, require the statute in force when the cause of action accrued to apply. Hence, where she loaned five hundred dollars in 1878 of her separate property, she could sue on the loan in 1892: *Ham v. Kunzi*, 56 O. S. 531, IV Longsdorf's Notes, 697. See also LIMITATION.

G. C., § 11591, did not enlarge or vary the liabilities of a married woman, but fundamentally changed the form of the remedy: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's

Notes, 318; *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339.

B. POWER TO SUE.

A married woman could not maintain ejectment for lands conveyed to her as general property, before the act of 1861, for her husband had the right of possession: *Clark v. Clark*, 20 O. S. 128, II Longsdorf's Notes, 983.

The husband's answer, disclaiming title and admitting her right, does not divest his title and enable her to recover. It is not a form of conveyance known to the law: *Clark v. Clark*, 20 O. S. 128, II Longsdorf's Notes, 983. See also EJECTMENT.

Inducing a husband by fraud to pay one thousand two hundred dollars for land worth only one hundred dollars, which he had the defendant convey to his wife, is a cause of action in him alone, and not in both, and an action in favor of both is erroneous: *Bartges v. O'Neil*, 13 O. S. 72, II Longsdorf's Notes, 598. See also PARTIES.

Married women whose shares are separate estate may unite with persons *sui juris* in renting to cotenants, and may unite without joining the husbands in an action for rent. The husbands are not necessary parties unless they have an interest in the rent of their wives' property: *Cahoon v. Kinen*, 42 O. S. 190, IV Longsdorf's Notes, 104. See also TENANTS IN COMMON.

The original decree will not be reversed as to who had no interest in it, though she was under disability: *Kay v. Watson*, 17 O. 27, I Longsdorf's Notes, 793. See also BILL OF REVIEW.

Actions for tort, such as for personal injuries by one spouse against the other, not maintainable: *State v. Phillips*, 85 O. S. 317.

A widow can sue her husband's executors for money loaned to the husband: *Hurlbut v. Wade*, 40 O. S. 603, IV Longsdorf's Notes, 44.

Both husband and wife must join for injury to the rights of the wife's person, whether from torts or contracts. Accordingly, for malpractice of a physician sent for by the husband to treat the wife, the averment of a contract by both is not a variance: *Gallaher v. Thompson*, W. 466, I Longsdorf's Notes, 37.

A note to a married woman remains hers until her husband asserts his marital rights; accordingly, she can recover judgment on it by next friend, if no objection is raised to her capacity to sue alone or for the nonjoinder of the husband: *Hoop v. Plummer*, 14 O. S. 448, II Longsdorf's Notes, 674.

The wife's right to sue alone is not compulsory (but now see G. C., § 11245), and she may join her husband, and a joint judg-

ment may be rendered: *Reinheimer v. Carter*, 31 O. S. 579, III Longsdorf's Notes, 607 [affirming *Carter v. Reinheimer*, 4 Dec. Rep. 148, 1 Clev. L. Rep. 75].

She may sue alone for tort committed upon her as for assault and battery: *Stevenson v. Morris*, 37 O. S. 10, III Longsdorf's Notes, 887; *Ashley v. Rockwell*, 43 O. S. 386, IV Longsdorf's Notes, 172; *Cornell v. Durke*, 7 Dec. Rep. 580, 4 Bull. 31.

Slander of the wife may be sued by her and her husband jointly, as her reputation is not her separate property, but is his as well: *Anderson v. Pack*, 4 Dec. Rep. 495, 2 Clev. L. Rep. 260, 4 Bull. 596.

A wife living separate from her husband by reason of his abuse, and having property decreed to her as alimony, may sue at law in regard to such property without joining the husband: *Benadum v. Pratt*, 1 O. S. 403, I Longsdorf's Notes, 992.

If the husband voluntarily renounce his rights by abandoning his wife in a foreign country, and she comes here to live, she may contract as to necessities, and sue and be sued as a *feme sole*: *Wagg v. Gibbons*, 5 O. S. 580, II Longsdorf's Notes, 205; *Layton v. Conover*, 1 Dec. Rep. 186, 3 W. L. J. 364.

If the wife loans money known to be her separate property, the subsequent act of the debtor in giving notes for it to the husband does not make him trustee of an express trust for her, but she can sue by next friend: *Stannus v. Walker*, 12 Dec. Rep. 277, 1 H. 537.

The wife should sue by next friend, and not with her husband, to recover her separate property. If he is a party it should be as a defendant. So, though the property be a debt for which notes to the husband were made: *Stannus v. Walker*, 12 Dec. Rep. 277, 1 H. 537.

A wife, in the absence of the husband, having charge of the home and the general management of affairs, is not by virtue of that relation authorized in his name to institute a criminal prosecution and make him thereby liable for damages if the charge turns out to be erroneous: *Miles v. Salisbury*, 21 O. C. C. 333, 12 O. C. D. 7.

G. C., §§ 7995, *et seq.*, as amended 93 v. 132, placing a married woman on the plane of a *feme sole*, can not be given retroactive effect or be applied to causes of action which arose prior to its enactment: *Railway Co. v. Harber*, 12 O. C. D. 648.

A married woman can maintain an action at law in her own name to recover a money judgment against her husband for money loaned to him: *Brenneman v. Brenneman*, 1 O. N. P. 332, 3 O. D. (N.P.) 392.

Disability of a party who is not suing by next friend—as a married woman suing to

quiet title in 1870—not being objected before going to trial, it is then too late: *Woog v. Barnhart*, 41 O. S. 177, IV Longsdorf's Notes, 57. See also PARTIES.

A wife sued with her husband for trespass by her on a private alley, in which she claims an easement, may, in default of answer by her husband, make a separate defense, and if good, it is complete for both: *Lowe v. Redgate*, 42 O. S. 329, IV Longsdorf's Notes, 115. See also PLEADINGS.

A married woman living with her husband may maintain an action in her own name for services in giving special care and attention to an invalid for whose board and lodging in their home her husband has already received compensation: *Badger v. Orr*, 1 O. C. C. A. 49.

Compensation for services rendered by a wife outside of the home of her husband, with whom she is living, such services not being in the discharge of her household or domestic duties and not in interference therewith, is recoverable in an action therefore in her own name and for her own use: *Bechtol v. Ewing*, 89 O. S. —.

C. SUITS AGAINST MARRIED WOMEN.

A married woman may be sued alone on the joint and several note of herself and husband. G. C., § 11245, requires the joinder only when the cause of action is against both: *Buning v. Berteling*, 5 O. N. P. 167, 7 O. D. (N.P.) 129.

An independent defense may be made by a married woman sued with her husband, hence she may demur and he answer: *Graf v. Wirthweine*, 12 Dec. Rep. 4, 1 H. 19.

It is not compulsory to sue the wife alone; accordingly, in a suit to construe a will, it is not error to make the husbands of female legatees codefendants with them: *Gillen v. Kimball*, 34 O. S. 352, III Longsdorf's Notes, 721.

An action to charge a wife's separate property for a bill of goods sold to her and her husband, need not make him a codefendant: *Fisher v. McMahon*, 4 Dec. Rep. 93, 1 Clev. L. Rep. 22, 3 Bull. 51.

The remedy against a married woman's separate estate is now the same as if she were unmarried; accordingly, if she merely becomes a surety, no lien exists, and, hence, if she is a nonresident, having property here, no service by publication, under G. C., § 11292, lies, though an attachment might have been had: *Fabrique Co. v. Stanage*, 50 O. S. 417, IV Longsdorf's Notes, 505.

In an action against a married woman for the conversion of certain property, her husband was to be joined as defendant, prior to the enactment of legislation requiring an

action against her alone: *Dunning v. Choate*, 8 Dec. Rep. 316, 7 Bull. 77.

A nonresident *feme covert* could not be proceeded against as a *feme sole*, and a decree on service by publication for her was erroneous: *Kay v. Watson*, 17 O. 27, I Longsdorf's Notes, 793.

The common law rule of the unity of interest between husband and wife preventing the application of the statute of limitations to claims existing in favor of the wife against the husband during coverture, on grounds of public policy, has been abrogated in Ohio by statute: *Liggett v. Liggett*, 3 O. N. P. (N.S.) 518, 51 Bull. 59. See also LIMITATIONS, STATUTE OF.

XIV. POWER TO ACT AS EXECUTRIX.

Marriage of a *feme sole* executrix or administratrix extinguished her authority (G. C., § 10636, only allowed one already married to be appointed). It is not revived by her becoming a widow: *In re Fagin*, 10 Dec. Rep. 180, 19 Bull. 149, Goebel, 149. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

XV. CRIMINAL LIABILITY.

The law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469; *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472; *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 553; *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

The presumption that wife joining her husband in a crime acts under his coercion does not apply if the jury find marriage was not proved: *Davis v. State*, 15 O. 72, I Longsdorf's Notes, 698.

Crime committed by a married woman in her husband's presence is only *prima facie* presumed to be by coercion, and if this is rebutted she is punishable: *Tabler v. State*, 34 O. S. 127, III Longsdorf's Notes, 704.

If a wife join with her husband in the commission of a crime less than murder, she is presumed to act under the coercion of her husband, and in law is not guilty; but the fact of coverture must be clearly made out by proof: *Davis v. State*, 15 O. 72, I Longsdorf's Notes, 698.

The common law rule that neither husband nor wife can be prosecuted for larceny of the goods of the other, is not abrogated by G. C., §§ 7995 and 8004, defining rights and liabilities of husband and wife, nor by G. C., § 12447, defining larceny. An intention of the legislature to abolish an established rule of the common law and to create a crime where none existed before, must clearly and

unmistakably appear: *State v. Phillips*, 85 O. S. 317.

A married woman can not be punished for larceny because she has taken and converted to her own use the personal property of her husband: *State v. Phillips*, 85 O. S. 317.

Statutes in derogation of the common laws must be construed strictly: *State v. Phillips*, 85 O. S. 317.

XVI. LIABILITY OF THIRD PERSON.

A. ALIENATION OF AFFECTIONS.

A father permitting his daughter to live with him, but forbidding her husband to stay about the house is not actionable. Some act restraining her return must be shown: *Friend v. Thompson*, W. 636, I Longsdorf's Notes, 49.

A wife's father, by receiving, protecting and providing for her and her children, separated from her husband in consequence of his intemperance, neglect and abuse, is not liable to an action by the husband: *Rabe v. Hanna*, 5 O. 530, I Longsdorf's Notes, 310.

Charging defendant with enticing away plaintiff's wife sufficiently avers plaintiff's marriage and that he had a wife: *Friend v. Thompson*, W. 636, I Longsdorf's Notes, 49.

Husband and wife are entitled to the affection, society, co-operation and aid of each other in every conjugal relation, and either may maintain an action for damages against any one who wrongfully and maliciously interferes with the marital relationship and thereby deprives one of the society, affection and consortium of the other: *Flandermeyer v. Cooper*, 85 O. S. 327.

A wife has an action against one who wrongfully induces or procures her husband to abandon or send her away. But the defendant's acts must have been malicious: *Westlake v. Westlake*, 34 O. S. 621, III Longsdorf's Notes, 744; *Clark v. Harlan*, 13 Dec. Rep. 634, 1 C. S. C. R. 418; *Scheurer v. Scheurer*, 4 Dec. Rep. 297, 1 Clev. L. Rep. 233, 3 Bull. 689.

A wife's parents are not liable for encouraging her to separate from her husband in the honest and reasonable belief that it was necessary for her protection, although there is in fact no such necessity, yet if the motive is malice and ill will to the husband, an action lies: *Holtz v. Dick*, 42 O. S. 23, IV Longsdorf's Notes, 86.

When parties at the age of consent marry, parents have no ground to compel a separation on the ground that the wife was not sixteen and married without their consent, and separation by them not for her protection but to gratify ill will toward the husband they are liable to him: *Holtz v. Dick*, 42 O. S. 23, IV Longsdorf's Notes, 86.

In a husband's action against his wife's parents, with whom she is living, on the question whether she is there voluntarily or by malicious interference, evidence that they had since the separation encouraged her to associate with dissolute persons, thus tending to obstruct reconciliation, is competent: *Holts v. Dick*, 42 O. S. 23, IV Longsdorf's Notes, 86.

Such also is the rule of declarations or confessions if the wife in her husband's action against a seducer or one who enticed her away: *Westlake v. Westlake*, 34 O. S. 621, III Longsdorf's Notes, 744.

In a wife's action for loss of her husband's consortium, declarations of the husband in the defendant's absence as to the cause of his leaving or sending her away are hearsay and not admissible: *Westlake v. Westlake*, 34 O. S. 621, III Longsdorf's Notes, 744.

In an action for damages on account of the alienation of the affections of a husband, the wife must establish by a preponderance of the testimony that the alienation complained of was the result of wrongful influences knowingly exerted by the defendant with that end in view, and that the alienation did not result from the plaintiff's own conduct or from a condition of mind on the part of the husband for which the defendant was not responsible: *Smith v. Lamnick*, 9 O. L. R. 87, 56 Bull. 220.

In an action for alienation of affections, the burden of proof as to the averments constituting the offense is upon the plaintiff: *Bloomer v. Cherry*, 5 O. L. R. 534, 53 Bull. 23.

In an action for the alienation of the affections of a husband, it is necessary to show a wrongful and wilful attempt on the part of defendants that caused the husband of plaintiff to abandon her, that they did the things charged, and that by their action in so doing the result alleged was brought about: *Bloomer v. Cherry*, 5 O. L. R. 534, 53 Bull. 23.

In an action for the alienation of affections, the allegations constituting the offense must be proved by a preponderance of the evidence: *Bloomer v. Cherry*, 5 O. L. R. 534, 53 Bull. 23.

That a husband voluntarily bestows his affections upon the defendant without any act upon the part of the defendant which resulted in the alienation of his affections from his wife, will not entitle plaintiff to recover on the ground of alienation of affections, neither will mere proof of a separation and that plaintiff's husband was upon terms of intimate friendship with defendant: *Bloomer v. Cherry*, 5 O. L. R. 534, 53 Bull. 23.

A petition by a husband against his wife's relatives for inducing her to leave him is de-

murrable if it fail to aver facts making the act malicious. Mere averments of conspiracy, ill will and malice are conclusions of law, for the act may have been lawful: *Mead v. Hoskins*, 6 O. N. P. 522, 8 O. D. (N.P.) 342.

A petition for alienating a wife's affections will not be required to aver the manner or false statements by which she was induced to leave plaintiff for this would be pleading evidence: *Moore v. Jackson*, 1 Dayton Term Rep. (Iddings) 2.

If a husband either actively or passively connived at defendant's improper attentions to his wife he can not recover for alienation of her affections. If the separation is due to neglect or want of support by the husband and not to defendant's attention, no recovery for alienation of affections can be had: *Myers v. Reynolds*, 3 O. N. P. 186, 5 O. D. (N.P.) 619.

If after the separation the defendant debauched the wife, the fact that the spouses had lived unhappily together is to be considered, because the husband's loss is less than if there had been conjugal affection: *Myers v. Reynolds*, 3 O. N. P. 186, 5 O. D. (N.P.) 619.

A judgment for damages for the alienation of a wife's affections is within § 17 of the bankruptcy act of 1898, relating to "wilful and malicious injuries to the person or property of another," and it not released by a discharge in bankruptcy: *Ealine v. Sargent*, 3 O. C. C. (N.S.) 66, 13 O. C. D. 180. See also **BANKRUPTCY; ALIENATION OF AFFECTIONS.**

B. SALE OF DRUGS, ETC.

Husband and wife are entitled to the affection, society, co-operation and aid of each other in every conjugal relation, and either may maintain an action for damages against any one who wrongfully and maliciously interferes with the marital relationship and thereby deprives one of the society, affection and consortium of the other: *Flandermeyer v. Cooper*, 85 O. S. 327.

One who with knowledge that a husband by the constant and continued use of morphine has become so weakened in body and mind that he is unable to resist his cravings for the drug, and who after the repeated protests of the wife continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is liable to the wife for damages for her loss of consortium: *Flandermeyer v. Cooper*, 85 O. S. 327.

Imputed negligence does not obtain in Ohio. Negligence of a husband in buying a drug for his wife from defendant, which caused her death, is not imputed to her unless she made

him her agent, and she did not do so by simply making known to him her desire for the medicine, by reason of which he obtained it: *Davis v. Guarnieri*, 45 O. S. 470, IV Longsdorf's Notes, 289. See also NEGLIGENCE.

C. PERSONAL INJURY.

At common law, a husband has a right of action against one who wrongfully or through negligence injures his wife, to recover for the resulting loss of her services, and for his necessary medical, surgical, and other expenses in healing her injuries, and this right of action is not abridged or affected by the legislation embraced in G. C., §§ 7995 to 8004, inclusive: *Railway Co. v. Glenn*, 66 O. S. 395, IV Longsdorf's Notes, 910.

An action will not lie for loss of services of a wife who was instantly killed in an accident: *Bauman v. Railway*, 9 O. N. P. (N.S.) 320, 20 O. D. (N.P.) 509.

Injury to the husband by negligence gives the wife now no action for loss of support or of wages or for work in nursing him or money expended or distress. For neither have a right to recover for the other's loss of earnings, and on the other items there is no privity with defendant, but her claim is against the husband: *Welch v. Morrison*, 9 Dec. Rep. 852, 17 Bull. 370.

In an action for wrongful death, it will be presumed in the absence of evidence that decedent supported his wife: *Railway Co. v. Ward*, 2 O. C. C. (N.S.) 256, 15 O. C. D. 399. See also DEATH BY WRONGFUL ACT.

A husband is entitled to recover damages for expenses of care and physician's bills incurred by reason of injuries sustained by wife through the negligence of others: *Railroad Co. v. Harber*, 12 O. C. D. 648.

In an action by a woman for personal injuries against a railroad company, special declarations and denial having been made as to expenses of care and physicians' bills, though no motion is made of her being married, her right to recover will be defeated by evidence that she is married, inasmuch as judgment in such case would not bar the husband's right to recover on the same cause of action: *Railroad Co. v. Harber*, 12 O. C. D. 648. See also DAMAGES; PERSONAL INJURIES.

XVII. ACTION BY AND AGAINST MARRIED WOMAN.

A. JURISDICTION.

1. Equity.

The jurisdiction of equity over separate property is not limited by the separate property acts, and is enlarged by them over what

was theretofore general property. These statutes altered legal rights and liabilities: *Phillips v. Graves*, 20 O. S. 371, II Longsdorf's Notes, 1002.

Charges will be enforced in equity through a receiver (1) by appropriating the personality; (2) by sequestering rents, etc., of realty; (3) by selling realty if necessary: *Phillips v. Graves*, 20 O. S. 371, II Longsdorf's Notes, 1002.

G. C., § 11591, does not create a new cause of action or enlarge or vary the liabilities of a married woman, but merely changes the form of remedy: *Jens v. Gugel*, 26 O. S. 527, III Longsdorf's Notes, 326; *Allison v. Porter*, 29 O. S. 136, III Longsdorf's Notes, 450.

The inherent power of a court of equity to charge the separate estate still exists, except as to contracts, on which a remedy at law is given: *Levi v. Earl*, 30 O. S. 147, III Longsdorf's Notes, 521.

Equity charges the estate not by reason of a valid contract, but because it is just: *Levi v. Earl*, 30 O. S. 147, III Longsdorf's Notes, 521.

As suit on a contract charging separate estate was on equity alone, the rule requiring remedies at law to be first exhausted before seeking equitable relief did not apply, and money owing to her could be reached by joining her and her debtor without first getting judgment at law. The effect of the amendments of 1884 are not involved in this case: *Elliott v. Lowhead*, 43 O. S. 171, IV Longsdorf's Notes, 156.

A wife can sue her husband in an equity case to establish her rights in property: *Bank v. Wallace*, 45 O. S. 152, IV Longsdorf's Notes, 266.

A wife's administrator's action against her husband's administrator for rents collected by the husband, although a chancery case, is, under the code, a jury case: *Gunsaulius v. Pettit*, 46 O. S. 27, IV Longsdorf's Notes, 309.

An action brought by a husband against his wife to enforce her duty under G. C., §§ 7995, *et seq.* (84 v. 132), to assist in his support is not for the recovery of money only and triable by a jury, but is equitable in its nature and triable by the court: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

A married woman's debt when collectible only by charging her estate, without personal judgment, constitutes an appealable case: *Alsdorf v. Reed*, 45 O. S. 653, IV Longsdorf's Notes, 301. See also APPEALS.

2. Justice of Peace.

A justice has no jurisdiction of a suit to charge debts of a married woman on her separate estate (*quaere*, if he would of a contract which she could make as to the sepa-

rate estate), and G. C., § 11591, does not give the justice jurisdiction: *Allison v. Porter*, 29 O. S. 136, III Longsdorf's Notes, 450.

The decision in *Partick v. Littell*, 36 O. S. 79, III Longsdorf's Notes, 831, authorizing a personal judgment, does not alter the rule that a justice has no jurisdiction of a case against a married woman, being a chancery case: *Schultz v. Myer*, 6 Dec. Rep. 1086, 10 Am. L. Rec. 312, 6 Bull. 674.

The amendments of 1884 do not retroact so as to give a justice jurisdiction of an action on a married woman's prior contract: *Koch v. Seifert*, 9 Dec. Rep. 411, 13 Bull. 15.

Coverture not pleaded, even before a justice, does not make a judgment void, but voidable, and its enforcement will not be enjoined unless some equitable ground of relief, as fraud, or coercion, is shown: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149.

An antenuptial debt of a married woman is within a justice's jurisdiction, and as the husband was also liable in certain cases a joint judgment will be deemed to be one of them to sustain it: *Bruder v. Biehl*, 1 O. C. C. 85, 1 O. C. D. 51.

Services in selling a married woman's real estate can not be recovered for against her before a justice: *McConnel v. Nolan*, 4 Dec. Rep. 306, 1 Clev. L. Rep. 268.

A married woman on appeal of a justice's judgment against her, by demurring generally, and for want of jurisdiction enters an appearance and gives jurisdiction to the common pleas. She should have moved to dismiss: *Miller v. Truman*, 7 Dec. Rep. 374, 2 Bull. 241.

So if she pleads to the merits, without objecting to the jurisdiction, she thereby enters appearance and submits to the jurisdiction: *Miller v. Creighton*, 7 Dec. Rep. 602, 4 Bull. 139.

A justice's judgment by default against a married woman, whose coverture would have been a defense had it appeared, would be reversible on error *coram nobis*: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149.

Errors not on the record, if by tribunals inferior to the common pleas, may be considered by the common pleas under G. C., § 12241. Accordingly, it may reverse a justice's judgment against a married woman, though coverture did not appear on the record, a justice at that time not having jurisdiction of such case: *Shreve v. Parrott*, 4 Dec. Rep. 373, 2 Clev. L. Rep. 52, 4 Bull. 39.

But if a judgment (against a married woman) is by the common pleas, it is not reversible on error *coram nobis* for error *dehors* the record is only assignable to courts

below the common pleas under G. C., §§ 10620, 10621: *Evans v. Jones*, 8 Dec. Rep. 543, 8 Bull. 308; *Shreve v. Parrott*, 4 Dec. Rep. 373, 2 Clev. L. Rep. 52, 4 Bull. 39; *Hahner v. Kaufman*, 5 Dec. Rep. 412, 5 Am. L. Rec. 439. See also APPEALS.

B. PARTIES.

For the general discussion of the subject of parties, see PARTIES.

C. PLEADING.

No personal action can be brought on a *feme covert's* contract. An action on a note signed by husband and wife, stating on its face that their house and lot was pledged to secure it, is demurrable. The creditor must proceed *in rem* in order to charge her property: *Groene v. Frondhof*, 12 Dec. Rep. 760, 3 Gaz. 151, 1 D. 504.

It is necessary to aver that she has separate property: *Becroft v. Dossman*, 7 Dec. Rep. 322, 2 Bull. 110; *Kurtz v. Murray*, 7 Dec. Rep. 331, 2 Bull. 122; *Roskoph v. Coates*, 4 Dec. Rep. 135, 1 Clev. L. Rep. 60; *Wilcox v. Zimmerman*, 4 Dec. Rep. 150, 1 Clev. L. Rep. 75; *Hinman v. Williams*, 7 Dec. Rep. 709, 4 Bull. 1079.

It is necessary to aver that she intended to charge her separate property: *Roskoph v. Coates*, 4 Dec. Rep. 135, 1 Clev. L. Rep. 60.

A petition against a wife for goods bought by the husband for use on her estate shows no cause of action against her without an averment showing agency. He may have made the improvement for his own convenience: *Kelley v. Mills*, 1 O. N. P. 382, 2 O. D. (N.P.) 265.

Separate property subject to be charged with the judgment must be averred or proved in order to recover against a married woman on her note: *Buning v. Berteling*, 5 O. N. P. 167, 7 O. D. (N.P.) 129.

Pleadings in reference to married women need not aver coverture, separate estate or that the contract was in reference thereto, but may be the same as if she were not married: *Bank v. Holden*, 9 Dec. Rep. 546, 14 Bull. 399.

A married woman suing alone to quiet title in her property, not averring that it was separate property, can offer evidence that it was such, and, hence, to sustain the decree, it will be presumed that such proof was given: *Woog v. Barnhart*, 41 O. S. 177, IV Longsdorf's Notes, 57.

In an action against the maker of a note an answer that she is a married woman is good: *Wilcox v. Zimmerman*, 4 Dec. Rep. 150, 1 Clev. L. Rep. 75.

The separate property need not be described in the petition. It is sufficient to

aver she has it: *Kurtz v. Murray*, 7 Dec. Rep. 330, 2 Bull. 122; *Hinman v. Williams*, 7 Dec. Rep. 709, 4 Bull. 1079. And see *Patrick v. Littell*, 36 O. S. 79, III Longsdorf's Notes, 831.

It must be averred that the note was given to benefit her separate property, else the judgment is erroneous until the record shows this was proved: *Becroft v. Dossman*, 7 Dec. Rep. 322, 2 Bull. 110.

A petition on a note, it would seem, should aver separate estate at the time of suing, and not merely at the time of executing the note: *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339; *Wilcox v. Zimmerman*, 4 Dec. Rep. 150, 1 Clev. L. Rep. 75.

Under G. C., § 11364, there will be no reversal for failure to aver in the petition, a separate estate at the time of suing and not merely at the time of executing the note: *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339.

Averring that the goods were bought for her separate business, does not imply that she had separate property: *Kurtz v. Murray*, 7 Dec. Rep. 330, 2 Bull. 122.

The agreement to charge separate property for the husband's debt need not be in writing, and if in writing, can not be required to be attached to the petition: *Fisher v. McMahon*, 4 Dec. Rep. 87, 1 Clev. L. Rep. 14, 3 Bull. 52.

No recovery can be had against a married woman on her note, even under G. C., § 11591, unless it is averred and proved that she has separate property: *Jens v. Gugel*, 26 O. S. 527, III Longsdorf's Notes, 326 [affirming *Jens v. Gugel*, 7 Dec. Rep. 85, 1 Bull. 103]; *Cook v. Spencer*, 5 Dec. Rep. 331, 4 Am. L. Rep. 665, 1 Bull. 73.

It is sufficient to aver separate property subject to be charged without describing any piece, nor need the decree subject any specific piece. Nor can a contract to pay be construed to pay out of a particular piece, so as to create a lien superior to homestead: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318.

A petition by a mortgagee, averring a purchase by a married woman, and her assumption of the mortgage as part of the purchase-money, shows the property to be her separate estate and justifies the inference that she charged her separate estate with the payment, and, hence, such intention need not be averred in direct terms: *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386.

That a petition under the act of 1884 on a note, need not aver coverture, a separate estate, or that the contract was with reference thereto, but may be declared on as against a feme sole: *Bank v. Holden*, 9 Dec. Rep. 546, 14 Bull. 399. See also *Dunkham v. Bruce*, 9

Dec. Rep. 682, 16 Bull. 291, which is denied in *Drake v. Birdsall*, 10 Dec. Rep. 56, 18 Bull. 243.

For the general discussion of the subject of pleading, see PLEADINGS.

D. EVIDENCE.

An entry in the diary of a partner purporting to be the result of an examination of his account as shown by the partnership books, some of which have since been destroyed by fire, being against interest when made, is admissible as evidence of payment or assumption of payment of a debt of his wife: *Miller v. McLean*, 11 O. C. C. (N.S.) 424, 21 O. C. D. 64 [reversing *McLean v. Miller*, 5 O. N. P. (N.S.) 57, 17 O. D. (N.P.) 628]. See also EVIDENCE.

A marriage certificate by the solemnizing minister not dated nor recorded nor exemplified, and not an ancient document, and not proved to have been made concurrently with the marriage, is mere hearsay, and not admissible in a criminal case to prove the marriage: *Whalen v. State*, 12 O. C. C. 584, 5 O. C. D. 488. See also BIGAMY.

For the general discussion of the subject of evidence, see EVIDENCE.

E. SUMMONS.

A summons against A and B, who were husband and wife, was returned indorsed: "Served the same by leaving at each of the within named defendant's * * * usual place of residence, a certified copy of the within summons, etc. Sheriff's fees: Service, 45, copies 50, etc.," shows a good service upon each defendant: *Elliott v. Plattor*, 43 O. S. 198, IV Longsdorf's Notes, 159.

Service upon a wife, who does not live with her husband, is not obtained by leaving summons at the residence of the husband: *Ault v. Jones*, 7 O. N. P. 669, 5 O. D. (N.P.) 558.

Failure to comply with G. C., § 12191, relative to notice by a surety requiring his creditor to commence suit, can not be predicated on the fact that the notice was sent to the husband of the owner of the note, where it appears that the husband showed the notice to his wife and they talked it over together, and as her agent and attorney he advised her to disregard it, which she did: *Voss v. Moorman*, 17 O. D. (N.P.) 175, 4 O. L. R. 4. See also SURETYSHIP.

In an action for damages on account of the alienation of the affections of a husband, the wife must establish by a preponderance of the testimony that the alienation complained of was the result of wrongful influences knowingly exerted by the defendant with that end in view, and that the alienation did not result from the plaintiff's own

conduct, or from a condition of mind on the part of the husband for which the defendant was not responsible: *Smith v. Lamnick*, 9 O. L. R. 87.

In an action for compensation by a wife for services rendered outside of the home of her husband, it is not necessary, in order that she recover, that it be shown that the services were rendered with the consent of her husband and that there was an understanding between them that the same should be on her own account and that she should receive the compensation therefor: *Bechtol v. Ewing*, 89 O. S. —.

F. JUDGMENT.

1. Charge Upon Separate Estate.

A decree subjecting a separate estate is not proper under the act of 1884, amended earlier forms of G. C., §§ 11245, 11591, for only a personal judgment as if against a *feme sole* is thereby permitted on her contracts. Accordingly, such decree does not constitute a lien superior to a later mortgage by her on the same property, but the mortgage is superior thereto: *Sanders v. Shepherd*, 17 O. C. C. 503, 9 O. C. D. 496.

An action against a married woman to subject her estate to pay a note, though a personal judgment may be asked under G. C., § 11591, is not a jury case, and, hence, is appealable: *Avery v. Vansickle*, 35 O. S. 270, III Longsdorf's Notes, 780.

A personal judgment against a married woman on her written contract relating to her separate estate, is not erroneous, since by G. C., § 11591, her entire property, where she is not restricted in the instrument creating it, and not merely that described in the petition, is liable since 1874: *Patrick v. Littell*, 36 O. S. 79, III Longsdorf's Notes, 831 [affirming *Patrick v. Littell*, 5 Dec. Rep. 379, 5 Am. L. Rec. 260, 1 Bull. 310].

Foreclosure of a wife's mortgage does not merge a remedy against her other property to pay a deficiency: *Avery v. Vansickle*, 35 O. S. 270, III Longsdorf's Notes, 780.

A judgment against the husband on the joint note of himself and wife, it being only joint in form, since she is not personally liable on it, does not merge the right to charge her separate estate by a later suit: *Avery v. Vansickle*, 35 O. S. 270, III Longsdorf's Notes, 780.

Where work is done on a wife's property, the contract being with her husband, but for her and with her concurrence, taking his note for the amount and getting judgment on it does not release her liability for the debt, and her estate can be subjected: *Decamp v. Gaskill*, 13 Dec. Rep. 584, 1 C. S. C. R. 337.

Alimony can not, either before or after payment thereof, be subjected to the payment of debts of the wife which existed prior to the allowance thereof: *Fickel v. Granger*, 83 O. S. 101.

In an action brought by a husband against his wife to enforce her duty under G. C., §§ 7995, *et seq.* (84 v. 132), the husband's interest in the wife's property may be declared and the property subjected to the payment of a reasonable sum found necessary for his support; (1) by appropriating personal property through a receiver; (2) by sequestering rents and profits; (3) by sale of realty if necessary: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

In an action brought by a husband against his wife to enforce her duty under G. C., §§ 7995, *et seq.* (84 v. 132), to assist in his support, a husband who without fault has been excluded from the wife's dwelling, may be restored to the occupancy of the dwelling, and the order therefor may be enforced by proceedings for contempt: *Hickle v. Hickle*, 6 O. C. C. 490, 3 O. C. D. 552.

A married woman's separate estate can be subjected to her ordinary engagements within ten years, being an action for relief under G. C., § 11222, and is not governed by the six years of § 11227: *Mathers v. Hewitt*, 8 Dec. Rep. 616, 9 Bull. 63. See also LIMITATION.

A personal judgment may be rendered and enforced against a married woman the same as if she were unmarried: *Bank v. Holden*, 9 Dec. Rep. 546, 14 Bull. 399.

A judgment or decree against a married woman finding that she intended and did charge her separate estate, consisting of certain described property, and charging said property with the payment of the debt and ordering a sale as on execution if not paid, has the force of a decree in chancery creating a specific charge upon such property, notwithstanding the law at the time authorized a personal judgment: *Smith v. Phillips*, 5 O. N. P. (N.S.) 502, 18 O. D. (N.P.) 429 [affirmed, *Smith v. Phillips*, 18 O. D. (N.P.) 429]. See also EQUITY.

Where the petition does not ask for a personal judgment and no personal judgment is rendered, no lien is acquired upon her separate estate: *Sanders v. Shepherd*, 17 O. C. C. 503, 9 O. C. D. 496.

A decree subjecting the separate estate of a married woman does not constitute a lien superior to a later mortgage by her on the same property, but the mortgage is superior thereto: *Sanders v. Shepherd*, 17 O. C. C. 503, 9 O. C. D. 496.

A judgment in an action to foreclose a mortgage, executed by a husband and wife to secure the payment of the wife's promissory

note, does not bar a subsequent action to charge the separate property of the wife: *Avery v. Vansickle*, 35 O. S. 270, III Longsdorf's Notes, 780.

2. Personal Liability.

No personal money judgment could be had against a married woman on her general contracts in 1873: *Hoover v. Gibson*, 24 O. S. 389, III Longsdorf's Notes, 180.

A personal judgment against her may be rendered, and enforced by execution: *Hill v. Myers*, 46 O. S. 183, IV Longsdorf's Notes, 318; *Society of Friends v. Haines*, 47 O. S. 423, IV Longsdorf's Notes, 386; *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339; *Dunkham v. Bruce*, 9 Dec. Rep. 682, 16 Bull. 291; *Bank v. Holden*, 9 Dec. Rep. 546, 14 Bull. 399.

A personal judgment against a married woman may be rendered though the note sued on was made before the act of 1884, for the act relates to the remedy and is not within the prohibition of G. C., § 26: *Smith v. Frame*, 3 O. C. C. 587, 2 O. C. D. 339.

On judgment confessed on a cognovit note signed by husband and wife, she as surety only, it was held her power to contract as a *feme sole* under G. C., § 7996, as amended in 1884, is only in relation to her separate property, and a personal judgment at law against her will be set aside if the consideration of her suretyship has no relation to her separate estate: *Drake v. Birdsall*, 10 Dec. Rep. 56, 18 Bull. 243 [denying *Dunkham v. Bruce*, 9 Dec. Rep. 682, 16 Bull. 291].

A personal judgment against a married woman rendered in an action on her promissory note, executed and delivered in the year 1879, in which action she answered and pleaded her coverture, and that she owned no separate estate when the note was executed, the latter fact being traversed by reply, is not void because the record thereof fails to show that the court passed on the issue thus made, but such judgment is voidable merely: *Hart v. Manahan*, 70 O. S. 189, IV Longsdorf's Notes, 972 [following *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149].

A judgment against a married woman by default is void and not voidable, and will not be enjoined unless some equitable ground of relief be shown: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149; *Hart v. Manahan*, 70 O. S. 189, IV Longsdorf's Notes, 972.

In an action against a married woman, upon her obligation, in writing, to pay for services rendered, or money advanced, for the benefit of her separate estate, it is not error to render a personal judgment against her:

Patrick v. Littell, 36 O. S. 79, III Longsdorf's Notes, 831.

A husband's freehold in his wife's lands may be sold on execution; its value is the fee, deducting the remainder: *Canby v. Porter*, 12 O. 79, I Longsdorf's Notes, 597.

If error clearly intervened there must be a reversal unless absence of prejudice clearly appears. Accordingly, a judgment in favor of husband and wife instead of husband alone, rendered on demurrer, is erroneous, for there might have been a set-off or counterclaim good against the husband alone: *Bartges v. O'Neil*, 13 O. S. 72, II Longsdorf's Notes, 598. See also ERROR.

G. REVIEW.

A suit by a wife's administrator against the husband's administrator for her money collected by the husband, was held not appealable: *Gunsaulius v. Pettit*, 46 O. S. 27, IV Longsdorf's Notes, 309. See also APPEALS.

HYDRANTS.

See MUNICIPAL CORPORATIONS.

HYDRAULIC COMPANIES.

The legislature can not, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation: *Walker v. Board of Public Works*, 16 O. 540, I Longsdorf's Notes, 781.

He who owns the land on both banks of a navigable river, owns the entire river, subject only to the easement of navigation, and he who owns land upon one bank only, owns to the middle of the main channel, subject to the same easement: *Walker v. Board of Public Works*, 16 O. 540, I Longsdorf's Notes, 781.

Where the lease or contract for water power points out the manner of adjusting claims for damages for failure to furnish the water power contracted for and such claims have been adjusted in accordance therewith, the lessee can not in addition call upon a court of equity to cancel such contract on account of such failure: *Paper Co. v. Hydraulic Co.*, 18 O. C. C. 200, 10 O. C. D. 57.

Under a lease or contract for power, to lessees, their heirs and assigns forever, the rental being secured by way of mortgage on the property where such power is to be furnished, but containing no express stipulation that the heirs or assigns of the lessee are to be liable therefor, the real estate so mortgaged by the original lessor is liable for the rent that may become due; whether the assigns of the original lease are personally

liable is not decided: *Paper Co. v. Hydraulic Co.*, 18 O. C. C. 200, 10 O. C. D. 57.

Leases or contracts for water power to the lessees, their heirs and assigns forever, the rental being secured by way of mortgage on the property where such power is to be furnished, but containing no express stipulation that the heirs or assigns of the lessees are to be liable therefor, are not leases at will, and are not terminable at the election of the assignee of the original lessees: *Paper Co. v. Hydraulic Co.*, 18 O. C. C. 200, 10 O. C. D. 57.

Where a hydraulic company was chartered for thirty years, with the right to make leases of water power for a limited time, a repeal of these provisions gave it power to make perpetual leases: *Paper Co. v. Hydraulic Co.*, 18 O. C. C. 200, 10 O. C. D. 57.

HYDRAULIC RIGHTS.

See WATERS AND WATERCOURSES.

HYPOTHECATION.

See PLEDGE AND COLLATERAL SECURITY.

HYPOTHESIS.

That the evidence of guilt in criminal cases must exclude every reasonable hypothesis except that of guilt, see EVIDENCE.

HYPOTHETICAL OPINION.

See EVIDENCE; WITNESSES.

HYPOTHETICAL QUESTIONS.

For hypothetical questions, see EVIDENCE; WITNESSES.

HYSTERICS.

To constitute a publication respecting a person libelous *per se*, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred or contempt, or affects him injuriously in his trade or profession. Hence a statement published in a newspaper of and concerning a woman that she "had hysterics," the same not containing any imputation upon her as an individual, or in respect to her profession or business, is not, though untrue, *per se* libelous, and can not be made a ground of recovery in the absence of proof of special damage: *Printing Co. v. Neithersole*, 84 O. S. 118. See also LIBEL AND SLANDER.

I

ICE-CREAM PARLOR.

For ice cream parlor, see CIVIL RIGHTS STATUTES.

IDEM SONANS.

See EVIDENCE; JUDGMENT.

IDENTIFICATION.

See EVIDENCE; IDENTITY.

IDENTITY.

H. E. Fairchild, who serves in the board of education, will be presumed the same as E. H. Fairchild, whom the village recorder, as clerk of the board, had appointed. Besides, his acts as a *de facto* member are valid: *Gates v. Beckwith*, 2 Dec. Rep. 394, 2 W. L. M. 589. See also OFFICERS.

Notice to take before Jas. T., and taking them before Jas. W. T., is immaterial if they are apparently the same person: *Friend v. Thompson*, W. 636, 1 Longsdorf's Notes, 49. See also DEPOSITIONS.

The petition on an appeal bond must state that the case in the appellate court is the same as that appealed. Mere identity of names is not such a showing: *North v. Merchant*, 2 Dec. Rep. 69, 1 W. L. M. 284. See also APPEALS.

Affiant of the same name as the person pleading will be presumed the same without averring he is plaintiff or defendant: *Brotton v. Allston*, 2 Dec. Rep. 393, 2 W. L. M. 588.

Where one of the appellants in a will case was C. F. Steinkamp, but the party to the petition was Christian Steinkamp, Sr., on error to refusal to dismiss the appeal, it was held that all presumptions were in favor of the judgment, and the names may represent the same person, for a middle initial is frequently dropped, and the suffix Sr. may not unreasonably be treated as a superfluity:

Wagner v. Ziegler, 44 O. S. 59, IV Longsdorf's Notes, 193.

If a libel is ambiguous as to who is intended, a witness, who knows the parties and circumstances, may give their opinion as to who is meant. This is not construing the libel. The defendant can not escape because his ingenuity has prevented any but acquaintances recognizing who is intended: *Mo-Loughlin v. Russell*, 17 O. 475, I Longsdorf's Notes, 823. See also LIBEL AND SLANDER.

Swearing merely that the matters and things herein set forth are true, without referring to the petition as his petition, is not sufficiently definite. But if pending a motion to strike the petition from the files a default decree is taken which is now asked to be set aside, a new petition and new summons is not necessary, the parties having thus come in, but the decree will be set aside, and the verification amended: *Lannert v. Pies*, 4 Dec. Rep. 282, 1 Clev. L. Rep. 210. See also PLEADINGS.

In malicious prosecution for having arrested plaintiff on a charge of making threats, defendant having in order to show probable cause, offered an unsigned threatening letter, written by some one disappointed by a will, may offer the will in evidence as tending to show that plaintiff's condition satisfied the terms of the letter, and thus identified him as its author: *John v. Bridgman*, 27 O. S. 22, III Longsdorf's Notes, 342.

To identify the prisoner as the murderer, the conduct of his dog soon after in scenting a trail from the spot of the murderer, appearing to follow it across a field to a creek where recent foottracks like the defendant's were found, is admissible: *State v. Brooks*, 1 Dec. Rep. 407, 9 W. L. J. 109. See also EVIDENCE.

A letter purporting to have been written over thirty years ago is an ancient document, and where produced from the family papers of the addressee is presumed to have been written by the purported writer, and if both are dead, is admissible without further authentication: *Bell v. Brewster*, 44 O. S. 690, IV Longsdorf's Notes, 245.

A foreign will not admitted to record here, though ineffectual to pass title, may be competent evidence as an ancient document to prove identity of persons: *Barr v. Chapman*, 11 Dec. Rep. 862, 30 Bull. 264. See also WILLS, LEGACIES AND DEVISES.

Where in an action for injury by the kick of a vicious and dangerous horse, plaintiff's evidence shows that the horse was one named Nelly, and defendant shows that Nelly was of a gentle disposition, but it appears further from defendant's evidence that the kick was by a horse named Pearl who was vicious and dangerous, a verdict for plaintiff will not be

disturbed: *Schlitz Brewing Co. v. Blacklay*, 18 O. C. C. 359, 10 O. C. D. 17. See also ANIMALS.

Evidence is competent that a blood-hound trained to follow human scent was within a day after a burglary put upon the scent at the place and followed it to defendant's door. It is a circumstance tending to identify the accused: *State v. Hall*, 3 O. N. P. 125, 4 O. D. (N.P.) 147.

C devised his property to his children, W and E, but the executor being unable to find them, turned the property over to the widow, an imbecile, and now, fourteen years later, the plaintiffs, claiming to be W and E, seek to recover it from the guardian. The question is whether plaintiff's father, who abandoned them in another state, is the same person as C, the testator. It was held that the onus to prove identity where the defendant was at greater disadvantage than the plaintiffs, as guardian of an imbecile without personal access to the facts, was on the plaintiffs. Identity might be proved by a concurrence of circumstances. Identity of name raises a presumption of identity of person. Memory of personal appearance fifty years back was too unreliable to be considered. An old lady's memory was of more weight than an old man's as to domestic occurrences of her youth, as a marriage, etc. *Contra*, of his memory as to business matters. Declarations of the testator as to his history and family were admissible. In tracing the history of the deceased, judicial notice would be taken of the history of the country, as the date and duration of the Seminole war in Florida: *Sperry v. Tebbbs*, 10 Dec. Rep. 318, 20 Bull. 181.

IDENTITY OF OFFENSES.

See AUTREFOIS ACQUITT AND CONVICT; INCLUDED OFFENSES.

IDIOT.

For idiot, see INSANE, IMBECILES AND IDIOTS.

IDLE AND TRUANT CHILDREN.

See SCHOOLS, PUBLIC.

IDLE PERSONS.

See TRAMPS.

IGNORANCE.

For ignorance, see NOTICE AND KNOWLEDGE.

For ignorance of facts, etc., see NOTICE AND KNOWLEDGE; MISTAKE.

For ignorance of law, see LAW; MISTAKE.

Concealment means some affirmative act. Mere ignorance is not sufficient: *Morris v. Cisler*, 7 O. N. P. (N.S.) 142, 18 O. D. (N. P.) 538. See also FRAUD AND DECEIT.

Mere ignorance of the whereabouts of a debtor who is not absent from the state does not toll the statute of limitations as applied to an action on an account, but the burden is on the creditor to show affirmative acts on the part of the debtor which prevented a discovery of his whereabouts: *Morris v. Cisler*, 7 O. N. P. (N.S.) 142, 18 O. D. (N.P.) 538. See also LIMITATIONS, STATUTE OF.

IGNORANCE OF FACTS.

See MISTAKE; NOTICE AND KNOWLEDGE.

IGNORANCE OF LAW.

See MISTAKE; NOTICE AND KNOWLEDGE.

ILLEGAL ACTS.

See CONTRACTS; CRIMES AND OFFENSES; TORTS, and cross references thereunder.

ILLEGAL ARREST.

See ARREST; FALSE IMPRISONMENT.

ILLEGAL ASSESSMENTS.

See ASSESSMENTS.

ILLEGAL BUSINESS.

For illegal contracts, see CONTRACTS; GAMBLING.

A state agent's illegal loan of money is not an illegal contract which can not be ratified, though prohibited under penalty: *State v. Buttles*, 3 O. S. 309, II Longsdorf's Notes, 31. See also AGENCY.

The business of the Provident Bond and Investment Company of Philadelphia, was a game of chance. The holders of its bonds will not be assisted by the courts and a receiver of its funds here will be refused and attachments dissolved: *Deposit Co. v. Jones*, 6 O. D. (N.P.) 582, 36 Bull. 87. See also ATTACHMENT.

A husband who is a partner, or claims a partnership interest, in property used by his wife in conducting houses of ill fame with his knowledge and connivance, or who, without such knowledge or connivance seeks the aid of equity to protect his interest in prop-

erty used in such houses, will, in the absence of allegations in his petition tending to explain in what way the property is lawfully in such houses, be regarded as a *particeps criminis* in the business; and in such case his petition to restrain her from selling, encumbering or otherwise disposing of the property, and for the appointment of a receiver thereof to manage, sell and set off to him his interest therein, will be denied, and the parties left where equity finds them: *Backenstoe v. Backenstoe*, 14 O. D. (N.P.) 353. See also PARTNERSHIP.

ILLEGAL CONDITIONS.

See CONDITIONS AND LIMITATIONS; CONTRACTS; DEEDS; WILLS, LEGACIES AND DEVISES.

ILLEGAL CONTRACTS.

See CONTRACTS.

ILLEGAL FEES.

See FEES; OFFICE.

ILLEGAL IMPRISONMENT.

See FALSE IMPRISONMENT.

ILLEGAL LOAN.

See INTEREST AND USURY; CONTRACTS.

ILLEGAL MARRIAGE.

See MARRIAGE.

ILLEGAL SALES.

See SALES.

ILLEGAL SPECULATION.

See GAMBLING.

ILLEGAL TAXES.

See TAXATION.

ILLEGAL VOTES.

See BRIBERY; ELECTIONS, POLITICAL.

ILLEGITIMACY.

For illegitimacy, see BASTARDY; DESCENT AND DISTRIBUTION.

ILL FAME.

See **HOUSE OF ILL FAME.**

ILL FEELING.

The fact that ill feeling against the deceased was entertained by those not on trial is not proof of the conspiracy: *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252. See also **AIDERS, ABETTERS AND ACCOMPLICES.**

ILL REPUTE.

See **HOUSE OF ILL FAME.**

Ill repute of itself means bad reputation: *Smith v. State*, 14 O. C. C. (N.S.) 257.

A person owning and conducting a house of ill repute is guilty of contributing to the delinquency of a minor under seventeen years of age, where it is shown that such minor was admitted by a person apparently acting as a servant or employe and making no inquiry as to the age of the minor: *Smith v. State*, 14 O. C. C. (N.S.) 257.

Where a person owns and conducts a house of ill repute, the duty is imposed on her to know that those whom she permits in her house and to act apparently as her servants, shall obey the law, and in case they do not, she as principal and proprietor of the house in which the delinquency occurs is liable to pay the penalty of the statute: *Smith v. State*, 14 O. C. C. (N.S.) 257.

ILL TREATMENT.

See **ASSAULT AND BATTERY; ASSAULT WITH INTENT; DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.**

ILL WILL.

See **MALICE.**

ILLICIT COHABITATION.

See **ADULTERY.**

ILLICIT INTERCOURSE.

See **SEXUAL INTERCOURSE.**

ILLITERACY.

See **SCHOOLS, PUBLIC.**

ILLUSIONS.

See **INSANE, IMBECILES AND IDIOTS.**

IMBECILE.

For imbeciles, see **INSANE, IMBECILES AND IDIOTS.**

IMITATION.

See **TRADE-MARKS AND TRADE NAMES.**

IMMATERIAL AVERMENTS.

See **PLEADINGS.**

IMMATERIAL ERRORS.

See **ERROR.**

IMMATERIAL EVIDENCE.

See **EVIDENCE.**

IMMATERIAL FACTS.

See **FRAUD AND DECEIT.**

IMMATERIAL ISSUE.

See **PLEADINGS.**

IMMEMORIAL USAGE.

See **CUSTOM AND USAGES.**

IMMINENCE OF DANGER.

See **NEGLIGENCE.**

IMMORAL BOOKS, ETC.

See **OBSCENE LITERATURE.**

IMMORAL CONDUCT.

See **INDECENT CONDUCT.**

IMMORAL CONSIDERATION.

See **CONTRACTS.**

IMMORAL CONTRACTS.

See **CONTRACTS.**

IMMORAL HABITS.

See **DELINQUENCY.**

IMMORAL LITERATURE.

See OBSCENE LITERATURE.

IMMORAL PUBLICATIONS.

For immoral publications, see INDECENT PUBLICATIONS.

IMMOVABLES.

See REAL PROPERTY, and cross references thereunder.

IMMUNITY.

See AIDERS, ABETTERS AND ACCOMPLICES; EVIDENCE; WITNESSES.

IMMUNITY FROM SUIT.

See SUMMONS.

IMPAIRING OBLIGATION OF CONTRACTS.

See CONSTITUTIONAL LAW.

IMPANELING JURY.

See JURY.

IMPARTIAL.

See JURY; COURTS.

IMPARTIAL TRIAL.

See TRIAL.

IMPEACHING EVIDENCE.

See IMPEACHMENT; EVIDENCE.

IMPEACHING WITNESS.

See IMPEACHMENT; WITNESSES.

IMPEACHMENT.

For certificate of acknowledgment, see ACKNOWLEDGMENT.

For the impeachment of witness, see WITNESSES.

A paper called an "opinion" signed by the arbitrators and delivered in such case by them to the counsel of the parties, accompanying the award, which paper purports to cite reasons for the decision of the arbi-

trators, but is not made part of the award, nor in any way referred to in the award, and is not required by the agreement of submission or the oaths of the arbitrators, is not competent evidence to impeach the award: *Corrigan v. Rockefeller*, 67 O. S. 354, IV Longsdorf's Notes, 932.

The testimony of arbitrators in a case submitted for arbitration is not competent evidence, to impeach the award: *Corrigan v. Rockefeller*, 67 O. S. 354, IV Longsdorf's Notes, 932.

The award is an arbitration can not be impeached for error, nothing but fraud in the parties or in the arbitrators, or such manifest mistake as naturally works a fraud, can be alleged to avoid it: *Corrigan v. Rockefeller*, 67 O. S. 354, IV Longsdorf's Notes, 932. See also ARBITRATION.

The accounts of executors or administrators are impeachable for fraud, and, if necessary, the whole account must be restated: *In re Leidigh*, 15 O. D. (N.P.) 193. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

The minutes of a board of county commissioners may be impeached by parol testimony: *Stolz v. Selz*, 12 O. D. (N.P.) 664. See also COUNTIES AND COUNTY COMMISSIONERS.

IMPEDIMENTS.

For impediments to marriage, see BREACH OF PROMISE; MARRIAGE.

IMPERATIVE STATUTES.

See STATUTES.

IMPLEMENTS OF LABOR AND TRADE.

For exemptions from execution, see EXECUTION, WRIT OF.

IMPLICATIONS.

For implications, see also EVIDENCE.

For implied conditions, see CONDITIONS AND LIMITATIONS; CONTRACTS.

For implied contracts, see CONTRACTS.

For implied warranty, see SALES; WARRANTY.

For amendments to the constitution by implication, see CONSTITUTIONAL LAW.

For amendments to statutes by implication, see STATUTES.

For repeals of the constitution by implication, see CONSTITUTIONAL LAW.

For repeals of statutes by implication, see STATUTES.

An officer whose fees are regulated by statute can charge fees only for those services for which compensation is fixed by law. Fees are not allowed by implication and there are no constructive fees: *State v. Lewis*, 22 O. C. C. 618, 12 O. C. D. 597 [affirmed, *Lewis v. State*, 57 O. S. 189, IV Longsdorf's Notes, 711].

The compensation of public officers can not be enlarged by implication beyond the terms of statute: *Richardson v. State*, 66 O. S. 108, IV Longsdorf's Notes, 899.

When an officer's power is purely statutory, the courts will be slow to raise it by implication: *Crawford v. Taylor*, 6 O. C. C. (N.S.) 278, 17 O. C. D. 245 [reversed, without opinion, *Taylor v. Crawford*, 72 O. S. 560]. See also OFFICE.

There is an implied condition in executory agreements to the effect that their performance shall not be rendered impossible by the intervention of unforeseen, accidental and uncontrollable superior agencies and that their performance will be excused when it is prevented by such agencies: *Board of Education v. Townsend*, 63 O. S. 514, IV Longsdorf's Notes, 861. See also CONTRACTS.

Where no time for performance is fixed by a contract, the law implies that performance is to take place within a reasonable time: *Stewart v. Herron*, 77 O. S. 130, IV Longsdorf's Notes, 1031 [reversing *Herron v. Stewart*, 10 O. C. C. (N.S.) 355, 20 O. C. D. 662].

While a railroad company selling a coupon ticket over its own and a connecting line may, by contract, either express or implied, make itself responsible for the safe carriage of the passenger over the entire route, yet the mere sale of such ticket does not import such contract or undertaking beyond its own line: *Pennsylvania Co. v. Loftis*, 72 O. S. 288, IV Longsdorf's Notes, 990. See also CARRIERS.

The power of defining the functions of the judicial department is only limited by the general rule that a grant of general powers to any department constitutes of itself an implied exclusion of all other departments from the exercise of such powers: *Fairview v. Giffie*, 73 O. S. 183, IV Longsdorf's Notes, 1001.

The doctrine relating to repeals and amendments by implication applies alike to constitutions and statutes, and it requires that earlier expressions yield when it is necessary to give effect to the latest expression of the intention of those whose intention is entitled to control: *State v. Creamer*, 83 O. S. 412. See also CONSTITUTIONAL LAW.

A valid sentence of imprisonment in a criminal case must in and of itself be definite and complete in all its material terms, and

so certain and accurate as to the time of its commencement and proper termination as that it shall not be necessary for either the prisoner or the officers charged with its execution to apply to a court to ascertain its meaning: *Hamilton v. State*, 78 O. S. 76, IV Longsdorf's Notes, 1038. See also SERVICES.

In an action for conspiracy, the damage sustained constitutes the gravamen, and proof of special damage is required, and can not be implied from the mere effort to injure the plaintiff by a conspiracy to that end, although the efforts in that behalf may consist of declarations which would raise such an implication in an action for libel or slander: *Zurhorst v. Kroll*, 10 O. C. C. (N.S.) 228, 21 O. C. D. 696. See also CONSPIRACY.

An agreement to purchase necessarily implies a promise to pay: *Stewart v. Herron*, 77 O. S. 130, IV Longsdorf's Notes, 1031 [reversing *Herron v. Stewart*, 10 O. C. C. (N.S.) 355, 20 O. C. D. 662]. See also PAYMENT.

When a person receives the property of another, or illegally, unlawfully or wrongfully obtains the property of another, the law implies an obligation upon his part to refund it to the owner: *Kirchner v. Smith*, 7 O. C. C. (N.S.) 22, 18 O. C. D. 45. See also CONVERSION.

Parol evidence can not be used for the purpose of either reforming or construing the clear and settled legal effect and meaning of the contract, nor can it be introduced to vary whatever the law implies from the contract: *Douglass v. Campbell*, 2 O. C. C. (N.S.) 62, 14 O. C. D. 241. See also EVIDENCE.

A grant, in consideration of \$1.00, of all the oil and gas under certain premises, with right of entry for drilling and operating and reserving a share of oil produced, etc., implies an engagement to develop the premises for oil and gas: *Oil Company v. Robinson*, 71 O. S. 302, IV Longsdorf's Notes, 983.

Under a condition in an oil lease that if no well is completed within ninety days the grant shall become null and void unless the lessee shall pay certain sums per year after demand, the time within which the implied arrangement by the lessee to develop the premises must be performed is postponed by the acceptance of the specified sum, and does not commence to run until the end of the year for which the payment is accepted; the lease does not become null and void at the end of the year upon refusal of the lessor to accept payment for another year: *Oil Company v. Robinson*, 71 O. S. 302, IV Longsdorf's Notes, 983. See also OIL AND GAS.

The defense of contributory negligence is inconsistent with a defense entirely upon the ground that the defendant was guilty of no negligence; the definition of contributory neg-

ligence implies negligence on the part of the defendant: *Traction Co. v. Stevens*, 75 O. S. 171, IV Longsdorf's Notes, 1014 [reversing *Traction Co. v. Stephens*, 7 O. C. C. (N.S.) 454, 18 O. C. D. 497]. See also NEGLIGENCE.

The waiver of an accused of his right to a jury trial must clearly and affirmatively appear upon the record, and it can not be assumed or implied by a reviewing court from the silence of the accused, or his mere failure to demand a jury: *Simmons v. State*, 75 O. S. 346, IV Longsdorf's Notes, 1017 [distinguishing *Dailey v. State*, 4 O. S. 57, II Longsdorf's Notes, 74; *Billigheimer v. State*, 32 O. S. 435, III Longsdorf's Notes, 642]. See also JURY.

The express provisions of the constitution of the state establish such relation between the election of state officers and the convening of the general assembly that since the seventeenth article, adopted in 1905, has expressly changed the date of the election from November of the odd-numbered years to the same month of the even-numbered years, the provision for the convening of the regular session of the general assembly then elected must be regarded as changed by implication from the first Monday of January in the even-numbered years to the first Monday of the same month in the odd-numbered years: *State v. Creamer*, 83 O. S. 412. See also LEGISLATURE.

The implied powers with which county commissioners are clothed are *ex necessitate* only, and where procedure is provided by statute there can be no necessity to improvise one: *Ritter v. Railway Co.*, 6 O. N. P. (N.S.) 161. See also COUNTIES AND COUNTY COMMISSIONERS.

The earlier of two statutes to the extent that they are irreconcilable is repealed by implication: *State v. Morris*, 63 O. S. 496, IV Longsdorf's Notes, 861 [approving *State v. Halliday*, 63 O. S. 165, IV Longsdorf's Notes, 851]. See also STATUTES.

The very essence of reciprocity in the enforcement of statutes of sister states implies that each state as to the subject-matter shall have and enforce identical laws: *Railway Co. v. Fox*, 64 O. S. 133, IV Longsdorf's Notes, 868. See also COMITY.

A real estate broker, authorized to sell, has no implied authority to execute a contract of sale binding upon his principal: *Ettinger v. Weatherhead*, 9 O. C. C. (N.S.) 172, 19 O. C. D. 137 [reversed, *Weatherhead v. Ettinger*, 78 O. S. 104, IV Longsdorf's Notes, 1038].

Authority to purchase goods as agent for another and on his credit, can not be implied from special authority given such agent to sell goods and devote the proceeds to a

particular purpose: *Kelly v. Tracy*, 71 O. S. 220, IV Longsdorf's Notes, 981.

An agent to procure a contract has no power to discharge it, implied from the original authority merely: *Johnson v. Insurance Co.*, 66 O. S. 6, IV Longsdorf's Notes, 895.

Where an owner of real estate gives to his agent a written agreement to sell to be delivered by him to a proposed purchaser, the law will imply that the agent was empowered to accept the purchase money from the purchaser: *Schippicasaw v. Church*, 9 O. C. C. (N.S.) 166, 19 O. C. D. 678. See also AGENCY.

IMPLIED AGENCY.

See AGENCY.

IMPLIED AMENDMENT.

See CONSTITUTIONAL LAW; STATUTES.

IMPLIED BEQUESTS.

See WILLS, LEGACIES AND DEVISES.

IMPLIED CONDITIONS.

For implied conditions, see CONDITIONS AND LIMITATIONS.

IMPLIED CONTRACTS.

For implied contracts, see CONTRACTS; QUASI-CONTRACTS.

IMPLIED COVENANTS.

See CONTRACTS; DEEDS.

IMPLIED DEDICATION.

See DEDICATION.

IMPLIED DEVISES OR LEGACIES.

See WILLS, LEGACIES AND DEVISES.

IMPLIED EASEMENT.

See EASEMENT.

IMPLIED LIEN.

See LIENS.

IMPLIED MALICE.

See MALICE.

IMPLIED NOTICE.

See NOTICE AND KNOWLEDGE.

IMPLIED OR QUASI-CONTRACTS.

See CONTRACTS; QUASI-CONTRACTS.

IMPLIED POWERS.

See AGENCY; CORPORATIONS; MUNICIPAL CORPORATIONS; PARTNERSHIP.

IMPLIED PROMISE.

See CONTRACTS.

IMPLIED RATIFICATION.

See AGENCY; FRAUD AND DECEIT; PARTNERSHIP.

IMPLIED REPEAL.

See CONSTITUTIONAL LAW; STATUTES.

IMPLIED SURETYSHIP.

See SURETYSHIP.

IMPLIED TRUSTS.

See TRUSTS.

IMPLIED WAIVER.

See WAIVER.

IMPLIED WARRANTY.

For implied warranty, see DEEDS; LANDLORD AND TENANT; SALES; WARRANTY.

A broker for distillers who contracts in his own name to sell and deliver on the cars barrelled spirits in bond for export, impliedly warrants that the barrels shall be fit and filled for transportation, and is liable, independent of negligence, for leakage due to improper barrelling or latent defect in the wood, and there is no duty or opportunity for the buyer to inspect: *Stevens v. Pincoffs*, 9 Dec. Rep. 479, 14 Bull. 110.

IMPORTING VOTERS.

See ELECTIONS, POLITICAL.

IMPOSITION.

See FRAUD AND DECEIT; UNDUE INFLUENCE.

IMPOSSIBILITY.

A contract to remove or rebuild a schoolhouse is not rendered impossible by the fact that such schoolhouse is blown down by a storm, if the original materials are not carried away: *Board of Education v. Townsend*, 63 O. S. 514, IV Longsdorf's Notes, 861 [reversing *Board of Education v. Townsend*, 15 O. C. C. 674, 8 O. C. D. 732].

The word "impossible" as used in a clause in a mining contract providing that the requirement of the mining of a minimum tonnage shall not apply so long as it shall be "impossible to mine" etc., does not mean absolute physical impossibility, but should be construed in a business sense, and the mining and removing of the minimum tonnage is "impossible" when it appears that on account of causes and natural disturbances not attributable to the fault of the lessee, it can not be mined and removed without resorting to unreasonable or extraordinary expense or the employment of unusual and extraordinary means: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed on another ground, *Coal Co. v. Coal Co.*, 86 O. S. 140].

Covenants in a mining contract to mine and remove a minimum tonnage and to pay a minimum royalty are not absolute where the contract provides that said minimum provision shall not apply and "in case and so long as it shall be impossible to mine and remove said amount by reason of strikes, lockouts, fires, floods or any other cause beyond the control" of the lessee, except lack of transportation: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed, *Coal Co. v. Coal Co.*, 86 O. S. 140].

The question of impossibility of mining and removing the minimum tonnage under a saving clause of the lease in case of doubt or conflict in the evidence is one of fact to be submitted to the jury: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed, *Coal Co. v. Coal Co.*, 86 O. S. 140].

Retention of possession by the lessee under a mining contract without mining and removing the minimum tonnage provided for, if impossible from causes beyond its control, is not sufficient to render it liable for the minimum royalty: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed, *Coal Co. v. Coal Co.*, 86 O. S. 140].

If the contract be for the entire school year it may be discharged by the son becoming disabled by illness from attending the full year. Both parties must be deemed to have acted on the assumption that, if such an event intervened, the agreement for the full school year would be discharged: *Groff*

v. *Hertenstein*, 12 O. C. C. (N.S.) 515, 21 O. C. D. 633.

Where in mining contracts a minimum royalty or deed rent is reserved without exception, the lessee is bound, except in cases where there is no minable coal or where it has become exhausted: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed, *Coal Co. v. Coal Co.*, 86 O. S. 140].

Under a mining contract providing for the mining of an annual minimum quantity, the burden of proof is upon the lessee to show that it was prevented from mining and removing the minimum tonnage on account of causes beyond its control: *Coal Co. v. Coal Co.*, 12 O. C. C. (N.S.) 465, 21 O. C. D. 458 [reversed, *Coal Co. v. Coal Co.*, 86 O. S. 140].

For the effect of subsequent impossibility upon contracts, see **CONTRACTS**.

IMPOSSIBLE CONDITIONS.

See **CONDITIONS AND LIMITATIONS**.

IMPOTENCY.

See **DIVORCE, ALIMONY AND CUSTODY OF CHILDREN**.

IMPOUNDING ANIMALS.

See **ANIMALS**.

IMPRESSIONS OF WITNESSES.

See **EVIDENCE; WITNESSES**.

IMPRISONMENT.

For imprisonment for contempt, see **CONTEMPT**.

For imprisonment for debt, see also **ARREST; IMPRISONMENT FOR DEBT**.

For escape from imprisonment, see **ESCAPE**.

For false imprisonment, see **FALSE IMPRISONMENT**.

For imprisonment until fine etc. paid, see **FINES**.

For mittimus for imprisonment, see **MITTIMUS**.

For prison bounds in case of imprisonment for debt, see **ARREST**.

For release from imprisonment, see **HABEAS CORPUS; PARDON; INSOLVENT LAWS**.

For the remedy for illegal imprisonment, see **HABEAS CORPUS**.

Where the accused, on being sentenced, is present, but, being on bail, is not in custody and is not turned over to the sheriff, nor any

written authority given to the sheriff to take him, but he repairs to the sheriff's office, and is there taken to jail, the imprisonment is legal: *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575.

A threat of consequential imprisonment to result from a threatened prosecution for a crime is not duress. Duress is fear of life or member, or mayhem, or of unlawful imprisonment: *Moore v. Adams*, 8 O. 372, I Longsdorf's Notes, 441. See also **RESCISSIION**.

A wife's mortgage for a sum embezzled by her husband made under threats to arrest him is not duress if he was actually guilty and the arrest would have been legal: *Herbst v. Manss*, 8 Dec. Rep. 215, 6 Bull. 336 [affirming *Herbst v. Manss*, 7 Dec. Rep. 701, 4 Bull. 1038].

A person convicted in Cuyahoga county under the Sunday closing law should be sentenced to the Cleveland workhouse, under G. C., § 4128, and not to the county jail: *Edis v. Butler*, 8 O. N. P. 183, 11 O. D. (N.P.) 245 [following *Kimbleawecz v. State*, 51 O. S. 228, IV Longsdorf's Notes, 539]. See also **INTOXICATING LIQUOR**.

The addition of the words "at hard labor" to a sentence of imprisonment in a workhouse does not aggravate or increase the punishment authorized by statute. A sentence of imprisonment in that institution is necessarily a sentence at hard labor: *Hamilton v. State*, 78 O. S. 76, IV Longsdorf's Notes, 1038.

The court may and should declare in the sentence for what time the convict shall be kept at hard labor and for what period in solitary confinement, and may also render judgment for costs (G. C., § 12374): *In re Clark*, 50 O. S. 649, IV Longsdorf's Notes, 521. See also **SENTENCE**.

Imprisonment of the putative father for not giving security for the child's support is not for debt, but a police regulation, and the statute is therefore not unconstitutional: *Musser v. Stewart*, 21 O. S. 353, III Longsdorf's Notes, 33.

An imprisonment for failure to pay the judgment and costs is not for debt and the statute is therefore not unconstitutional: *Welty v. Furley*, 2 Dec. Rep. 399, 2 W. L. M. 596. See also **BASTARDY**.

G. C., § 11856, authorizing contempt proceedings for the delivery of attached property, and to enforce the payment of the money due on the redelivery bond, must be construed so as not to conflict with the constitutional prohibition of imprisonment for debt: *Bank v. Becker*, 62 O. S. 289, IV Longsdorf's Notes, 834. See also **ATTACHMENT**.

An assignee for creditors not complying with an order of court to pay over to a creditor a certain sum can not be committed

for contempt, not being a requisition to deliver specific property, for this amounts to imprisonment for debt: *In re French*, 3 Dec. Rep. 175, 4 Gaz. 209; *In re Rowekamp*, 11 Dec. Rep. 539, 27 Bull. 289. See also CONTEMPT.

A judgment debtor ordered by proceedings in aid of execution to deliver to the sheriff shares of stock which he admits owning in a foreign corporation is guilty of contempt if he does not obey, and imprisonment to compel obedience is not for debt under constitution, Art. I, § 15: *In re Conklin*, 5 O. C. C. 78, 3 O. C. D. 40.

Payment of the debt can not be enforced by contempt proceedings in the absence of all fraud. This would probably not be constitutional: *Bank v. Bank*, 6 O. S. 254, II Longsdorf's Notes, 235.

The probate judge found that A held money of the judgment debtor by fraudulent conveyance and ordered him to pay it to a receiver to be applied on the judgment. A, claiming it as a gift, refused to obey. It was held that the probate judge had no power to imprison A for contempt, but the receiver must resort to an action: *White v. Gates*, 42 O. S. 109, IV Longsdorf's Notes, 95. See also PROCEEDINGS IN AID OF EXECUTION.

Contempt proceedings may be used to collect alimony *pendente lite*. As G. C., § 11994, does not provide for a judgment there is no other way. The allowance is not a debt within the constitutional guaranty against imprisonment for debt: *Stewart v. Stewart*, 10 Dec. Rep. 662, 23 Bull. 38; *Kaderabek v. Kaderabek*, 3 O. C. C. 419, 2 O. C. D. 236.

Money due on contract, express or implied, and judgment thereon, is a debt under constitution Art. I, § 15, which forbids imprisonment for debt. An order, in contempt proceedings against sureties for the redelivery of attached property, requiring them on failure to pay the judgment to be imprisoned, contravenes their constitutional rights: *Bank v. Becker*, 62 O. S. 289, IV Longsdorf's Notes, 834.

A final money decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt: *State v. Cook*, 66 O. S. 566, IV Longsdorf's Notes, 917 [distinguishing *Conrad v. Everich*, 50 O. S. 476, IV Longsdorf's Notes, 508; *Lockwood v. Krum*, 34 O. S. 1, III Longsdorf's Notes, 693]. See also CONSTITUTIONAL LAW.

On imposing a fine the court can not order commitment until it is paid, unless so provided by statute: *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542. See also FINES.

G. C., § 2140, which provides for the transfer from the reformatory to the penitentiary

of any prisoner who, subsequent to his commitment, shall be shown to have been at the time of his conviction, more than thirty years of age, or to have been previously convicted of crime, is not in contravention of Art. IV, § 1 of the constitution of Ohio, § 16 of the bill of rights, or Art. XIV, § 1 of the constitution of the United States: *In re Clayton*, 13 O. D. (N.P.) 546.

The age of a prisoner and the fact of his previous conviction and imprisonment, which determine whether he shall be confined in the reformatory or the penitentiary need not be judicially determined, and an order of the court that he is to be confined in one prison or the other is merely advisory. Hence, the board of managers of the reformatory in finding that a prisoner is not eligible to the reformatory and ordering him transferred to the penitentiary under G. C., § 2140, does not exercise judicial powers nor deprive such prisoner of his liberty without due process of law: *In re Clayton*, 13 O. D. (N.P.) 546. See also PENITENTIARIES.

The transfer of a prisoner who is an escaped convict from the workhouse to the custody of the chief of police, as the first step in his return to the penitentiary, will be presumed to have been accomplished by legal process, and upon his return to the workhouse after completing his term in the penitentiary, *habeas corpus* will not lie for his release, at least until the time his workhouse sentence would have expired had there been no interruption by transferring him to the penitentiary: *Harrington v. Bader*, 12 O. C. C. (N.S.) 257, 32 O. C. D. 493, 6 O. L. R. 170. See also CONVICT.

If the imprisonment under sentence of a court of competent jurisdiction is clearly unauthorized and void, relief may be obtained by *habeas corpus*; if voidable, a writ of error is the appropriate remedy: *In re Shaw*, 7 O. S. 81, II Longsdorf's Notes, 271; *In re Van Hagan*, 25 O. S. 426, III Longsdorf's Notes, 249.

The director of charities and correction in Cleveland (R. S. § 1545-67, repealed 96 v. 96), was clothed with power to discharge a prisoner from the workhouse only where the question involved in his discharge was the propriety of retaining him in confinement, that is, a question of humanity, as distinguished from one of grace, which belongs to the pardoning power; or a question of the propriety of retaining him in custody as distinguished from the propriety of committing him to custody, or as to whether his sentence is properly proportioned to his guilt: *Jihi v. Barry*, 3 O. N. P. (N.S.) 65, 16 O. D. (N.P.) 33 [affirmed in memorandum opinion by circuit court, *Jihi v. Barry*, 16 O. D. (N.P.) 33].

Under R. S., § 1545-67 (repealed, 96 v. 96), the discharge of a prisoner from the workhouse in Cleveland could only be made upon the approval of the mayor, and under such regulations as might be provided by law or ordinance, and in the absence of a regulating statute or ordinance the discharge was invalid: *Jihi v. Barry*, 3 O. N. P. (N.S.) 65, 16 O. D. (N.P.) 33 [affirmed in memorandum opinion by circuit court, *Jihi v. Barry*, 16 O. D. (N.P.) 33].

Under R. S., §§ 1545-67, *et seq.* (repealed 96 v. 96), it is not probable that the legislature intend to grant power to a director of charities and correction in Cleveland to interfere at all with sentences imposed by the court of common pleas in county or state cases, as distinguished from sentences imposed by the municipal court: *Jihi v. Barry*, 3 O. N. P. (N.S.) 65, 16 O. D. (N.P.) 33 [affirmed in memorandum opinion by circuit court, *Jihi v. Barry*, 16 O. D. (N.P.) 33].

Under R. S., §§ 1545-67, *et seq.* (repealed 96 v. 96), the failure of the mayor to indorse his approval of the discharge by the director of charities of a prisoner from the workhouse might have been cured by a subsequent indorsement thereof, provided the proceedings were otherwise regular: *Jihi v. Barry*, 3 O. N. P. (N.S.) 65, 16 O. D. (N.P.) 33 [affirmed in memorandum opinion by circuit court, *Jihi v. Barry*, 16 O. D. (N.P.) 33]. See also CLEVELAND.

The term "period of imprisonment," as used in G. C., § 2163, means the term of sentence less the time deducted for good conduct: *In re Bailus*, 8 O. C. C. (N.S.) 454, 19 O. C. D. 632 [affirmed, without opinion, *In re Bailus*, 74 O. S. 452]. See also CITIZENSHIP.

The effect of unlawful duress is to vitiate all contracts it enters into unless in some way the effect is afterwards waived. To constitute imprisonment such duress as will avoid a contract, it must be unlawful, and the party must be innocent: *Wheelock v. Bank*, 8 O. N. P. 627, 10 O. D. (N.P.) 622 [affirmed, *Bank v. Wheelock*, 52 O. S. 534, Longsdorf's Notes, 582]. See also DURESS.

Arrest on *capias ad satisfaciendum* satisfies the judgment. If the debtor turns out real estate to release his body, the effect is the same as a levy thereon, and the lien of the judgment on other lands is not discharged: *Douglas v. Wallace*, 11 O. 42, I Longsdorf's Notes, 539.

Imprisonment satisfies a judgment only while it continues, or in case of release with the creditor's assent, but not in case of escape or release without assent: *Bowrell v. Zigler*, 19 O. 362, I Longsdorf's Notes, 883.

Arrest of the body discharges the lien of the judgment on land, and turning out particular land to obtain release from the arrest does not revive the general lien: *Stuble v. Walpole*, W. 447, I Longsdorf's Notes, 35. See also JUDGMENT.

A citizen of this state loses his citizenship upon his conviction and imprisonment for a felony; and, while serving his sentence in the state penitentiary in Franklin county, is no more a citizen of the county of his former residence than that of his imprisonment; nor has he a usual place of residence in the county wherein he resided prior to his conviction; and, as the place of abode at the time of service of process, his place of residence therefore is in the county wherein he is imprisoned: *Thompson v. Montrass*, 2 O. N. P. (N.S.) 368, 14 O. D. (N.P.) 495. See also DOMICILE.

A person convicted of a felony who is taken by force from the county of his residence and conveyed to Franklin county, and there imprisoned in the state penitentiary under sentence of the court wherein he was arraigned, convicted and sentenced, may be sued and served with summons under G. C., § 11277, in the latter county while so imprisoned. The rules, that a person, surrendered by the governor of another state and brought into this state on a specific criminal charge, can not be deprived of any rights except those forfeited by the commission of the alleged crime until after he is afforded an opportunity to return home; and that service of summons upon a party decoyed into a county for that purpose, or upon a person who is attending in a county other than his residence as a party or witness in a case, will be set aside, are not, in such case, applicable: *Thompson v. Montrass*, 2 O. N. P. (N.S.) 368, 14 O. D. (N.P.) 495.

The residence of one who is serving a sentence of imprisonment is, for the purpose of service of summons, in the county where the prison is located, and service upon him in a suit brought in that county renders service valid upon co-defendants in the county where they reside: *Thompson v. Montrass*, 2 O. N. P. (N.S.) 368, 14 O. D. (N.P.) 495. See also SUMMONS.

IMPRISONMENT FOR DEBT.

For imprisonment for debt, see ARREST.

Imprisonment for debt is a remedy and not part of the contract, hence its abolishment may and does operate on debtors already in jail: *Parker v. Sterling*, 10 O. 357, I Longsdorf's Notes, 518.

IMPROBABILITY OF EVIDENCE.

See EVIDENCE; TRIAL.

IMPROPER PARTIES.

See PARTIES.

IMPROPERLY INFLUENCING JURY.

See JURY; TRIAL.

IMPROVED ROAD.

See ROADS.

IMPROVEMENT BONDS.

See BONDS, NEGOTIABLE.

IMPROVEMENT OF HIGHWAYS.

See ROADS.

IMPROVEMENT OF NAVIGATION.

See WATERS AND WATERCOURSES.

IMPROVEMENTS.

For public improvements, see ASSESSMENTS; MUNICIPAL CORPORATIONS; PUBLIC CONTRACTS, STREETS, ETC.

In an action to enforce the specific performance of a parol contract for the sale of land, the value of improvements made upon the land can not be recovered by plaintiff as damages for the breach of the contract: *Thomas v. Watt*, 15 O. D. (N.P.) 427. See also SPECIFIC PERFORMANCE.

The fact that improvements were made upon land by the purchaser will not take a parol contract for the sale of land out of the statute of frauds, because he can be compensated therefor by recovering their value: *Thomas v. Watt*, 15 O. D. (N.P.) 427. See also FRAUDS, STATUTE OF.

The act of April 22, 1910 (101 v. 134), amending G. C., § 3812, requires the third method of assessing property for improvements to be made by the "foot front," meaning thereby that if a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement and be

assessed for the number of feet on the improvement that it would have in such case, and no more: *Henry v. Barberton*, 12 O. N. P. (N.S.) 364, 22 O. D. (N.P.) 157 (following *Haviland v. Columbus*, 50 O. S. 471, IV Longsdorf's Notes, 507; *Sandrock v. Columbus*, 51 O. S. 317, IV Longsdorf's Notes, 544; *Toledo v. Sheill*, 53 O. S. 447, IV Longsdorf's Notes, 610, and distinguishing *Oakwood v. Stoecklein*, 81 O. S. 332, IV Longsdorf's Notes, 1057.

IMPROVEMENTS, STREET.

See ASSESSMENTS; STREETS.

IMPROVING ROADS.

See ROADS.

IMPUTABLE NEGLIGENCE.

See NEGLIGENCE.

IMPUTED.

For imputed knowledge, see NOTICE AND KNOWLEDGE.

For imputed negligence, see NEGLIGENCE.

INACTIVE DEPOSIT.

See PUBLIC FUNDS.

INADEQUACY OF CONSIDERATION.

See CONTRACTS.

INADEQUATE DAMAGES.

See DAMAGES.

INADEQUATE REMEDY AT LAW.

See EQUITY, and cross references thereunder.

INADVERTENCE.

See MISTAKE.

INALIENABLE RIGHTS.

Liberty to contract is one of the inalienable rights of man guaranteed to every citizen, subject only to such restrictions as clearly appear to be for the general welfare:

State v. Robins, 71 O. S. 273, IV Longsdorf's Notes, 982. See also CONSTITUTIONAL LAW.

INCAPACITY.

See specific titles such as INFANTS; INSANE, IMBECILES AND IDIOTS; HUSBAND AND WIFE, ETC.

INCAPACITY TO SUE.

See PARTIES.

INCENDIARISM.

See ARSON AND OTHER BURNINGS.

INCEST.

Scope Note.—Includes sexual intercourse between persons related within forbidden degrees; elements of the crime; and the prosecution thereof. Excludes all forbidden intercourse, voluntary or forcible, except between persons related within forbidden degrees.

Cross References.

See also ADULTERY; CAENAL KNOWLEDGE; RAPE; SEXUAL INTERCOURSE.

For responsibility for crime in case of infants, insane persons, etc., see, HUSBAND AND WIFE; INFANTS; INSANE, IMBECILES AND IDIOTS; INTOXICATION.

For general questions, see AIDERS, ABETTERS AND ACCOMPLICES; AUTREFOIS ACQUIT AND CONVICT; EVIDENCE; INDICTMENT; JURISDICTION; SENTENCE; VENUE; VERDICT.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Nearer of Kin.
 - A. By consanguinity.
 - B. By affinity.
- III. Marriage not a Defense.
- IV. Adultery and Fornication.
- V. Indictment.
- VI. Evidence.

I. DEFINITION.

For statutory definition, see G. C., § 13023.

II. NEARER OF KIN.

A. BY CONSANGUINITY.

Father and daughter are within the prohibition of G. C., § 13023: *Lowther v. State*, 4 O. C. C. 522, 2 O. C. D. 685; *Straub v. State*, 5 O. C. C. (N.S.) 529, 17 O. C. D. 50.

Intercourse between an uncle and his niece is incestuous: *State v. Brown*, 47 O. S. 102, IV Longsdorf's Notes, 359.

B. BY AFFINITY.

Affinity is the relationship which arises from marriage between one of the spouses and the blood-relations of the other, and does not include persons related to the other simply by affinity. Therefore a husband is not related by affinity to his wife's brother's wife, and sexual intercourse between them, though immoral, is not an indictable offense

within the provisions of G. C., § 13023: *Chinn v. State*, 47 O. S. 575, IV Longsdorf's Notes, 396.

The relation of stepfather and stepdaughter, within the meaning of the statute against incest, does not exist after the termination of the marriage relation between the stepfather and the stepdaughter's mother: *Noble v. State*, 22 O. S. 541, III Longsdorf's Notes, 100.

A brother-in-law and sister-in-law are, within the meaning of the statute prescribing the punishment of incest, nearer of kin, by affinity, than cousins: *Stewart v. State*, 39 O. S. 152, III Longsdorf's Notes, 1015.

III. MARRIAGE NOT A DEFENSE.

An averment that the parties were not husband and wife is unnecessary since G. C., § 13023, forbids intercourse between persons "nearer of kin, * * * than cousins" whether they have gone through the form of marriage or not: *State v. Brown*, 47 O. S. 102, IV Longsdorf's Notes, 359. See also CONFLICT OF LAWS; MARRIAGE.

IV. ADULTERY AND FORNICATION.

A single sexual act between the parties related within the prohibited degree, constitutes incest: *Barnhouse v. State*, 31 O. S. 39, III Longsdorf's Notes, 561; *State v. Brown*, 47 O. S. 102, IV Longsdorf's Notes, 359.

Prior to G. C., § 13672, it was held that *emissio seminis* is an essential ingredient in the crime of incest. But where the act is not consummated, it will be presumed from other necessary acts preceding it: *Noble v. State*, 22 O. S. 541, III Longsdorf's Notes, 100.

Incest may be committed with or without the consent of the woman, and it is not error for the court to charge the jury that if they find an act of sexual intercourse took place that the consent on the part of the female is presumed: *State v. Robinson*, 83 O. S. 136.

A person indicted for incest against his daughter can not escape conviction by showing that in committing the offense he also committed the crime of rape in that the daughter was under the age of consent: *Straub v. State*, 5 O. C. C. (N.S.) 529, 17 O. C. D. 50.

V. INDICTMENT.

An indictment for incest with one's stepdaughter, sufficiently describes the relationship of the parties, by alleging it to be that of stepfather and stepdaughter, without setting forth the marriage of the defendant to the mother, or the subsistence of the marriage relation at the time of committing the crime: *Noble v. State*, 22 O. S. 541, III Longsdorf's Notes, 100.

An indictment for incest which charges the criminal act to have been committed continuously through a specified period of years is to be regarded as charging several distinct offenses, and is bad for duplicity: *Barnhouse v. State*, 31 O. S. 39, III Longsdorf's Notes, 561.

In an indictment charging an uncle with having intercourse with his niece it is not necessary to expressly aver that the relation between uncle and niece is nearer than that between cousins: *State v. Brown*, 47 O. S. 102, IV Longsdorf's Notes, 359.

Incest is not a joint offense and where it was committed between a father and his daughter, the father may be indicted without indicting the daughter: *Lowther v. State*, 4 O. C. C. 522, 2 O. C. D. 685.

VI. EVIDENCE.

Letters from a husband to his wife, properly in the possession of a third person, the

only portion of which is prejudicial to the accused is addressed to the daughter with whom incest is charged, are admissible: *Lowther v. State*, 4 O. C. C. 522, 2 O. C. D. 685.

Testimony by a daughter that a father had intercourse with her is not incompetent as a mere conclusion: *Straub v. State*, 5 O. C. C. (N.S.) 529, 17 O. C. D. 50.

In a criminal prosecution for incest, the evidence of the woman may require corroboration if she consented to the illegal intercourse; but such corroborating may be found in evidence that such woman and defendant had opportunities for sexual intercourse together; that defendant kissed her and embraced; that she had given birth to a child; and that no opportunity was shown for her to have sexual intercourse with any other person: *State v. Robinson*, 83 O. S. 136.

A girl under fourteen years of age who consents to intercourse with her father is not such an accomplice as will render her testimony incredible or unworthy of belief unless corroborated by other witnesses, and the jury may convict upon her uncorroborated testimony: *Straub v. State*, 5 O. C. C. (N.S.) 529, 17 O. C. D. 50.

For the general discussion of the subject of evidence, see EVIDENCE.

INCHOATE DOWER.

See DOWER.

INCIDENTAL POWERS.

See AGENCY; CORPORATIONS; PARTNERSHIP.

INCIDENTAL RELIEF.

See EQUITY, and cross references thereunder.

INCIDENTS.

For incidents of estates see specific titles such as FEE SIMPLE; FEE TAIL; LIFE-ESTATES; DOWER; CURTESY; LANDLORD AND TENANT; TENANTS IN COMMON, ETC.

INCITING CRIME.

See AIDERS, ABETTERS AND ACCOMPLICES.

INCLINED-PLANE RAILWAYS.

Crossing streets by bridges or tunnels is only compelled by G. C., § 9141, on the inclined plane and not on surface connecting roads purchased or leased: *Telephone Asso-*

ciation v. Inclined Plane Railway, 10 Dec. Rep. 713, 23 Bull. 165 [not affected on this point by the reversal in *Railway v. Telegraph Association*, 48 O. S. 390, IV Longsdorf's Notes, 422].

On purchase of an existing street railway by an inclined-plane railway, the act of 1887 permits a substitution of electricity or other motive power for horses, on the permit of the board of public works without obtaining consent of council: *Telephone Association v. Inclined Plane Railway*, 10 Dec. Rep. 713, 23 Bull. 165 [affirmed, on this point in the reversal in *Railway v. Telegraph Association*, 48 O. S. 390, IV Longsdorf's Notes, 422].

The act of 1877, empowering inclined plane railways to obtain and operate street railways connected therewith, puts them only on the same footing as other owners of street railways, and did not prolong or enlarge the time or terms of an existing street railway grant acquired by them. Nor did permission of the city authorities to substitute electricity for animals impliedly renew such grant: *Cincinnati v. Inclined Plane Railway*, 11 Dec. Rep. 892, 30 Bull. 321.

Where an inclined plane railway company was organized under the steam railroad laws, a subsequent extension of it through certain streets by city ordinance as a street railway is void, for a steam railroad can not be extended as a street railroad, and an extension assumes an original street railroad grant: *Cincinnati v. Inclined Plane Railway*, 11 Dec. Rep. 892, 30 Bull. 321.

INCLOSURE.

See FENCES.

INCLUDED OFFENSES.

See also ASSAULTS WITH INTENT; ATTEMPTS; BURGLARY; HOMICIDE; LARCENY; MAIM; POCKET-PICKING; RAPE; ROBBERY.

The doctrine of included offenses was a part of the common law of the land: *Brown v. State*, 2 O. C. C. (N.S.) 409, 15 O. C. D. 130.

The test as to included offenses is found in the essential ingredients or elements of crime. The maximum penalty of an offense does not afford an exclusive test: *Whitten v. State*, 12 O. C. C. (N.S.) 348 [reversed, *State v. Whitten*, 82 O. S. 174].

To constitute a crime within a crime, the greater must include the less, so that a conviction of the greater would bar a prosecution for the less and proof of the less would show facts essential to, but falling short of proof of the greater: *Holtz v. State*, 30 O. S. 486, III Longsdorf's Notes, 540.

A refusal of the court upon the request of the accused to instruct the jury as to lesser and included offenses is prejudicial error: *Whitten v. State*, 12 O. C. C. (N.S.) 348 [reversed, *State v. Whitten*, 82 O. S. 174].

Where an indictment in charging a crime of a higher grade, necessarily includes a crime of a less grade, the jury may acquit the defendant at the greater charge and find him guilty of the less offense: *Stewart v. State*, 5 O. 241, I Longsdorf's Notes, 272.

Under an indictment for an assault to murder with malice aforethought, if the proof is of an assault with intent, maliciously and purposely, to kill, though there was no malice aforethought, there may be a conviction: *Sharp v. State*, 19 O. 379, I Longsdorf's Notes, 883.

Under an indictment for an assault with intent to kill and an assault with intent to wound, a verdict, that the defendant is guilty of an assault only, may be rendered: *White v. State*, 13 O. S. 569, II Longsdorf's Notes, 629. See also ASSAULT WITH INTENT.

An indictment for biting an ear with intent to maim, will not sustain a conviction of biting with intent to disfigure, for the latter is not an inferior degree of the offense charged, but is an offense of the same degree. Conviction, however, could have been had for assault and battery (G. C., § 13692): *State v. Johnson*, 58 O. S. 417, IV Longsdorf's Notes, 743. See also MAIM.

It is not error in an indictment charging murder in an attempt to commit robbery, for the court, in connection with proper instructions with respect to the several degrees of murder, and as to assault and battery, to charge, if the facts proven warrant it, as follows: "Has the state established by clear, convincing and satisfactory evidence beyond a reasonable doubt, that the defendant is guilty as charged in the indictment or of some other degree of murder or manslaughter, or it may be assault and battery, or assault merely; otherwise your verdict should not be guilty": *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

The crime of murder in the second degree is not included as one of the lower grades of crimes under an indictment for murder in the first degree by means of poison (there being no evidence or feature in the case which would warrant such a finding), and the jury, in such event, will not be instructed as to such crime: *State v. Oppenheimer*, 49 Bull. 257.

An indictment for murder in the first degree by means of poison embraces only the lesser grade crimes of manslaughter, attempt to kill or injure by means of poison, assault and battery, or assault; and where the evidence does not warrant, under the law, a

conviction for the higher crime expressly charged, the accused may, if the evidence and law will justify it, be convicted of any of the lower crimes mentioned: *State v. Oppenheimer*, 49 Bull. 257.

A charge of murder in the first degree includes also, by force of law, the crimes of murder in the second degree, manslaughter, and assault and battery, and under such charge the accused may be convicted of either of the crimes named: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

An indictment for murder in the first degree includes within its scope the other lesser crimes of murder in the second degree, manslaughter, shooting with intent to kill, shooting with intent to wound, assault and battery: *State v. Kerlin*, 51 Bull. 317.

A charge of murder in the first degree includes the crimes of murder in the second degree, manslaughter, assault with intent to kill, assault and battery and assault: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94. See also HOMICIDE.

It is not error in the case of one charged with murder in the first degree to charge the jury that, if the evidence justifies it, a verdict may be returned of guilty of murder in the second degree, or of manslaughter or of assault and battery: *Van Zandt v. State*, 13 O. C. C. (N.S.) 526. See also CHARGE OF COURT.

The charge of rape in an indictment includes the lesser offense of assault with intent to rape: *State v. McCann*, 5 O. L. R. 388, 52 Bull. 563. See also RAPE.

An indictment charging the crime of pocket-picking, where the property stolen is valued at \$20, includes the offense of petit larceny: *Whitten v. State*, 12 O. C. C. (N. S.) 348 [reversed, *State v. Whitten*, 82 O. S. 174].

An indictment for pocket picking does not include either assault and battery or assault: *Whitten v. State*, 12 O. C. C. (N.S.) 348 [reversed, *State v. Whitten*, 82 O. S. 174]. See also POCKET PICKING.

In an indictment for buying and concealing under the former act against "receiving or buying" stolen goods, the concealing is not part of the crime, but is surplusage. No sentence in such case for the misdemeanor of concealing stolen goods can be imposed under the act of 1836: *Holtz v. State*, 30 O. S. 486, III Longsdorf's Notes, 540. See also STOLEN GOODS.

A person acquitted on an indictment for stealing certain property may be subsequently indicted and tried for receiving and concealing the same property, knowing it to

have been stolen: *Beamer v. State*, 10 O. C. C. (N.S.) 131, 19 O. C. D. 578. See also AUTREFOIS ACQUIT AND CONVICT.

An indictment charging in separate counts, shooting with intent to kill and shooting with intent to wound, includes the lesser offenses of assault and battery and assault, and upon the trial of the accused upon such an indictment the jury may find the accused not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery or an assault only: *State v. McCoy*, 88 O. S. —.

Where, upon the trial of a person charged by indictment with shooting with intent to kill and shooting with intent to wound, the court properly charges the jury upon all issues in the case, except that it inadvertently omits to charge that the defendant might, if the evidence warrants, be found not guilty of shooting with intent to wound, but guilty of assault and battery, and the court's attention is not called to this omission and no request to give such a charge is made, a judgment of conviction of the accused of shooting with intent to wound should not be reversed for such inadvertent omission of the court to so charge: *State v. McCoy*, 88 O. S. —.

INCOME.

For gifts of income by will, see WILLS, LEGACIES AND DEVISES.

Whether a mortgage will follow and include a lot purchased with the tolls and income of a railroad company subsequent to the execution of an income mortgage, where all the property covered by the mortgage is entirely insufficient to pay off and discharge the indebtedness specified in it, was questioned but not decided in *King v. Railroad Co.*, 12 O. C. D. 551.

A purchase by a reorganized railroad company can not be said to have been made with the tolls, revenues or income of the original defunct company and as such to be subject to the conditions of an income mortgage executed prior to the acquirement of the property: *King v. Railroad Co.*, 12 O. C. D. 551. See also RAILROADS.

INCOMPATIBLE OFFICES.

See OFFICE.

INCOMPETENCY.

For incompetency of parties to transactions, see specific titles such as INFANTS; INSANE, IDIOTS AND IMBECILES, ETC.

For incompetency of evidence, see EVIDENCE.

For incompetency of witnesses, see WITNESSES.

INCOMPLETE CONTRACTS.

See CONTRACTS.

INCONSISTENT ACTS.

See ESTOPPEL; EVIDENCE.

INCONSISTENT DEFENSES.

See PLEADINGS.

INCONSISTENT DESCRIPTION.

See DEEDS.

INCONSISTENT FINDINGS.

See FINDINGS BY COURT; FINDINGS OF FACT; VERDICT.

INCONSISTENT INSTRUCTIONS.

See CHARGE OF COURT.

INCONSISTENT OFFICES.

See OFFICE.

INCONSISTENT POSITION IN LEGAL PROCEEDING.

See ACTION, and cross references thereunder; PLEADINGS.

INCONSISTENT PROVISIONS.

See CONTRACTS; DEEDS; STATUTES; WILLS, LEGACIES AND DEVISES.

INCONSISTENT STATEMENTS.

See EVIDENCE; WITNESSES.

INCONTINENCE.

See ADULTERY; DIVORCE, ALIMONY AND CUSTODY OF CHILDREN; SEDUCTION.

INCORPORATION.

For creation of corporations, see CORPORATIONS.

For incorporation into pleadings, see PLEADINGS.

INCORPOREAL HEREDITAMENTS.

For incorporeal hereditaments, see EASEMENT, and cross references thereunder; STREETS; WATERS AND WATERCOURSES; WAYS.

An abutting lot owner has a peculiar interest in the street whereon his lot abuts, of which the local or general public can not materially or substantially deprive him; a private right in the nature of an incorporeal hereditament; a special easement in the street appendant and appurtenant to his lot for ingress or egress, which is as much property as the lot itself: *Gunning v. Railway Co.*, 14 O. D. (N.P.) 660; *Weber v. Railway Co.*, 13 O. D. (N.P.) 194. See also ABUTTING OWNERS.

INCORRIGIBLE CHILDREN.

See BOYS' INDUSTRIAL SCHOOL; GIRLS' INDUSTRIAL HOME; DELINQUENCY.

INCREASE IN VALUE.

See DAMAGES; EMINENT DOMAIN.

INCREASE OF STOCK.

See CORPORATIONS; LIFE-ESTATES.

INCREASING COMPENSATION.

See OFFICE.

INCRIMINATING ANSWER.

See CONSTITUTIONAL LAW; EVIDENCE; WITNESSES.

INCUMBRANCES.

For the assumption of incumbrances by a purchaser, see VENDOR AND PURCHASER.

For covenants against incumbrances, see COVENANTS.

For incumbrances on real estate, see JUDGMENT; LIENS; MORTGAGES.

Ordinary building restrictions applicable to all the property in the neighborhood, of which a proposed purchaser has knowledge, can not be classed as incumbrances, unless they affect the marketable quality of the title, and the presumption is that they are a benefit rather than a detriment to the property: *Egle v. Morrison*, 6 O. C. C. (N.S.) 609, 17 O. C. D. 497 [affirmed, without opinion, *Morrison v. Egle*, 73 O. S. 388]. See also DEEDS.

IN CUSTODIA LEGIS.

See ATTACHMENT; EXECUTION; RECEIVERS.

INDEBITATUS ASSUMPSIT.

See ASSUMPSIT.

INDEBTEDNESS.

See DEBT AND LIABILITY; DEBTOR AND CREDITOR.

INDECENT ASSAULT.

For indecent assault, see ASSAULT WITH INTENT.

INDECENT CONDUCT.

In a prosecution under an ordinance making indecent conduct a punishable offense, the affidavit should state what act or acts committed by the defendant are claimed to constitute indecent conduct: *King v. New London*, 8 O. N. P. (N.S.) 34, 19 O. D. (N.P.) 411.

Where two persons are charged with indecent conduct, evidence that one of them has entered a plea of guilty is not admissible upon the trial of the other: *King v. New London*, 8 O. N. P. (N.S.) 34, 19 O. D. (N.P.) 411.

INDECENT EXPOSURE.

See INDECENT CONDUCT.

INDECENT LANGUAGE.

In a prosecution under G. C., § 13032, for uttering obscene language in the presence of females, while it is not necessary to set out the exact language used by the accused, nevertheless the words used should be described with some particularity, and enough of the language should be set forth, with such allegations as are necessary to show that

a crime has been committed: *Hummel v. State*, 10 O. D. (N.P.) 492.

INDECENT PUBLICATIONS.

The printing or selling of an obscene newspaper is within the inhibitions of G. C., § 13035: *O'Brien v. State*, 37 O. S. 113, III Longsdorf's Notes, 898.

An indictment for a violation of G. C., § 13035, which charges that the accused, at a certain time and in a certain county, "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to-wit: a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient in law, without containing a copy of the alleged indecent and immoral pamphlet: *State v. Zurhorst*, 75 O. S. 232, IV Longsdorf's Notes, 1015.

As to the power of cities to provide by ordinance for the punishment of such offenses, see: *O'Brien v. Cleveland*, 4 Dec. Rep. 189, 1 Clev. L. Rep. 100.

INDEFINITE CONTRACTS.

See CONTRACTS.

INDEFINITE FAILURE OF ISSUE.

See WILLS, LEGACIES AND DEVISES.

INDEFINITE PLEADINGS.

See PLEADINGS.

INDEMNITY.

For bonds, contracts, etc., of indemnity, see BONDS, SURETY; GUARANTY; SURETYSHIP.

The contract of insurance, other than that of life and accident, is a contract of indemnity, whereby, for a consideration, one undertakes to compensate another if he shall suffer loss: *State v. Laylin*, 73 O. S. 90, IV Longsdorf's Notes, 999 [affirming *State v. Laylin*, 3 O. N. P. (N.S.) 185, 15 O. D. (N.P.) 360]. See also INSURANCE.

There is an essential difference, in legal effect, between covenants of indemnity, strictly, that is, of indemnity against loss, and covenants to pay, or assume, or stand for the debt or a surety's liability thereon. A right of action accrues upon the latter class as soon as the debt matures and is unpaid; while those of the former class are not broken and no right of action accrues until the indemnitee has suffered a loss against which the covenant runs: *Lithographic Co. v. Skillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870.

A verbal promise to indemnify another for going security (on a replevin bond here) for a third person, is only collateral to the principal's obligation to protect his surety, and, hence, not enforceable: *Easter v. White*, 12 O. S. 219, II Longsdorf's Notes, 558.

Where K at the request of H indorses a bill for him as accommodation, on which bill H's name does not appear, and K has to pay it, and sues H to recover the amount, no independent consideration appearing, the statute of frauds applies, and no written promise to indemnify appearing, he can not recover: *Kelsey v. Hibbs*, 13 O. S. 340, II Longsdorf's Notes, 612.

A promise of indemnity by one not a party to an obligation to induce another to become surety is a promise to answer for another's default: *Ferrell v. Maxwell*, 28 O. S. 383, III Longsdorf's Notes, 413.

A promise of indemnity by one already a surety to an obligation to induce another to become surety is a promise to answer for his own default: *Ferrell v. Maxwell*, 28 O. S. 383, III Longsdorf's Notes, 413.

The judgment creditor's oral promise to indemnify an officer for seizure and sale of property claimed to be exempt is not within the statute: *Mays v. Joseph*, 34 O. S. 22, III Longsdorf's Notes, 695; *Smith v. Robinson*, 3 O. C. C. 257, 2 O. C. D. 146. See also FRAUDS, STATUTE OF.

A joint lessee's conveyance of all his interest to his colessee raises an implied promise by the latter to indemnify him against the rent, and the grantor is as to the grantee a surety entitled to reimbursement for payments of rent, though not for payments to the lessor for release for the future: *McHenry v. Carson*, 41 O. S. 212, IV Longsdorf's Notes, 58. See also CONTRACTS.

Indemnity held by one surety, if proceeding from a stranger and not from the principal, does not inure to the cosureties. Thus, a wife's mortgage of her real estate for the exclusive benefit of one of her husband's sureties can not be shared by the others. As the husband has no interest in her separate estate, he contributes nothing by joining in

the mortgage; his curtesy is that of surviving husband in property owned by her at her death: *Leggett v. McClelland*, 39 O. S. 624, III Longsdorf's Notes, 1054.

A surety upon a bond given to indemnify one of several sureties, upon a replevin bond, being a stranger to the action of replevin, is bound no further than he agrees to be bound, and he will not by construction and against the terms of his obligation, be held to indemnify cosureties of the indemnified surety: *Surety Co. v. Boyle*, 65 O. S. 486, IV Longsdorf's Notes, 890.

An indemnity mortgage to one surety inures to all cosureties, including those who subsequently became such under an order of court requiring additional sureties: *Bank v. Teeters*, 31 O. S. 36, III Longsdorf's Notes, 561.

Sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship, until such loss has occurred; nor has the defendant in the replevin suit who recovered a judgment against the plaintiff therein, though the sureties and judgment debtor be insolvent and the judgment be otherwise uncollectible: *Lithographing Co. v. Skillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870.

A court of equity can not compel the performance of a covenant of indemnity in advance of the happening of the event or contingency upon which, by its terms, it is to be performed: *Lithographing Co. v. Skillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870. See also REPLEVIN.

A guaranty to save another from "liability" on debts—as here to an outgoing partner—unlike saving harmless or from damages, may be sued upon when judgment has been had against the indemnified party on a liability, though he has not paid it, and the creditor may intervene in the action so as to obtain the fruits of the action: *Pratt v. Walworth*, 15 O. C. C. 412, 8 O. C. D. 472 [affirmed, without opinion, *Walworth v. Pratt*, 62 O. S. 639].

If A is sued on two claims, on one of which B is liable over to him but not on the other, A's notice to B to defend the suit does not vouch him in for the suit on both claims, and A can not recover from B any part of the costs and attorney's fees which he has had to pay: *Bank v. Bank*, 10 O. C. C. 233, 6 O. C. D. 452. See also JUDGMENT.

Stay of execution granted by a judgment creditor to an executor and his sureties does not release an indemnity bond given to the sureties to save them harmless, for they are not sureties to such creditor, nor are the first sureties their creditors until payment of the judgment by them, and hence

no remedy of the indemnity sureties is suspended or impaired: *Buffington v. Bronson*, 61 O. S. 231, IV Longsdorf's Notes, 806.

Where a wife gave a note and mortgage on her land for three thousand dollars to indemnify her husband's indorser on his two thousand seven hundred dollar note, renewing the latter note does not deprive the indorser of his right to enforce the indemnity mortgage, for the wife's right to pay the three thousand dollar note and compel reimbursement from the husband was not affected by the renewal: *Wise v. Willard*, 41 O. S. 679, IV Longsdorf's Notes, 82. See also SURETY.

The sureties in a general bond of a guardian, under G. C., § 10920, and in a special bond for the sale of real estate under G. C., § 10947, where the funds have been commingled are cosureties only to the extent of the proceeds of the real estate: *Swisher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872. See also GUARDIAN AND WARD.

A mortgage to indemnify the mortgagee against indorsements to be thereafter made by him is superior to a judgment rendered after so indorsing: *Kramer v. Bank*, 15 O. 253, I Longsdorf's Notes, 711. See also MORTGAGES.

A bond to pay any judgment that may be recovered against the obligee is broader than one to indemnify, and the recovery is the amount of the judgment, and it is not necessary for the obligee to aver or prove that he has paid the judgment: *Martin v. Bolenbaugh*, 42 O. S. 508, IV Longsdorf's Notes, 126. See also BONDS, SURETY.

Indemnity against uncollectible debts is a contract of insurance, and hence ambiguities are to be construed in favor of the assured: *Credit Co. v. Littleford*, 18 O. C. C. 889, 9 O. C. D. 846.

An action can not be maintained upon the official bond of a county commissioner to recover indemnity to the county on account of damages which it has been compelled to pay for injuries to persons and property resulting from the negligence of the board of county commissioners in maintaining a highway: *State v. Collins*, 82 O. S. 240 [affirming *State v. Collins*, 8 O. N. P. (N.S.) 65, 19 O. D. (N.P.) 327].

Where a bond is given by H as principal with S as his surety to secure the faithful performance by H of a contract made and entered into between H and a brewing company, which contract was conditioned and provided that H should purchase beer of said brewing company in carload lots, should have a total credit with said company on the purchase of beer under said contract of not to exceed two car loads at any one time, and providing further that H on ordering the third car load of beer, should pay for the

first, and that the third car load should not be shipped by said brewing company, until the first car load had been paid for, and failure of the brewing company to require payment for the first car load of beer before shipping the third, and the giving by it of a credit to H in excess of two car loads at any one time, is a material breach and violation of the terms and conditions of said contract and, if without consent of the surety, operates to release him from liability on said bond: *Brewing Co. v. Schultz*, 68 O. S. 407, IV Longsdorf's Notes, 946.

In an action to recover damages which plaintiff has been compelled to pay on account of the joint negligence of plaintiff and defendant in connection with the breaking of a mill race and the overflow of adjacent property, it is not error to refuse to charge that the plaintiff can not recover if, under all the facts and circumstances of the case which were known or should have been known to him, he did not exercise reasonable and ordinary care, where it appears that plaintiff called the attention of defendant's foreman to the danger, who replied that he would take care of it: *Railway Co. v. Canal Co.*, 7 O. C. C. (N.S.) 69, 18 O. C. D. 51 [affirmed, without opinion, *Railway Co. v. Canal Co.*, 75 O. S. 620].

In an action to recover damages which plaintiff has been compelled to pay on account of the joint negligence of plaintiff and defendant in connection with the breaking of a mill race and the overflow of adjacent property, it is not error to refuse to charge to the effect that if plaintiff knew of the acts of defendant affecting the safety of the mill race and took no steps to avoid the injury, he was guilty of such contributory negligence as will prevent his recovering, where it appears that plaintiff called the attention of defendant's foreman to the danger, who replied that he would take care of it: *Railway Co. v. Canal Co.*, 7 O. C. C. (N.S.) 69, 18 O. C. D. 51 [affirmed, without opinion, *Railway Co. v. Canal Co.*, 75 O. S. 620].

The rule that where two or more contribute by their wrongdoing to the injury of another, such injured person may recover from all of them in a joint action, or he may pursue one of them and recover from him, in which case the one thus compelled to respond is entitled to neither indemnity nor contribution from those who with him caused the injury, does not apply where the wrongdoer who was compelled to respond for the injury was not, as between the wrongdoers themselves, a wrongdoer at all; and recovery by the injured party from such a party is not a bar to an action by him against the other parties to the wrong: *Railway Co. v. Canal Co.*, 7 O. C. C. (N.S.) 69, 18 O. C. D. 51

IV. Formal Requisites, 8703.

- A. *Legislature may control*, 8703.
- B. *In writing*, 8704.
- C. *Commencement*, 8704.
- D. *Endorsements*, 8705.
 - 1. By prosecuting attorney, 8705.
 - 2. By witness, 8705.
 - 3. By foreman, 8706.
- E. *Conclusion*, 8707.

V. The Accusation, 8707.

- A. *Following the statute*, 8707.
- B. *Stating essential elements*, 8709.
 - 1. In general, 8709.
 - 2. Laying venue, 8711.
 - 3. Intent and scienter, 8712.
 - a. Statutes, 8712.
 - b. When averred, 8712.
 - c. How averred, 8714.
 - 4. Stating time, 8715.
 - 5. Describing persons, 8716.
 - 6. Describing property, 8719.
 - 7. Describing instruments, 8721.
 - 8. Stating value, 8722.
 - 9. Negative averments, 8723.
- C. *Certainty*, 8725.
 - 1. In general, 8725.
 - 2. Specific examples, 8726.
- D. *Surplusage*, 8728.
- E. *Repugnancy*, 8730.
- F. *Variance*, 8730.
 - 1. Effect, 8730.
 - 2. Variance in name, 8730.
 - a. Material, 8730.
 - b. Immaterial, 8731.
 - 3. Variance as to matter or thing, 8733.
 - a. Material, 8733.
 - b. Immaterial, 8733.
 - 4. Question reviewable, 8735.

VI. Joinder of Offenses, 8735.

- A. *When joinder is proper*, 8735.
 - 1. In general, 8735.
 - 2. Specific examples, 8736.
- B. *Presumption favors joinder*, 8737.
- C. *Duplicity*, 8737.
- D. *Election*, 8738.
 - 1. On indictments, 8738.
 - 2. On counts, 8739.
 - a. When necessary, 8739.
 - b. Discretionary with court, 8741.
 - 3. On evidence, 8742.

VII. Joinder of Persons, 8742.**VIII. Attacking Indictment, 8743.**

- A. *Motion to quash*, 8743.
 - 1. Statute and construction, 8743.

tries of a recognizance received by him from examining courts, nor for entering the attendance of petit jurors and certificates of their fees. He may be allowed for entries in judgment indexes, but not for making a bar docket, G. C., § 11389. Allowance for making a copy of the trial docket for the printer is proper (G. C., § 2872), also lists of cases recognized to appear for grand jury purposes: *Butler Co. v. Welliver*, 12 O. C. C. 440, 5 O. C. D. 569.

A failure to index in the foreign execution docket (G. C., § 2837) all the names of the judgment debtors will defeat the lien of the

levy on the property of one whose name is not indexed, as here of the wife of one indexed, as against a subsequent mortgagee without actual notice. The phrase "index of each case" means of all the names, and the phrase "entries so made" shall be notice includes such index: *Laudon v. Denman*, 18 O. C. C. 857, 4 O. C. D. 65. See also EXECUTION, WRIT OF.

INDICIA OF OWNERSHIP.

See ESTOPPEL; SALES.

INDICTMENT.

Scope Note.—Includes formal written accusations of crime by grand juries; formal requisites and contents of indictments; attack of indictments by motion to quash, plea in abatement, and demurrer; joinder of offenses and offenders; amendment; and waiver of defects. Excludes affidavits and informations; organization of, and inquiries by grand juries; indictments for particular offenses; arraignment of accused; rights of accused in general; variance between averment and evidence; and prosecution of aiders and abettors.

Cross References.

See also ACCUSED; AIDERS, ABETTERS AND ACCOMPLICES; ARRAIGNMENT; BAIL AND RECOGNIZANCE; EVIDENCE; EXAMINATION OF ACCUSED; GRAND JURY; INFORMATION; JURY; PROSECUTING ATTORNEY; VENUE; VERDICT; WITNESSES.

For rights of accused, see ACCUSED.

For questions of venue, see VENUE.

For questions relating to grand jury, see GRAND JURY; JURY.

For prosecution by information, see INFORMATION.

For arraignment of accused, see ARRAIGNMENT.

For preliminary examination of accused, see EXAMINATION OF ACCUSED.

For indictment of aiders and abettors, see AIDERS, ABETTERS AND ACCOMPLICES.

For bail, see BAIL AND RECOGNIZANCE.

For questions relating to indictments in specific crimes, see specific crimes.

For indictment as evidence, see EVIDENCE.

For necessity of averring age of testator in case of forgery of a will, see WILLS, LEGACIES AND DEVISES.

For averment of notice in case on non-removal of explosives, see INSPECTION LAWS.

For the effect of a plea of guilty on error proceeding on ground of insufficiency of indictment, see ERROR.

For necessity of showing former conviction in case of a second or subsequent offense, see INTOXICATING LIQUOR.

For separate trials of persons jointly indicted, see TRIAL.

For sufficiency of indictment for violating anti-trust statute, see MONOPOLIES AND UNLAWFUL COMBINATIONS.

That an indictment is sufficient in charging keeping of a bucket-shop without averment of purpose or defining nature of transactions, see GAMBLING.

For necessity of setting out a copy of the instrument in case of forgery, see FORGERY.

For offenses for which a corporation is liable, see CORPORATIONS.

For discharge of prisoner where there has been a failure to indict, see ACCUSED.

That an indictment charging a duty need not aver how or by whom imposed, see STREET RAILWAYS AND INTERURBAN RAILWAYS.

For questions concerning affidavits, see AFFIDAVIT.

For questions concerning variance, see also EVIDENCE.

ANALYTICAL OUTLINE.

- I. Definition, 8699.
- II. Necessity, 8701.
- III. Right of Accused to Copy, 8703.

IV. Formal Requisites, 8703.

- A. *Legislature may control*, 8703.
- B. *In writing*, 8704.
- C. *Commencement*, 8704.
- D. *Endorsements*, 8705.
 - 1. By prosecuting attorney, 8705.
 - 2. By witness, 8705.
 - 3. By foreman, 8706.
- E. *Conclusion*, 8707.

V. The Accusation, 8707.

- A. *Following the statute*, 8707.
- B. *Stating essential elements*, 8709.
 - 1. In general, 8709.
 - 2. Laying venue, 8711.
 - 3. Intent and scienter, 8712.
 - a. Statutes, 8712.
 - b. When averred, 8712.
 - c. How averred, 8714.
 - 4. Stating time, 8715.
 - 5. Describing persons, 8716.
 - 6. Describing property, 8719.
 - 7. Describing instruments, 8721.
 - 8. Stating value, 8722.
 - 9. Negative averments, 8723.
- C. *Certainty*, 8725.
 - 1. In general, 8725.
 - 2. Specific examples, 8726.
- D. *Surplusage*, 8728.
- E. *Repugnancy*, 8730.
- F. *Variance*, 8730.
 - 1. Effect, 8730.
 - 2. Variance in name, 8730.
 - a. Material, 8730.
 - b. Immaterial, 8731.
 - 3. Variance as to matter or thing, 8733.
 - a. Material, 8733.
 - b. Immaterial, 8733.
 - 4. Question reviewable, 8735.

VI. Joinder of Offenses, 8735.

- A. *When joinder is proper*, 8735.
 - 1. In general, 8735.
 - 2. Specific examples, 8736.
- B. *Presumption favors joinder*, 8737.
- C. *Duplicity*, 8737.
- D. *Election*, 8738.
 - 1. On indictments, 8738.
 - 2. On counts, 8739.
 - a. When necessary, 8739.
 - b. Discretionary with court, 8741.
 - 3. On evidence, 8742.

VII. Joinder of Persons, 8742.**VIII. Attacking Indictment, 8743.**

- A. *Motion to quash*, 8743.
 - 1. Statute and construction, 8743.

2. Defects not apparent on record, 8745.
 - a. Selection of grand jury, 8745.
 - b. Unconstitutionality, 8745.
 - c. Misjoinder, 8745.
 - d. Jurisdiction, 8746.
3. Defects in form, 8746.
4. Defects in charging offense, 8746.
 - a. Insufficiency, 8746.
 - b. Indefiniteness, 8747.
 - c. Duplicity, 8748.
- B. *Plea in abatement*, 8748.
 1. Form, 8748.
 2. Construction, 8748.
 3. Grounds, 8749.
 - a. In general, 8749.
 - b. Misnomer, 8749.
 - c. Defects in grand jury, 8750.
 - aa. Irregular selection, 8750.
 - bb. Personal disqualifications, 8751.
 - cc. Miscellaneous, 8752.
 - d. Insufficiency, 8753.
 4. Insufficient plea, 8753.
- C. *Demurrer*, 8753.
 1. Grounds, 8753.
 - a. In general, 8753.
 - b. No offense charged, 8753.
 - c. Defect as to intent, 8754.
 2. Demurrer to evidence, 8754.
 3. Time of filing, 8754.
 4. Effect, 8754.

IX. Amendment, 8755.

X. Waiver of Defects, 8755.

- A. *Statutory provision*, 8755.
- B. *Waiver of motion to quash*, 8756.
 1. In general, 8756.
 2. Defects in form, 8756.
 3. Defects in charging offense, 8757.
- C. *Waiver of plea in abatement*, 8757.

I. DEFINITION.

An indictment is the written accusation originating from the ordeal of the grand inquest of the county, before any person can be put upon his trial for a high crime: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327.

An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury: *Lasure v. State*, 19 O. S. 43, II Longsdorf's Notes, 925; *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542.

An indictment is a written accusation and presentment, finding that some person or persons named therein has committed the crime: *In re Grand Jury*, 8 O. L. R. 245.

The indictment, in contemplation of the constitution, is that written statement of the nature and cause of the accusation, with all the certainty and substantial requirements heretofore sanctioned and declared essential by the settled law of the country: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327.

An indictment, within the meaning of the constitution, is a written charge against the accused, presented by a grand jury, upon oath, in the form prescribed by the legislature: *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942.

No man, by express consent, can make that an indictment, authorizing the court to try that which, in fact, was not an indictment. Nor can that be converted into an indict-

ment which, in law, is not, by implied consent, derived from waiver or plea: *Doyle v. State*, 17 O. 222, I Longsdorf's Notes, 806.

II. NECESSITY.

"Except in cases of impeachment and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases of petit larceny, and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." Art. I, § 10, of the constitution of Ohio.

Felonies must be prosecuted by indictment; and while the legislature has the power to prescribe forms and dispense with many formal allegations in indictments, there is a limit to such power; and it is clear that there is no authority in the legislature to enact, or in the court to determine, that that shall be a sufficient indictment which fails to inform the accused of the offense with which he is charged: *Lane v. State*, 39 O. S. 312, III Longsdorf's Notes, 1028.

No man can be put on trial for a felony under the constitution and law of this state, until an indictment has been found against him, charging him with some crime: *Smith v. State*, 1 O. C. C. (N.S.) 493, 15 O. C. D. 25.

An individual accused of a crime, can not be compelled to answer the charge until the same has been made through the intervention of a grand jury, in the form of a presentment, or indictment. Should the legislature pass an act to compel an individual to answer, without this prerequisite, such act would be in violation of the constitution, and void: *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542; *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942; *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

Under the constitution of 1851 (Art. I, § 10, of the constitution of Ohio, in cases where the punishment is less than imprisonment in the penitentiary, an indictment is unnecessary, unless provided for by statute: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184. But in so ordaining, the framers of the constitution did not intend to substitute, in such cases, the proceeding by criminal information as it exists at common law. Reasons for this conclusion are stated in *Gates v. State*, 3 O. S. 293, II Longsdorf's Notes, 28, but there are others equally cogent": *Eichenlaub v. State*, 36 O. S. 140, III Longsdorf's Notes, 836.

There are many offenses, made so by statute, which are but quasi criminal, and where the legislature may direct the mode of redress untrammelled by Art. I, § 10 of the state

constitution. Such is Sabbath breaking, selling spirituous liquors on Sunday, and the disturbance of religious meetings, with many others (Swan's Stat. 255, 256). Long acquiescence in these enactments goes far to show the construction which has been placed by all on the constitution, and that there may be many offenses, though decidedly immoral and mischievous in their tendencies, that are not crimes, but at most only quasi criminal. Of such, jurisdiction may be given to a justice of the peace, or the mayor of an incorporated town: *Markle v. Akron*, 14 O. 586, I Longsdorf's Notes, 689.

By the tenth section of the first article of the constitution, a presentment or indictment of a grand jury is dispensed with, "in cases of petit larceny and other inferior offenses." How such offenses should thereafter be prosecuted, depended entirely upon legislative discretion. But, it is said, this dispensation only extends to offenses inferior in grade to petit larceny. We can not adopt such a construction. Indeed, to do so, would be to leave the whole matter to mere conjecture. It is very evident that petit larceny is simply named as one of a class of offenses; and equally so, that the class was intended to embrace all offenses for which a punishment less than imprisonment in the penitentiary is provided. This was a classification so long used in our laws, and so well understood, as to leave no doubt that it was the one intended to be adopted by the convention: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184.

The jurisdiction conferred on police courts by § 167 of the municipal code (66 v. 176), (see G. C., §§ 4567, *et seq.*), extended to petit larceny and all such other inferior offenses as are not required by Art. I, § 10, of the constitution, to be prosecuted by indictment: *Cole v. State*, 29 O. S. 226, III Longsdorf's Notes, 461.

G. C., § 3664, authorizing cities and villages to provide for the punishment of known thieves and pickpockets does not contravene Art. I, § 10 of the state constitution: *Morgan v. Nolte*, 37 O. S. 23, III Longsdorf's Notes, 888.

Cases for the violation of village ordinances, sent to the court of common pleas in pursuance of G. C., § 4539, should be tried in that court upon the affidavit filed before the mayor. Indictment of the accused is neither necessary nor proper: *Finnical v. Cadiz*, 61 O. S. 494, IV Longsdorf's Notes, 815; see also *Kubach v. State*, 1 O. N. P. (N.S.) 405, 14 O. D. (N.P.) 726.

The act of April 16, 1906, establishing juvenile courts and establishing procedure therein, does not contravene any of the provisions of the state constitution: *Travis v.*

State, 12 O. C. C. (N.S.) 374, 21 O. C. D. 492.

The record need not affirmatively show that the indictment or a copy of it was before the court or jury during the trial: *Huling v. State*, 17 O. S. 583, II Longsdorf's Notes, 851.

A trial and conviction on a copy of the original affidavit or indictment is not erroneous. No statute requires the originals to be before the court at the trial: *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129.

III. RIGHT OF ACCUSED TO COPY.

Under a former statute similar to G. C., § 13616, the accused in a capital case was entitled to a copy of the indictment at least twelve hours before trial: *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327.

The failure to furnish the accused with a copy of the indictment must be taken advantage of before trial; if waived then it can not be made ground for an arrest of judgment or of error: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436; *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327.

There is no law requiring a list of the names of the grand jurors to be furnished to the accused before trial in such a prosecution. [The *obiter dictum* in *Mahan v. State*, 10 O. 232, I Longsdorf's Notes, 507, overruled]; *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327.

A person charged with crime is not entitled, before, or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, nor to an inspection of a transcript of such evidence: *State v. Rhoads*, 81 O. S. 397.

The court of common pleas is without power in this state to entertain a motion by the defendant to inspect the minutes of the grand jury or a transcript made by the official stenographer of the testimony taken before the grand jury: *State v. Haugh*, 4 O. N. P. (N.S.) 79, 16 O. D. (N.P.) 477.

As to when the defendant may demand a bill of particulars of the acts relied upon for conviction, see *State v. Langan*, 1 O. D. (N. P.) 260, 31 Bull. 33.

IV. FORMAL REQUISITES.

A. LEGISLATURE MAY CONTROL.

The legislature can control the form of indictments, though it can not dispense with them: *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542; *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942; *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

In an indictment for issuing unauthorized bank paper the statute makes it sufficient to state that defendant acted as an officer of an unincorporated bank, not naming the office or the bank: *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542.

The technical formalities of the common law indictments may be abolished, and G. C., § 13583, that an indictment for manslaughter need not set out the manner or means of causing death, is not in violation of Art. I, § 10, of the Ohio constitution: *Wolf v. State*, 19 O. S. 248, II Longsdorf's Notes, 942.

B. IN WRITING.

Though an indictment in lead pencil might not be tolerated, yet a letter or syllable in lead pencil added for grammatical purpose will not vitiate: *May v. State*, 14 O. 461, I Longsdorf's Notes, 681.

C. COMMENCEMENT.

The word caption means that with which the clerk prefaces the indictment, on making up the complete record in the case: *State v. Decker*, 1 Dec. Rep. 527, 10 W. L. J. 328.

The heading of an indictment thus, "State of Ohio, Gallia Co. s. c., court of common pleas, October term, 1851," is not the caption, is no part of the indictment, and may be rejected as surplusage; accordingly, if its date is a year too early, thus making the crime later than the indictment, this is not fatal: *State v. Decker*, 1 Dec. Rep. 527, 10 W. L. J. 328.

If the caption shows that the prosecution is in the name of and by the state, this need not be averred in successive counts, nor will entering a *nolle prosequi* as to the first count render the remaining ones defective for want of the averment when contained in the caption. A *nolle* as to one count leaves all the rest unaffected: *Davis v. State*, 19 O. S. 270, II Longsdorf's Notes, 945.

Failing to aver that the grand jury were impaneled and sworn to inquire of crimes and offenses committed within the body of the county is not fatally defective: *Hurley v. State*, 6 O. 399, I Longsdorf's Notes, 346.

The number of the grand jury, or the number that found the bill, need not appear in the indictment. It is not a grand jury unless composed of the proper number: *Young v. State*, 6 O. 435, I Longsdorf's Notes, 349.

An indictment purporting to be by "the grand jurors of the state of Ohio inquiring of crimes and offenses within and for the county of Monroe," must be taken as found by a grand jury of that county, as well as for the state; and is, therefore, found by such a body as the law intends: *Mackey v. State*, 3 O. S. 362, II Longsdorf's Notes, 35.

If the indictment states the county and the term at which it was found, this is sufficient, as this implies that the court was held at the county seat, and the court will judicially notice when the term begins: *State v. Shanks*, T. 13.

An indictment reciting it is found at a term of court beginning November 3, averred an offense committed on November 5, it was held that the fiction that a term is to be considered as but one day is not regarded if it will work an injustice, and if it does not appear that the term ended before November 5 the indictment does not even appear to have been found before the offense was committed: *May v. State*, 14 O. 461, I Longsdorf's Notes, 681.

D. ENDORSEMENTS.

1. By Prosecuting Attorney.

The signature of a prosecuting attorney to an indictment, while usual after a matter of good practice, is not required by statute or common law: *State v. Mulford*, 12 O. D. (N.P.) 655.

Even if the signature of a prosecuting attorney were required by statute, its omission would be cured by G. C., § 13581, and would not be a good ground for setting aside a verdict: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305.

2. By Witness.

It is not necessary that an information should be indorsed with the name of the prosecuting witness: *Bartlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

An indictment for a misdemeanor not within any of the exceptions named in G. C., § 13572, which is neither endorsed by the prosecuting witness nor by the prosecuting attorney is defective on a motion to quash; but where the accused, without making such motion, pleads guilty, the objection is waived: *Picket v. State*, 22 O. S. 405, III Longsdorf's Notes, 87.

The necessity for the endorsement depends upon the character of the indictment as it is found by the grand jury. If the character of the indictment, when found "a true bill" by the grand jury, was such as to require no further indorsement, the indictment can not afterward become defective, for want of such indorsement, by reason of the defendant's not being found guilty of the highest grade of crime which is charged therein: *Baker v. State*, 12 O. S. 214, II Longsdorf's Notes, 557.

Indorsement for costs by the prosecuting witness is not required where, under an indictment for felony, the conviction is for a

misdemeanor only: *White v. State*, 13 O. S. 569, II Longsdorf's Notes, 629.

Where the name of a person, preceded by the words "good for costs," is found indorsed upon an indictment, when presented to the court by the grand jury, such name will, nothing appearing to the contrary, be presumed to be that of the prosecuting witness: *Munson v. State*, 20 O. S. 232, II Longsdorf's Notes, 991.

Under the act of 1854 the indictment need not be indorsed that it was found on sworn testimony sent to the grand jury by order of court on request, etc.: *Schaffner v. State*, 8 O. S. 642, II Longsdorf's Notes, 371.

But this was afterwards changed by the statute: *Picket v. State*, 22 O. S. 405, III Longsdorf's Notes, 87.

Under the act requiring the indictment, if not indorsed by the prosecuting witness, to have been found true on testimony sworn and sent to the grand jury by order of court, on request of the prosecuting attorney or foreman of the grand jury, if issue is taken on the truth of these facts the state must prove them. The indorsement of them on the indictment does not prove itself. A witness swearing that he testified before the grand jury after being sworn by the clerk does not prove that he was sent by order of court unless he had been sworn in open court: *State v. Elliott*, 1 Dec. Rep. 572, 10 W. L. J. 409.

3. By Foreman.

The omission of the word "foreman" after the foreman's signature on an indictment, is not fatal, although it is better practice to add it: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412.

G. C., § 13571, requiring the foreman of the grand jury to indorse on the indictment "a true bill," is satisfied by his adoption of and signing these words printed thereon: *Wagner v. State*, 42 O. S. 537, IV Longsdorf's Notes, 129.

The words "a true bill" may be printed over a blank indorsement, and afterwards signed by the foreman: *State v. Williamson*, 7 Dec. Rep. 618, 4 Bull. 279.

Where the foreman signs the indictment in the space provided for the clerk it is not sufficient ground on which to quash the indictment: *State v. Lewis*, 7 O. N. P. 533, 5 O. D. (N.P.) 552.

It is not fatal to an indictment that the foreman of the jury signed it J. P. Clark, instead of John P. Clark, the name appearing on the venire, for the court appointing the foreman is presumed to know his identity: *Geiger v. State*, 2 O. C. C. (N.S.) 174, 15 O. C. D. 742.

E. CONCLUSION.

The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the state of Ohio," but those words are not required to be at the conclusion of each count of an indictment: *Olendorf v. State*, 64 O. S. 118, IV Longsdorf's Notes, 867; *State v. Mulford*, 12 O. D. (N.P.) 720.

Omission of the conclusion "against the peace and dignity of the state of Ohio" from all the counts but the last, is not prejudicial when conviction was under the last count, and it does not appear that any of the evidence would have been incompetent under the last: *Ridenour v. State*, 38 O. S. 272, III Longsdorf's Notes, 967.

An indictment which concludes that the words "against the peace and dignity of the state of Ohio, being a further description of the same transaction complained of in the first count of this indictment" is not invalid although Art. IV, § 2, of the constitution of Ohio provides that indictments shall conclude "against the peace and dignity of the state of Ohio": *State v. Stapely*, 19 O. D. (N.P.) 110.

V. THE ACCUSATION.

A. FOLLOWING THE STATUTE.

An indictment of a statutory offense must set forth the charge in the words of the statute describing the offense: *Hess v. State*, 5 O. 1, I Longsdorf's Notes, 241.

It is always the safer course to follow the exact language of the statute, but it is not indispensable to the validity of the indictment, provided the words used are the exact equivalent of those of the statute: *Hagar v. State*, 35 O. S. 268, III Longsdorf's Notes, 779; see also *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542; *Spencer v. State*, 13 O. 401, I Longsdorf's Notes, 644; *Poage v. State*, 3 O. S. 229, II Longsdorf's Notes, 22; *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469; *White v. State*, 13 O. S. 569, II Longsdorf's Notes, 629; *Davis v. State*, 32 O. S. 24, III Longsdorf's Notes, 618.

It is not necessary to use the identical words of the statute provided others of similar import are employed: *Spencer v. State*, 13 O. 401, I Longsdorf's Notes, 644; *Stoughton v. State*, 2 O. S. 562, I Longsdorf's Notes, 1082; *Poage v. State*, 3 O. S. 229, II Longsdorf's Notes, 22; *Hagar v. State*, 35 O. S. 268, III Longsdorf's Notes, 779.

An indictment must pursue the words of the statute substantially in setting out the offense since with us there are no common law crimes: *Vanvalkenburg v. State*, 11 O. 404, I Longsdorf's Notes, 572.

An indictment, however, that simply follows the language of the statute may be defective, since in many cases something more is required: *Lamberton v. State*, 11 O. 282, I Longsdorf's Notes, 557; *Hagar v. State*, 35 O. S. 268, III Longsdorf's Notes, 779.

An information or indictment merely following the words of the statute is not sufficient unless it aver all the material facts necessary to prove in order to convict: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184.

If the statute does not use sufficient words to definitely describe the offense, following its exact language is not sufficient: *Groenland v. State*, 4 O. N. P. 122, 6 O. D. (N.P.) 313.

It is not always good pleading to make the averment in the language of the statute. If the language of the statute is of such a character as to inform the accused fully and distinctly of the facts, upon which the state relies, then it is sufficient; if it is not, then it is insufficient: *Hogue v. State*, 3 O. C. C. (N.S.) 315, 13 O. C. D. 567.

When a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute, but otherwise the wording of the statute is not sufficient: *Adams v. State*, 14 O. D. (N.P.) 257.

In setting out a statutory offense, it is sufficient to describe it in the words of the statute, with a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to show that the statutory offense has been committed by the party therein named, and to inform him as to what is intended: *Mitchell v. State*, 21 O. C. C. 24, 11 O. C. D. 446.

It is not sufficient in an indictment to follow merely the language of the statute if such language is not of the character to inform the accused fully and distinctly of the facts relied upon to prove the essential elements of the crime: *State v. Lang*, 5 O. N. P. (N.S.) 369, 18 O. D. (N.P.) 53.

Charging that A did "obstruct and abuse" an officer is not sufficient, although the exact language of the statute has been employed: *Aylmore v. State*, 11 Dec. Rep. 900, 30 Bull. 370.

Charging in the indictment that one knowingly and unlawfully permitted a thing to be done is sufficient under a statute which makes it unlawful to knowingly permit the thing to be done: *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

If the offense is marked by "or" in the statute, the indictment may substitute "and": *State v. Conner*, 30 O. S. 405, III Longsdorf's Notes, 536; *State v. Bauer*, 1 O. N. P. 103, 1 O. D. (N.P.) 199.

Whether an excepting proviso becomes a part of the description of the offense embodied in the affidavit is not affected by the fact that it is found in the enacting clause or in some other clause, or that the offense is defined in one section and the proviso making the exception is found in another: *Bramley v. Euclid*, 2 O. N. P. (N.S.) 508, 15 O. D. (N.P.) 155. See also *AFFIDAVIT*.

Averments of the provisions of statutes are unnecessary in civil or criminal pleadings from the fact that courts take judicial knowledge thereof: *State v. Mulford*, 12 O. D. (N.P.) 655. See also *STATUTES*.

B. STATING ESSENTIAL ELEMENTS.

1. In General.

Under the rules of criminal pleading the wrongful and unlawful act itself must be described, and not simply the intent with which it is done: *State v. Van Gunten*, 84 O. S. 177.

Every indictment should contain a complete description of the offense charged. It should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet; of the act done, which it behooves him to controvert, and so that the court, applying the law to the facts charged against him, may see that a crime has been committed: *Lamberton v. State*, 11 O. 282, 1 Longsdorf's Notes, 557.

The indictment must state every circumstance of knowledge, intention, or action that constitutes the criminal design; an indictment for aiding to pass a forged paper must set forth that the accused knew it to be a forgery: *Anderson v. State*, 7 O. (pt. 2) 250, 1 Longsdorf's Notes, 405.

The allegations of the indictment must specify with certainty every element of the crime, but no particular words need be used: *State v. Bowers*, 6 O. N. P. 529, 8 O. D. (N.P.) 324.

In charging an offense the highest degree of certainty is not required; certainty to a common intent is sufficient. Nor is unreasonable strictness to be required, and where an indictment clearly charges a crime and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is obtained: *Stoughton v. State*, 2 O. S. 562, 1 Longsdorf's Notes, 1082.

The fact that an indictment is inartistic or that there is some technical defect in the form, where it substantially charges a felony, will not defeat extradition: *Jackson v. Archibald*, 12 O. C. C. 155, 5 O. C. D. 533.

In an indictment an averment which is incidental as being introductory or collateral or an inducement to something else, need not

be set down, either so much in detail or with such directness as those parts are required to be which constitute the gist of the offense: *State v. Skransewsky*, 5 O. N. P. (N.S.) 177, 17 O. D. (N.P.) 575.

An indictment which does not charge all the criminalizing acts, which the state must prove to authorize a conviction, does not charge an offense: *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163.

An omission to state in an indictment all the criminalizing acts can not be cured by the use of the word "unlawfully": *State v. Owen*, 3 O. N. P. 181, 4 O. D. (N.P.) 163.

Where a greater punishment is prescribed for a second violation of a statute, the fact of a second offense must be averred to justify the increased punishment: *Larney v. Cleveland*, 34 O. S. 599, III Longsdorf's Notes, 741; *Blackburn v. State*, 50 O. S. 428, IV Longsdorf's Notes, 505.

Even if by statute each day of the existence of an unlawful condition is a separate offense, the indictment may charge the first or original offense with a *continuando* covering subsequent violations of the law: *Fisher v. State*, 84 O. S. 360; *Hughes v. State*, 9 O. C. C. (N.S.) 369, 19 O. C. D. 237 [affirmed, without opinion, *State v. Hughes*, 77 O. S. 640].

An indictment for writing an instrument with intent to defraud (G. C., § 13144), properly sets out extrinsic facts although the instrument does not show of itself how any one could be defrauded. If it is the affidavit of a physician as to the cause of death to be used to enable the wrong person to get life insurance, the policy need not be set out. It makes no difference that the policy was void, nor that defendant was not to obtain the money for himself: *State v. Hoffman*, 1 O. N. P. 290, 2 O. D. (N.P.) 206.

A count in an indictment is not rendered invalid by reason of a reference to a statement contained in a previous count without repeating the matter contained in such statement; and should it happen that the previous count is defective and is rejected for that reason, the remaining count may be sustained if the reference be sufficiently full to incorporate the matter going before: *Foster v. U. S.*, 9 O. L. R. 66 (C. C. A.).

It is a rule of pleading that operative facts must be directly alleged, while those upon which they operate, as well as those by way of inducement, may be charged indirectly and by way of recital: *State v. Skransewsky*, 5 O. N. P. (N.S.) 177, 17 O. D. (N.P.) 575. See also *PLEADINGS*.

An indictment charging a defendant with having rescued another who was in the lawful custody of a constable under a warrant issued by a justice of the peace in bastardy

proceedings, is insufficient under G. C. § 12832, because the person so rescued was not charged with an "offense": *State v. Ward*, 8 O. N. P. (N.S.) 561, 19 O. D. (N.P.) 744.

An indictment will not lie for the giving of false testimony before a grand jury, where from a reading of the indictment it is impossible to determine why or upon what ground the matter to which the defendant testified was material to the investigation which was being carried on by the grand jury: *State v. Tanner*, 9 O. L. R. 18.

2. Laying Venue.

An indictment must contain an averment of time and place, but having once been properly pleaded in that regard the use of the words "then and there" as to each subsequent fact is sufficient: *Evans v. State*, 24 O. S. 208, III Longsdorf's Notes, 170; *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29.

Where an indictment fails to allege that the offense was committed in the county where the indictment was found the defect is not cured by G. C., § 13581, providing that certain defects are not fatal: *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640.

The venue of an offense is not sufficiently stated where there is no allegation as to the county in which the alleged misdemeanor is claimed to have occurred, either in the affidavit or in the warrant: *Goldsmith v. State*, 13 O. C. C. (N.S.) 148, 22 O. C. D. 161.

Where the caption and other parts of a record show that a prosecution is being "carried on in the name, and by the authority, of the state of Ohio," in a specified county, and the offense is charged to have been committed in that county, the failure to allege that the county is in the state of Ohio is not sufficient ground for the arrest of judgment: *Mackey v. State*, 3 O. S. 362, II Longsdorf's Notes, 35; *Foster v. State*, 19 O. S. 415, II Longsdorf's Notes, 955.

Venue is not laid by locating the offense on a certain city street, or as having been committed "on the West Fork road, near Cole-rain pike," without adding the county and state: *Herzog v. State*, 9 O. N. P. (N.S.) 349, 20 O. D. (N.P.) 458.

Charging the unlawful keeping of a place for the sale of liquor "at" the village of X sufficiently alleges venue; the word "at" being equivalent to "in" or "within": *Volk v. Westerville*, 8 O. N. P. 139, 11 O. D. (N.P.) 144.

In an indictment under the anti-trust law against individuals, firms, partnerships, corporations or associations, or any two or more of them, it is not necessary to aver that

the trust or illegal combination exists or does business in the county in which the indictment is found: *State v. Delivery Co.*, 5 O. N. P. (N.S.) 89, 17 O. D. (N.P.) 515.

Where a statute simply provides punishment for an unlawful entry upon the lands of another, without making any provision for the restoration of the land to the rightful owner or occupant, and where locality or place is not an essential ingredient of the offense no particular description is necessary: *Fogarty v. State*, 6 O. N. P. 248, 9 O. D. (N.P.) 477.

An affidavit containing a defective allegation is cured by an information, properly alleging venue: *Krownstrot v. State*, 15 O. C. C. 73, 8 O. C. D. 119. See also VENUE.

3. Intent and Scienter.

(a) Statutes.

G. C., § 13590, providing how intent to defraud may be alleged, is not in conflict with § 10 of the bill of rights, which requires the accused, on demand, to be furnished with the nature and cause of the accusation against him: *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

The clause of G. C., § 12561, which makes the possession or buying of railroad property without scienter a crime is unconstitutional: *Kilbourne v. State*, 84 O. S. 247.

(b) When Averred.

If the statute makes intent or knowledge a part of the description of the offense, such intent or knowledge must be charged in the indictment: *Gatewood v. State*, 4 O. 386, I Longsdorf's Notes, 230; *Rich v. State*, 8 O. 111, I Longsdorf's Notes, 416; *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *Kain v. State*, 8 O. S. 306, II Longsdorf's Notes, 343; *Hagan v. State*, 10 O. S. 459, II Longsdorf's Notes, 454; *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469; *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

If a statute makes a certain intent an element of the offense, such intent must be averred directly and specifically in the indictment by a proper affirmative allegation: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939; *Kennedy v. State*, 34 O. S. 310, III Longsdorf's Notes, 718; *Coblentz v. State*, 84 O. S. 235.

Under G. C., § 12918, which makes it a criminal offense for any officer whose duty it is to superintend the construction of any public improvement knowingly to permit materials to be used therein different from the plans and specifications, it is not necessary to charge criminal intent; since criminal in-

tent is not an essential element of such offense: *State v. Sundmaker*, 11 O. N. P. (N. S.) 97; *sub nomine*, *State v. Henkel*, 22 O. D. (N.P.) 735.

Scienter need only be averred, (1) when it is part of the statutory description of the offense; and (2) when the legal presumption rebuts guilty knowledge: *State v. Carson*, 2 Dec. Rep. 81, 1 W. L. M. 333.

Guilty knowledge is not an element in a crime when not made so by the statute, if the ignorance was negligent or voluntary; and if excused by reason of good faith and reasonable ground for belief this is matter of defense and need not be averred or proved by the state: *Altschul v. State*, 8 O. C. C. 214, 4 O. C. D. 402.

An indictment must set forth every circumstance of knowledge, intention or action, that constitutes the criminal design. There can be no intention without knowledge, and an indictment for aiding to pass a forged paper must set forth that the accused knew it to be a forgery: *Anderson v. State*, 7 O. (pt. 2) 250, I Longsdorf's Notes, 405.

It is not necessary, in an indictment for selling counterfeit coins, to aver that the sale was made with intent to defraud: *Leonard v. State*, 29 O. S. 408, III Longsdorf's Notes, 481.

An intent to defraud is an essential ingredient in the crime of forgery, and must be directly and specifically charged: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

To indict for selling to a minor or person in the habit of getting intoxicated, knowledge of these facts must be averred: *Miller v. State*, 3 O. S. 475, II Longsdorf's Notes, 50; *Aultfather v. State*, 4 O. S. 467, II Longsdorf's Notes, 117; *Crabtree v. State*, 30 O. S. 382, III Longsdorf's Notes, 535.

Formerly an indictment for harboring a slave was bad unless it averred knowledge that the person was a slave, although the statute omitted to make *scienter* an ingredient of the crime: *Birney v. State*, 8 O. 230, I Longsdorf's Notes, 429.

The statute of 1894 being silent as to defendant's knowledge or intent, the state need not allege or prove it. But good faith and want of knowledge may be shown in defense, and defendant may show that he purchased from a manufacturer of good standing, on assurances of purity, which he believed then, and at the time he resold, to be true, and that he was not negligent. And if the jury find this true, they must acquit: *Haas v. State*, 1 O. N. P. 248, 2 O. D. (N.P.) 177. See also ADULTERATION.

Under the burglary law against breaking into a mansion and committing or attempting to commit violence, the intent of the entry

is immaterial and need not be averred; if the violence was done or attempted, it is enough: *Forsythe v. State*, 6 O. 19, I Longsdorf's Notes, 318. See also BURGLARY.

On joint indictment charging the principal with an assault with intent to kill, and the accessory with being present, aiding, the omission to charge intent to kill on the latter is not demurrable: *Hotelling v. State*, 3 O. C. C. 630, 2 O. C. D. 366. See also ASSAULT WITH INTENT.

An affidavit charging the accused with violation of a Sunday closing ordinance is insufficient unless it charges knowledge and criminal intent: *Daugherty v. Dennison*, 11 O. C. C. (N.S.) 13, 12 O. C. D. 776 [affirmed, without opinion, *Dennison v. Daugherty*, 59 O. S. 593]. See also INTOXICATING LIQUOR.

The intent to defraud need not be to defraud any particular person. The crime is in dealing in or having the paper for sale, and comprehends the wholesaler who furnishes it to the retailers who issue it as genuine: *Berlington v. State*, 2 O. S. 160, I Longsdorf's Notes, 1036.

The indictment for selling a counterfeit coin, G. C., § 13100, need not aver that the sale was with intent to defraud: *Leonard v. State*, 29 O. S. 408, III Longsdorf's Notes, 481. See also COUNTERFEITING.

An affidavit charging a person with a violation of the Beal law (G. C., §§ 6127, *et seq.*), in that he kept a place where intoxicating liquors were sold, purchased or given away, need not aver that such place was "knowingly" kept: *Page v. State*, 8 O. C. C. (N.S.) 581, 18 O. C. D. 660. See also INTOXICATING LIQUOR.

(c) How Averred.

G. C., § 13590, provides the manner in which an intent to defraud may be alleged.

In an indictment for delivering skim milk to a cheese factory, with intent to defraud (G. C., § 12719), it is not necessary to allege the particular person intended to be defrauded: *Bainbridge v. State*, 30 O. S. 264, III Longsdorf's Notes, 528; *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

It is sufficient to allege an intent to defraud a member of a firm and evidence that the intent was to defraud the firm is sufficient to support such allegation: *Stoughton v. State*, 2 O. S. 562, I Longsdorf's Notes, 1082.

The indictment must charge the intent to defraud directly, and not merely by way of legal deduction or inference from the facts previously found: *Drake v. State*, 19 O. S. 211, II Longsdorf's Notes, 939.

An indictment for selling within two miles of an agricultural fair need not aver knowl-

edge of the existence of such fair or its distance. If the law is a police regulation knowledge is of no consequence; a sale is at peril; and if it is one of the class where ignorance is a defense it need not be averred in the indictment: *State v. Fromer*, 7 O. N. P. 172, 6 O. D. (N.P.) 374.

Charging in the indictment that one knowingly and unlawfully permitted a thing to be done is sufficient under a statute which makes it unlawful to knowingly permit the thing to be done: *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

"Knowingly accusing by knowingly sending," charges that defendants' knowingly sent the accusation: *State v. Skransewsky*, 5 O. N. P. (N.S.) 177, 17 O. D. (N.P.) 575.

For an indictment for knowingly carrying out purpose, etc., of illegal combination in violation of anti-trust law, see *State v. Ice Co.*, 5 O. N. P. (N.S.) 89, 17 O. D. (N.P.) 515.

An averment of a female's age is not necessary in an indictment under G. C., § 13027, for inducing, etc., to enter a house of ill fame: *Studer v. State*, 9 O. C. C. (N.S.) 185, 19 O. C. D. 33 [affirmed, without opinion, *Studer v. State*, 74 O. S. 519].

Where intent is an essential element of the crime, if it is not alleged a demurrer will lie, if it is insufficiently alleged a motion to quash will lie: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

An indictment charging that the defendant did unlawfully and fraudulently embezzle and convert to his own use certain personal property of value, without the consent of the owner, under G. C., § 12467, is sufficient without alleging that the same was done with intent to embezzle: *Mitchell v. State*, 21 O. C. C. 24, 11 O. C. D. 446.

4. Stating Time.

G. C., § 13581, provides that an indictment shall not be invalid for omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense, or for stating the time imperfectly.

In an indictment for burglary charging the crime to have been committed on a certain day "in the night season of the same day, to-wit, about the hour of two o'clock at night" the allegation as to time is sufficiently distinct and certain: *Methard v. State*, 19 O. S. 363, II Longsdorf's Notes, 951.

Where there are several counts in an indictment for murder it is not a valid ground of objection that they differ in stating the time of the commission of the crime; nor is a verdict inconsistent which finds the defendant guilty under all such counts: *Griffin*

v. State, 18 O. S. 438, II Longsdorf's Notes, 906.

Where there are several counts in an indictment, in the first of which the time and place are specifically stated, it is sufficient to allege in the subsequent counts that the offense was then and there committed: *Evans v. State*, 24 O. S. 208, III Longsdorf's Notes, 170; *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29.

But the words of time and place, "then and there," must be repeated before every issuable fact, else demurrer lies. Thus, averring that defendant then and there assaulted A and did beat and strike A, fails to charge a battery, because of the omission of these words: *State v. Finch*, 2 Dec. Rep. 431, 3 W. L. M. 82.

Where the offense of keeping a disorderly house is charged with a continuando no specific time need be alleged: *Brown v. Toledo*, 7 O. N. P. 435, 5 O. D. (N.P.) 210.

Where, in a prosecution for the unlawful sale of liquor in a residence district, the affidavit charges that the defendant kept certain places from a certain date and at various times until a certain other date, the period being one week, although such affidavit is somewhat vague as to the "when" and "where" of the offense, yet it charges one offense and the defendant is not prejudiced by it: *Otte v. State*, 9 O. C. C. (N.S.) 293, 19 O. C. D. 203.

An allegation of time is immaterial, in case of embezzlement if the ownership was as alleged: *Tidd v. State*, 11 O. C. C. (N.S.) 271, 20 O. C. D. 679. See also EMBEZZLEMENT.

In returning an indictment charging a conspiracy against trade, it is not necessary that the grand jury state the exact date on which the illegal combination was effected: *State v. Ice Co.*, 5 O. N. P. (N.S.) 149, 17 O. D. (N.P.) 640.

An affidavit charging that A, on or about a given date, and at divers times, between then and at a later given date, did unlawfully aid, abet, etc., to the delinquency of B, a female minor child, and further stating the methods by which he contributed to the delinquency, states an offense under G. C., § 1654, and is not bad for duplicity, although the statute makes each day of contribution a separate offense: *Fisher v. State*, 84 O. S. 380.

5. Describing Persons.

G. C., § 13626, relating to misnomer in an indictment is not in contravention of Art. I, § 10, of the constitution of this state, providing that except in cases therein specified, "no person shall be held to answer for a

capital or otherwise infamous crime, unless on presentment or indictment of a grand jury": *Lasure v. State*, 19 O. S. 43, II Longsdorf's Notes, 925.

An indictment designating the accused by initial letters, as a baptismal name, is good after verdict: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

The surnames Davidson and Davison, with a middle initial are not the same, and it is a variance to describe the murdered person by one if he bears the other. Such a variance is, under G. C., § 13582, not fatal unless material to the merits or prejudicial, provided the person is shown to be the one intended, and the mistake is in the name only. Whether the mistake misled or prejudiced the prisoner is a question for the court. But the identity of the person intended and described is for the jury, and it is error to charge that it is a mere mistake of name, or that the grand jury intended the person proved to be killed: *Mead v. State*, 26 O. S. 506, III Longsdorf's Notes, 322.

To an indictment against O. Alonzo Rockwell, defendant pleaded that his name was, Orville A. Rockwell, and the reply averred that he was known equally by both, it was held, after proof of the plea the replication is not sustained by proof that he usually signed his name and was generally called O. A. Rockwell, and that relatives called him Alonzo: *Rockwell v. State*, 12 O. S. 427, II Longsdorf's Notes, 574.

Using the pronoun "her" is a sufficient allegation of sex in an indictment for rape: *State v. McCann*, 18 O. D. (N.P.) 64, 5 O. L. R. 410.

That persons are to the grand jury unknown is a sufficient statement that their names can not be ascertained: *Gordon v. State*, 46 O. S. 607, IV Longsdorf's Notes, 349; *Nickel v. State*, 6 O. C. C. 601, 3 O. C. D. 605.

Where the act or crime was committed by several persons, all being present at the time, it is not necessary when jointly indicted, for the indictment to set out which one of the defendants committed the act of killing: *Lindsay v. State*, 4 O. C. C. (N.S.) 409, 14 O. C. D. 1.

A charge that a murder by a pistol shot was committed by three persons, without alleging which did the shooting, is proper: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305.

A charge that A, B and C, with a pistol in their right hand then and there held, did unlawfully, etc., shoot does not require that C should have with his own hand held the pistol and fired, but will sustain C's conviction if he procured the crime to be committed: *State v. Snell*, 2 O. N. P. 55, 5 O. D. (N.P.) 670.

In returning an indictment charging a conspiracy against trade, under G. C., § 6398, the indictment is not rendered indefinite by charging a conspiracy between the defendants and others without stating who the others were, or by describing the accused as "the defendants" after they have once been named and afterward referred to as "each and all of the defendants herein": *State v. Ice Co.*, 5 O. N. P. (N.S.) 149, 17 O. D. (N. P.) 640.

An indictment will not lie for receiving payment of a false bill, where the defendant is so described as not to necessarily imply that he had authority to make the purchase or to draw a bill for the goods purported to have been purchased: *State v. Ruggles*, 10 O. N. P. (N.S.) 493, 20 O. D. (N.P.) 692 [exceptions overruled by the supreme court on the ground that indictment does not sufficiently charge that the bill paid was not a valid claim against the state: *State v. Ruggles*, 83 O. S. 474].

Where an indictment charges the accused with having assaulted and killed one "Percy Stuckey alias Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person: *Goodlove v. State*, 82 O. S. 365 [reversing *Goodlove v. State*, 13 O. C. C. (N. S. 17, 21 O. C. D. 537)].

An indictment which by clerical omission, if literally read, makes the assaulted person seem to be the one who made the assault, is bad. Prosecutions are *stricti juris*: *Turk v. State*, 7 O. (pt. 2) 240, I Longsdorf's Notes, 404.

A plea of misnomer, if sustained does not entitle a defendant to a discharge: *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 552 [affirmed, without opinion, *Miller v. State*, 55 O. S. 685].

In an indictment for burglary by breaking into the office of a railroad company, failing to allege that the company was incorporated is not sufficient ground for sustaining a motion to quash: *Burke v. State*, 34 O. S. 79, III Longsdorf's Notes, 699; *Hamilton v. State*, 34 O. S. 82, III Longsdorf's Notes, 700.

An indictment against three for sodomy on another is not bad on the ground that all could not participate in the same offense, for two could be accomplices and the assault could be joint, but only one act should be proved. Failure to aver sex is immaterial in rape and sodomy. Besides, the Christian names and pronoun show the sex: *Foster v.*

State, 1 O. C. C. 467, 1 O. C. D. 261. See also *SODOMY*.

An indictment of a member of the general assembly is sufficient, though he is called a member of the "legislature," for the terms are synonymous: *State v. Gear*, 7 O. N. P. 551, 5 O. D. (N.P.) 569. See also *BRIBERY*.

In a prosecution under G. C., §§ 6130, *et seq.*, as to intoxicating liquors, it is necessary that the affidavit, information or indictment, allege the name of the purchaser of such intoxicating liquors, or that his name is unknown: *State v. Ridgway*, 73 O. S. 31, IV Longsdorf's Notes, 998. See also *INTOXICATING LIQUOR*.

See also *MISNOMER*.

6. Describing Property.

G. C., § 13591, relating to the allegation of the ownership of property belonging to partners in an indictment, was intended to take the case provided for out of the operation of the rule prescribed in G. C., § 13582, relating to variance: *Mulrooney v. State*, 26 O. S. 327, III Longsdorf's Notes, 307.

The rule prescribed by G. C., § 13591, is a rule of pleading and not of substantive law: *Jones v. State*, 70 O. S. 36, IV Longsdorf's Notes, 968.

Where in an indictment for larceny, the property stolen is alleged to belong to one A, and the evidence shows that it belongs to A and B as partners, a conviction is proper. G. C., § 13591, relating to the allegation in an indictment of property belonging to partner, changes the common law rule: *Lasure v. State*, 19 O. S. 43, II Longsdorf's Notes, 925.

Formerly ownership of property stolen laid in partners was insufficient if the partnership was not established and one partner was an imbecile when the property was acquired: *Lewis v. State*, 4 O. 389, I Longsdorf's Notes, 231. See also *LARCENY*.

A qualified ownership will sustain an allegation of ownership: *Hayes v. State*, 14 O. C. C. (N.S.) 497 [affirmed, without opinion, *Hayes v. State*, 83 O. S. 490].

In an indictment for burglary by breaking into the office of a railroad company, failing to allege that the company was incorporated is not sufficient ground for sustaining a motion to quash: *Burke v. State*, 34 O. S. 79, III Longsdorf's Notes, 699; *Hamilton v. State*, 34 O. S. 82, III Longsdorf's Notes, 700.

Averring stealing bank bills "of the moneys, goods, and chattels of the said A," though they are neither moneys, goods, or chattels, sufficiently avers the ownership. These words may be rejected as surplusage: *Turner v. State*, 1 O. S. 422, I Longsdorf's Notes, 994.

If the affidavit substantially describe the offense it will authorize the subsequent proceedings. The omission of the name of the owner of the stolen property from the affidavit is not ground for reversal: *Montgomery v. State*, 7 O. S. 107, II Longsdorf's Notes, 275. See also *LARCENY*.

Indictment for hunting on lands of another (R. S. § 6966, repealed, 97 v. 477), averred to be "owner," includes a lessee, and parol evidence of the existence of the lease is not of its contents, but of the fact, and is admissible: *Fogarty v. State*, 6 O. N. P. 248, 9 O. D. (N.P.) 477. See also *TRESPASS*.

A wife's clothing, bought by her husband or with his means is not her separate property, and should not be laid as hers. Clothing bought with her separate means is her separate property, and should not be laid as the husband's although stolen from the dwelling: *Pratt v. State*, 35 O. S. 514, III Longsdorf's Notes, 803.

If the ownership is laid in A and B, proof that at the time of purchase in their joint names as partners B was, by imbecility, unable to assent to a contract, and, hence, no property vested in him, will prevent conviction: *Lewis v. State*, 4 O. 389, I Longsdorf's Notes, 231.

A corporation is included by the word "person" in the crimes act against burning the house of another "person": *Allen v. State*, 10 O. S. 287, II Longsdorf's Notes, 436. See also *ARSON AND OTHER BURNINGS*.

Ownership of the goods intended to be stolen need not be alleged: *State v. Beal*, 37 O. S. 108, III Longsdorf's Notes, 897. See also *BURGLARY*.

An indictment for arson properly charges the ownership of the property when the one named is the holder of the legal title: *Hutchinson v. State*, 8 O. C. C. (N.S.) 313, 18 O. C. D. 595. See also *ARSON AND OTHER BURNINGS*.

Misnomer of owner as charging arson of a schoolhouse belonging to the Board of Education of Amherst Township, when there can be no such body, its only legal name being Board of Education of the Township District of Amherst, is not material or prejudicial: *Gawn v. State*, 13 O. C. C. 116, 7 O. C. D. 19. See also *ARSON AND OTHER BURNINGS*.

An averment that certain descriptive features of property embezzled "are unknown to the grand jurors" is proper, but does not excuse the state for failing to procure a description thereof: *State v. Gibbs*, 9 O. N. P. (N.S.) 129 [see *State v. Gibbs*, 82 O. S. 457 and 82 O. S. 462]. See also *FALSE PRETENSES*.

7. Describing Instruments.

For necessary allegations in describing instruments, see G. C., §§ 13584, 13585, 13586, 13595.

In an indictment which charges that the accused "unlawfully and feloniously did steal money of the amount and value of fifty-five dollars, the property of," etc., the property stolen is sufficiently described under G. C., § 13595, although the indictment does not show what kind of money is charged to have been stolen, or that it was issued by lawful authority, or that it was intended to pass or circulate as money: *McDivit v. State*, 20 O. S. 231, II Longsdorf's Notes, 991.

In an indictment for larceny of United States treasury notes, describing them as promissory notes of the United States, without saying whether treasury notes or fractional currency, is sufficient: *Hummel v. State*, 17 O. S. 628, II Longsdorf's Notes, 856. See also LARCENY.

In an indictment under G. C., § 13125, punishing the conveying of land without title, it is not necessary that a copy of the deed be set forth. It is sufficient to aver that the conveyance was by deed of general warranty: *Kerr v. State*, 36 O. S. 614, III Longsdorf's Notes, 878.

An indictment under G. C., § 13035, which charges one with having possession of a certain "printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient in law, without containing a copy of the alleged and immoral pamphlet: *State v. Zurhorst*, 75 O. S. 232, IV Longsdorf's Notes, 1015.

The omission of the dollar mark from the figures representing the amount of a forged instrument will not render an indictment invalid: *State v. Mulford*, 12 O. D. (N.P.) 720.

The dollar sign (\$) is in such common use that a court will not hold an indictment bad because it is used in place of the word dollars, but the substitution of marks or signs in place of words is extremely dangerous: *State v. Lang*, 5 O. N. P. (N.S.) 369, 18 O. D. (N.P.) 53.

In an indictment for blackmail based on the filing of an affidavit charging one with murder, it is not necessary to allege the warrant or its service: *Jones v. State*, 14 O. C. C. 363, 7 O. C. D. 724.

Written instrument not entering into the gist of an offense need not be set out in the

indictment; *contra*, if they do; accordingly, while they should be set out in forgery, sending threatening letters, counterfeiting, etc.; they need not be in larceny, for their contents have no connection with the crime: *Stephens v. State*, W. 73, I Longsdorf's Notes, 5.

An indictment must set out the mark or describe the alteration in case of indictment for defacing earmark: *Sewall v. State*, W. 483, I Longsdorf's Notes, 39.

8. Stating Value.

G. C., § 13581, provides that an indictment shall not be invalid for want of a statement of value where it is not of the essence of the offense.

Where an indictment charged the embezzlement of numerous articles of property and alleged an aggregate value thereof, it was competent for the state to prove the embezzlement of any one or more of the articles of property charged, and the value of the same, although the value of each article of property was not separately stated in the indictment: *State v. Mook*, 40 O. S. 588, IV Longsdorf's Notes, 43. See also EMBEZZLEMENT.

It is not necessary in an indictment under G. C., § 12823, prohibiting bribery, to add a recital of the facts giving the thing offered a value, nor to aver a definite sum of money: *Watson v. State*, 39 O. S. 123, III Longsdorf's Notes, 1011. See also BRIBERY.

A charge of burglary, with intent to steal the "personal property" of a person named, is sufficient without alleging it to be of any value. The term property imports value: *Boose v. State*, 10 O. S. 575, II Longsdorf's Notes, 465.

Also "goods and chattels" import value: *Spencer v. State*, 13 O. 401, I Longsdorf's Notes, 644. See also BURGLARY.

The use of the dollar sign (\$) in an indictment for bribery in place of the word "dollar," though not commendable in practice, yet, as it is a sign or mark familiarly known and readily recognized, it does not render the indictment bad for uncertainty as not signifying a thing of value, as such defect or imperfection is one that would not tend to prejudice the rights of defendant: *State v. Lang*, 5 O. N. P. (N.S.) 369, 18 O. D. (N.P.) 53.

In an indictment for forging an instrument for \$2,027.74, the omission of the dollar mark from the figures representing such amount will not render the indictment invalid. The amount of the instrument forged, is, in such indictment, made sufficiently evident: *State v. Mulford*, 12 O. D. (N.P.) 720.

9. *Negative Averments.*

See also the specific crimes.

The general rule is that if negative matter enters into the description of the offense it must be averred: *Cheadle v. State*, 4 O. S. 477, II Longsdorf's Notes, 120; *Moody v. State*, 17 O. S. 110, II Longsdorf's Notes, 817; *Pope v. Cincinnati*, 3 O. C. C. 497, 2 O. C. D. 285.

When a criminal or penal statute contains an exception in the enacting clause, that exception must be negated in the indictment; but where the statute contains provisos and exceptions in distinct clauses, it is not necessary to allege that the defendant does not come within the exceptions nor to negative the provisos: *Hirn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

If provisos and exceptions are contained in distinct clauses it is not necessary to negative them. They are then all defenses which the state need not anticipate: *Becker v. State*, 8 O. S. 391, II Longsdorf's Notes, 351.

A negative averment to the matter of a proviso in a statute, is not requisite in an information or indictment, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it: *Stanglein v. State*, 17 O. S. 453, II Longsdorf's Notes, 843; *Billigheimer v. State*, 32 O. S. 435, III Longsdorf's Notes, 642; *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753; *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141; *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123; *Krownstrot v. State*, 4 O. N. P. 257, 6 O. D. (N.P.) 467; *Hirn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

Every indictment should contain a complete description of the offense charged, and must in all cases contain the negative averment if the matter of such exception enter into and become a part of the description of the offense: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

An ordinance of the city of Cincinnati made it unlawful to discharge fire-arms within the city limits. Persons in military array, those doing so in self-defense, or enforcing the laws, were expressly excepted from the operation of the section. The affidavit in the case did not allege that the act of the defendant did not come within the exceptions. It did not legally charge any offense against the ordinance, and the conviction of the defendant thereon was erroneous: *Pope v. State*, 3 O. C. C. 497, 2 O. C. D. 285.

In a prosecution under the "act to regulate the practice of medicine" passed February 27, 1896, it is not necessary to negative the provisions and exceptions as set forth in R. S. § 4403f (repealed 99 v. 511), in the

information: *Krownstrot v. State*, 15 O. C. C. 73, 8 O. C. D. 119; *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753.

Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negated by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary: *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753.

In an indictment under G. C., § 13030, charging a teacher with having sexual intercourse with a pupil, it is not necessary to aver that such teacher and pupil were not husband and wife: *Esley v. State*, 10 O. C. C. (N.S.) 169, 19 O. C. D. 568.

A charge that the defendant failed and neglected to do is equivalent to charging that he did not do the thing required by the statute: *Neifeld v. State*, 3 O. C. C. (N.S.) 551, 13 O. C. D. 246.

An affidavit or information charging the proprietor of a junk shop with "failing to retain the metal for thirty days," as required by G. C., § 6370, substantially charges that he did not retain it, and is sufficient to notify the defendant of the offense with which he is charged; he is not prejudiced in his substantial rights thereby because the provision of the statute is not negated: *Neifeld v. State*, 3 O. C. C. (N.S.) 551, 13 O. C. D. 246.

Words "not a drug store" sufficiently negative the statute as to keeping open a place where intoxicating liquors are sold, but not as to the selling of liquors by "a regular druggist": *Oberer v. State*, 8 O. C. C. (N.S.) 93, 18 O. C. D. 620.

If an exception is not contained in the description of the offense, but in a different offense, it need not be negated, accordingly, for assault with intent to rape, that the female was not the daughter or sister, need not be negated: *Williams v. State*, W. 42, I Longsdorf's Notes, 4; *Bowles v. State*, 7 O. (pt. 2) 243, I Longsdorf's Notes, 405. See also ASSAULTS WITH INTENT; RAPE.

The crime of rape against a daughter or sister, and that against any other woman than a daughter or sister, are different crimes and not grades of the same. Accordingly, in the latter the negative averment is necessary: *Howard v. State*, 11 O. S. 328, II Longsdorf's Notes, 505. See also RAPE.

A negative averment is not necessary that the former husband and wife had not been "continually and willfully absent for five years together unheard from": *Stanglein v. State*, 17 O. S. 453, II Longsdorf's Notes, 843. See also BIGAMY.

An indictment for prize fighting need not negative being in a gymnasium or athletic club by permission under G. C., § 12802, that section not being the crime of prize fighting under G. C., § 12800: *Seville v. State*, 49 O. S. 117, IV Longsdorf's Notes, 444. See also PRIZE FIGHT.

C. CERTAINTY.

1. In General.

The greatest certainty of averment in every particular of which the offense is capable is unnecessary. It is sufficient that the facts constituting the crime be stated with certainty to a certain intent in general: *Rufer v. State*, 25 O. S. 464, III Longsdorf's Notes, 252; *State v. Mulford*, 12 O. D. (N.P.) 720.

An indictment must aver, with reasonable certainty, all the material facts which are necessary to be proved to procure a conviction: *Ellars v. State*, 25 O. S. 385, III Longsdorf's Notes, 246.

An indictment which apprises the party charged of the charge against him so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime, and the person charged and is not void for uncertainty: *State v. Toney*, 81 O. S. 130.

A criminal charge must be made with such certainty and precision as will reasonably apprise the party who is charged with that which he is required to answer and will be expected to meet; and it must be made with such certainty and precision that the court and jury may know what they are to try, that the court may determine without difficulty what evidence is admissible; and that the record to be made will be sufficiently definite to show clearly of what charge the party has been placed in jeopardy: *Dillingham v. State*, 5 O. S. 280, II Longsdorf's Notes, 184; *Du Brul v. State*, 80 O. S. 52, IV Longsdorf's Notes, 1050; *State v. Van Gunten*, 84 O. S. 177; *Coblentz v. State*, 84 O. S. 235; *State v. Nye*, 11 O. N. P. (N.S.) 616, 21 O. D. (N.P.) 419.

The indictment or information must aver all the material facts which it is necessary to prove to produce a conviction, and with such reasonable certainty as to advise the accused what he may expect to meet on the trial: *Davis v. State*, 7 O. (pt. 1) 205, I Longsdorf's Notes, 371; *Lougee v. State*, 11 O. 68, I Longsdorf's Notes, 542; *Fouts v. State*, 8 O. S. 98, II Longsdorf's Notes, 327; *State v. Lang*, 5 O. N. P. (N.S.) 369, 18 O. D. (N.P.) 53.

The acts committed or omitted must be charged with precision under the circum-

stances, and with the intent mentioned in the statute: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

An affidavit so drawn that the act set forth may or may not be an infraction, so that it is necessary to wait until the prosecution has introduced its evidence before the defendant can know whether or not he must make any defense, is fatally defective: *Arata v. State*, 12 O. D. (N.P.) 730 reversed on a different construction of the defective allegation of the indictment in *State v. Arata*, 69 O. S. 211, IV Longsdorf's Notes, 957.

An indictment under G. C., § 13104, for obtaining money by false pretenses must set forth the alleged false pretenses with such certainty and precision as will reasonably apprise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible and must allege that the pretenses were in fact false and made with intent to defraud: *Horton v. State*, 85 O. S. 13.

2. Specific Examples.

Averring an offense as in violation of a certain section of the revised statutes, without noticing its amendment, refers to the section as then in force: *Oshe v. State*, 37 O. S. 494, III Longsdorf's Notes, 932.

It is not necessary that an indictment, under a statute which has been amended or repealed since the offense was committed, allege in express terms that the crime charged was committed in violation of said statute while it was in force; it is sufficient if the time of its commission was prior to the change in the law: *State v. Bell*, 6 O. N. P. (N.S.) 475, 16 O. D. (N.P.) 602.

The information charging a person with operating an automobile at a greater rate of speed than fifteen miles per hour within the limits of a municipality, does not with the certainty required in criminal pleadings show a violation of G. C., § 12804: *Brown v. State*, 10 O. N. P. (N.S.) 238, 20 O. D. (N. P.) 348.

A charge that accused falsely represented he was buying goods exclusively from a certain firm is insufficient under Art. I, § 10, of the state constitution. The indictment should further state names of other parties with whom he was dealing, the nature of transactions and their date and amount: *State v. Mina*, 15 O. D. (N.P.) 487, 3 O. L. R. 31.

An indictment is not indefinite and vague which charges that the defendant permitted "slag cement" to be used on a public improvement instead of "Portland cement," and which avers that the specifications call for

the "best grade of Portland cement" and that "slag cement" is a different material from "Portland cement": *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

Under G. C., § 12918, which makes it unlawful for an officer whose duty it is to superintend the construction of a public improvement knowingly to permit materials to be used therein different from the plans and specifications, an indictment charging that the defendant did "unlawfully and knowingly permit a certain material to be used in the making of the improvement aforesaid different from the plans and specifications, to-wit, slag cement, which was different from the material, to-wit, Portland cement, required by the plans and specifications" is sufficient; and it is not indefinite or vague: *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

An affidavit charging the having for sale a drug "which differed from the standard of strength laid down in said U. S. Pharmacopoeia," without showing wherein it differed is indefinite and violates Art. I, § 10 of the state constitution: *Groenland v. State*, 4 O. N. P. 122, 6 O. D. (N.P.) 313 [affirmed, without opinion, *State v. Groenland*, 39 Bull. 2].

An indictment which charges "that A unlawfully did falsely pretend with intent to defraud one B that he was selling counterfeit money; by which false pretenses the said A then and there did unlawfully obtain from the said B sixty-five dollars in money, of the value of sixty-five dollars of the personal property of said B; whereas in truth and in fact said A was not selling and had no intention at said time to sell and deliver any counterfeit money; and said A at the time he so falsely pretended as aforesaid well knew the said false pretenses to be false" does not set forth the alleged false pretenses with such certainty and precision as reasonably to apprise the defendant of what he will be required to answer, or as to enable the court to determine what evidence is admissible: *Horton v. State*, 85 O. S. 13.

As it is correct to plead facts and not conclusions of law, an indictment under G. C., § 12450, describing receiving stolen property, is good without averring the name or character of the offense thereby deemed to be committed: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412. See also **STOLEN PROPERTY**.

An indictment under G. C., § 13105, charging the presentation to the county commissioners of a false and fraudulent claim and obtaining payment of the same by the county treasurer which in describing the claim avers it to have been "a certain false and fraudulent claim," but in no way avers wherein it

was false and fraudulent, and states no facts showing that it was false or fraudulent, is bad on demurrer, and will not support a conviction: *Du Brul v. State*, 80 O. S. 52, IV Longsdorf's Notes, 1050 [overruling *Davis v. State*, 20 O. C. C. 430, 10 O. C. D. 738]. See also **OFFICERS**.

An indictment averring failure to change the place of storage of explosives for more than 30 days after notice from the inspector of shops is indefinite. It does not directly aver notice. Moreover, the substance of the notice should be stated: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123. See also **EXPLOSIVES**.

An affidavit which charges a person with selling and delivering oleomargarine, which, when so sold, contained coloring matter, to-wit: butter yellow, sufficiently charges a violation of the statute. It contains descriptive words which partially, but not wholly, bring the substance sold within the statutory definition of oleomargarine: *State v. Arata*, 89 O. S. 211, IV Longsdorf's Notes, 957 [reversing *Arata v. State*, 12 O. D. (N.P.) 730].

In an indictment for rescuing a prisoner from an officer, it is immaterial by what term the officer's assistant is designated, where the officer made the arrest and has the prisoner in his custody, together with an assistant: *State v. Ward*, 8 O. N. P. (N.S.) 561, 563; 19 O. D. (N.P.) 744.

For sufficiency in particular crimes, see **ARSON AND OTHER BURNINGS; BURGLARY AND OTHER BREAKINGS; RAPE, ETC.**

D. SURPLUSAGE.

An allegation in an indictment descriptive of that which is essential to the charge therein made, is a material allegation and can not be rejected as surplusage: *Goodlove v. State*, 82 O. S. 365 [reversing *Goodlove v. State*, 13 O. C. C. (N.S.) 17, 21 O. C. D. 537].

Allegations in an indictment which are not required by the statutory definitions of the crime charged are surplusage; and failure to prove such unnecessary allegations is immaterial: *Riehl v. State*, 11 O. N. P. (N.S.) 81, 21 O. D. (N.P.) 457.

Improper and unnecessary words may be rejected as surplusage: *State v. Shanks*, T. 13.

If an indictment for robbery contains a particular description of the bank notes taken, but erroneously avers them to be "money, goods and chattels," these words may be rejected as surplusage, and the count will be good: *Turner v. State*, 1 O. S. 422, I Longsdorf's Notes, 994. See also **ROBBERY**.

Concealment is not a necessary or essential element of the crime of buying stolen

goods, and, if alleged in the indictment, it is surplusage, and need not be proved: *Holtz v. State*, 30 O. S. 486, III Longsdorf's Notes, 540.

If one offense is well charged in an indictment, and another offense, in the same count, is ineffectually charged, either for want of certainty as to time or otherwise, the averments as to the latter may be rejected as surplusage. But if both offenses are effectually charged, the count will be bad for duplicity: *Barnhouse v. State*, 31 O. S. 39, III Longsdorf's Notes, 561.

An indictment against a sheriff for failing to account for fees received during the quarter (G. C., § 12889), sufficiently describes the offense as having been committed on the "1st day of April, 1908," and where the words "first Monday in April, 1908," are added, by virtue of G. C., § 13581, providing what defects are not fatal, their presence does not invalidate the indictment: *State v. Van Gunten*, 84 O. S. 172.

An indictment charged that a counterfeit was feloniously made. The statute made it a misdemeanor only. It was held that the word feloniously could be rejected as surplusage: *Hess v. State*, 5 O. 5, I Longsdorf's Notes, 241.

Under an affidavit charging the offense of keeping open a saloon on Sunday and insufficiently charging the offense of selling intoxicating liquors on Sunday there is but one offense charged, all reference to the sale of liquor is mere surplusage: *Kappes v. State*, 4 O. C. C. (N.S.) 14, 15 O. C. D. 723.

An averment in a trial for pointing a pistol at another that it was loaded, or that defendant knew it was loaded, is surplusage, and need not be proved: *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141.

An averment that the accused held the pistol in his right hand need not be proved. It is immaterial with which hand he shot: *State v. Martin*, 9 O. D. (N.P.) 778.

If an indictment contains too much—as if it charge counterfeiting coins knowing them to be such, and adds the words "legal and currently passing in Ohio"—these need not be proved, but should be rejected as surplusage, or after verdict would be presumed proved: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

In an indictment for removing a body from a grave without consent of relatives, "there being then and there a widow and children," this latter clause was not necessary, but being descriptive must be proved as laid: *Pringle v. State*, 1 Dec. Rep. 283, 7 W. L. J. 67 [supreme court].

E. REPUGNANCY.

That the averments in separate counts, are wholly irreconcilable with each other is not an objection. Each count is deemed to charge a distinct offense, and is to be questioned by its own averments alone. If objected to as repugnant or inconsistent, the question is as to the congruity of each count alone, and not its harmony with statements in other counts: *Griffin v. State*, 18 O. S. 438, II Longsdorf's Notes, 906.

Although there is a repugnancy in a count which avers that an instrument is a false and forged receipt for money, and then describes the instrument as a receipt for money, issued in fact by a certain company, to the draft clerk in their bank, yet under G. C., § 13581, the indictment will be deemed valid: *Henry v. State*, 35 O. S. 128, III Longsdorf's Notes, 765.

When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant: *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753.

Thus under R. S., § 4403f (repealed, 99 v. 511), which provides that a person shall be regarded as practicing medicine, who prescribes for a fee, or appends M. D. after his name, a single count may charge him with prescribing for a fee and appending M. D. to his signature, and either or both may be proved: *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753.

See also the specific crimes.

F. VARIANCE.

1. Effect.

G. C., § 13582, abrogates the rule of evidence on the subject of variance, in matters of description, between the allegation and proof. Mere variance will not justify an acquittal unless the variance is material or prejudicial in the opinion of the court: *Lytle v. State*, 31 O. S. 196, III Longsdorf's Notes, 573.

2. Variance in Name.

(a) Material.

Prior to the enactment of G. C., § 13582, where an indictment alleges that an affidavit was made, purporting to have been made by John K. Pickens, and the affidavit produced is actually made by John Pickens, no reference being had to John K. Pickens, the variance is fatal. Judgment reversed and order to discharge prisoner: *Pickens v. State*, 6 O. 275, I Longsdorf's Notes, 337.

Where an indictment charges the accused with having assaulted and killed one "Percy Stuckey, alias Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person: *Goodlove v. State*, 82 O. S. 365.

On an indictment charging two persons with the commission of a joint offense, both can not be convicted upon proof that each one committed an act constituting an offense similar to the act charged in the indictment: *Stephens v. State*, 14 O. 386, I Longsdorf's Notes, 676.

Prior to the enactment of G. C., § 13582, where the indictment alleges the unlawful selling of liquor to have been made at the grocery of M, in the township of A, and the proof shows a sale at the grocery of M, in the township of G, the variance was held to be fatal: *Moore v. State*, 12 O. S. 387, II Longsdorf's Notes, 571.

(b) *Immaterial.*

An indictment against a person by the initials of his Christian name is good after verdict, but bad on plea of abatement: *Smith v. State*, 8 O. 295, I Longsdorf's Notes, 436.

In a criminal proceeding, it is not necessary to insert the middle letter in a person's name, but if inserted, it must be proved as laid: *Price v. State*, 19 O. 423, I Longsdorf's Notes, 886.

If an indictment charge the name of the person slain as Maria Gardiner, alias Maria Buel, and the proof shows her real name to have been Maria Frances Buel, though generally known by the names in the indictment, it is sufficient: *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32.

Where an indictment for burning one's own building with intent to defraud an insurance company sets forth the name of such company, and the evidence fails to show that it was incorporated, such variance is not material or prejudicial: *Evans v. State*, 24 O. S. 458, III Longsdorf's Notes, 185.

Where the indictment charges the killing of one Elisha Davidson and the evidence proves the killing of one Elijah B. Davison, and it further appears to the satisfaction of the jury that the person intended to be described in the indictment and the person described in the proof are identical, the variance is not fatal: *Mead v. State*, 26 O. S. 505, III Longsdorf's Notes, 322.

Whether the variance has mislead or prejudiced the defendant is a question for the court, but it is a question for the jury

whether the person intended to be described in the indictment is the same as the one described in the proof: *Mead v. State*, 26 O. S. 505, III Longsdorf's Notes, 322.

Where a party to a judicial proceeding is described in the indictment as Curtis Pratt, which was his true name, it is not error to admit in evidence a transcript in which the same person is described as Curt Pratt, the variance under G. C., § 13582, not being material: *Lytle v. State*, 31 O. S. 196, III Longsdorf's Notes, 573.

On the trial of an indictment for obtaining property by false pretenses, the property was a check, alleged to have been drawn by Xenophon C. Scott, and the check offered in evidence was signed X. C. Scott, M. D. Such variance, which, in the opinion of the judge presiding at the trial, did not affect the rights of the prisoner or prejudice his case, is not ground for reversal in a court of error, where it does not appear that the discretion has been abused: *Tarboe v. State*, 38 O. S. 581, III Longsdorf's Notes, 995.

When, on a trial for forgery, a variance is alleged between the name to the forged instrument and the name appearing in the indictment, if the variance is plain, such instrument ought not to be allowed to go in evidence; but if the forged name is uncertain, and susceptible of being read as agreeing with the name stated in the indictment, it is not error for the court to submit the question to the jury: *Turpin v. State*, 19 O. S. 540, II Longsdorf's Notes, 967.

Where the ownership of stolen property is alleged to be in a corporation, designated by its corporate name, failure to prove incorporation is not material: *Murphy v. State*, 36 O. S. 628, III Longsdorf's Notes, 879; *Burke v. State*, 34 O. S. 79, III Longsdorf's Notes, 699.

A warrant describing the accused by the initials of his first and middle name is not void for that reason: *State v. Miller*, 13 O. C. 67, 7 O. C. D. 553.

Where a person is charged as principal, and the proof shows him to be the agent of another, it is not a fatal variance: *Fitton v. State*, 1 O. N. P. (N.S.) 133, 14 O. D. (N.P.) 156.

Where, in an indictment for arson, the ownership of the building is alleged to be in "the Board of Education of Amherst township," but the only legal designation of that body was "the Board of Education of the Township District of Amherst," the variance is not material: *Gawn v. State*, 13 O. C. 116, 7 O. C. D. 19.

The misspelling of the name of the defendant in the indictment under which he was tried does not present a question which can

be raised on a motion for arrest of judgment: *Smile v. State*, 1 O. C. C. A. 142.

3. Variance as to Matter or Thing.

(a) Material.

Prior to the enactment of G. C., § 13582, proof that the accused stole a gray gelding would not support a charge of stealing a gray horse: *Hooker v. State*, 4 O. 348, I Longsdorf's Notes, 225.

Prior to G. C., § 13582, an indictment for burning stacks of wheat is not supported by evidence of shocks of wheat: *Denbow v. State*, 18 O. 11, I Longsdorf's Notes, 834.

A verdict of guilty on an indictment for breaking into a stillhouse is not sustained by evidence showing that the house has been abandoned as a stillhouse, and was used as a mill for chopping corn: *Thalls v. State*, 21 O. S. 233, III Longsdorf's Notes, 25.

An indictment charging that the prisoner broke into a storeroom is insufficient under a statute making it an offense to break into a "storehouse," and the defect is available to him, although the objection was not made until the verdict had been rendered: *Hagar v. State*, 35 O. S. 268, III Longsdorf's Notes, 779.

Where the separate property of a wife has been stolen from the family residence, such fact alone will not authorize a conviction under an indictment laying the property in the husband: *Pratt v. State*, 35 O. S. 514; III Longsdorf's Notes, 803.

Where the indictment is for selling counterfeit bank notes, and the evidence shows the uttering and publishing as true and genuine, the variance is fatal: *Van Valkenburg v. State*, 11 O. 404, I Longsdorf's Notes, 572.

(b) Immaterial.

In an indictment for larceny, it is sufficient to describe United States treasury notes as "promissory notes of the United States given for the payment of money," adding their denomination and value: *Hummel v. State*, 17 O. S. 628, II Longsdorf's Notes, 832.

Where an indictment charges larceny of the property of A, and the evidence shows the property belonged to A and B as partners, the variance is not fatal under G. C., § 13591: *Lasure v. State*, 19 O. S. 43, II Longsdorf's Notes, 925.

An indictment for plucking and carrying away "one bushel of a certain cultivated plant and vegetable production, commonly called corn, * * * the same being then and there attached to the lands," etc., is sustained by proof of the stealing of corn from the standing and growing stock: *Wiswell v. State*, 21 O. S. 658, III Longsdorf's Notes, 51.

Where the indictment charged the stealing of a silver teapot and the evidence showed that the article stolen was plated ware only, said variance is not fatal in the absence of evidence showing it to be material or prejudicial: *Goodall v. State*, 22 O. S. 203, III Longsdorf's Notes, 68.

Where the indictment lays the ownership of a building burglarized in two or more persons, and the evidence shows it to be the sole property of one of the persons named, such variance is not fatal: *Mulrooney v. State*, 26 O. S. 326, III Longsdorf's Notes, 307.

Alleging burglary of a barn and proving burglary of a storehouse in the barn is not fatal variance: *Walters v. State*, 39 O. S. 215, III Longsdorf's Notes, 1020.

An indictment for breaking into the poultry house of A is supported by evidence of breaking into one of several compartments under a continuous roof, each compartment was in the exclusive possession of A and used by him as a poultry house: *State v. Buechler*, 57 O. S. 95, IV Longsdorf's Notes, 707.

Where the indictment alleges the breaking into the "storehouse" of B and the evidence shows the breaking and entering of a certain room, the property of B, built for and by him occupied exclusively as a storehouse, but which adjoined another room in the same building occupied by B and family as a living room, the variance is not fatal in the absence of evidence showing that it is material or prejudicial: *State v. Turnbaugh*, 79 O. S. 63, IV Longsdorf's Notes, 1043.

An indictment charging the malicious killing of a horse under G. C., § 13361, is sustained by proof of the killing of a gelding, since the latter is not specifically mentioned in the statute: *State v. Divine*, 2 Dec. Rep. 80, 1 W. L. M. 331.

Variance between the note offered to the jury and the one set out in the indictment, that in the latter the letter "s" is added to the word "promise" is not material: *May v. State*, 14 O. 461, I Longsdorf's Notes, 681.

In an indictment for forgery of a note, the omission of a power of attorney to confess judgment attached to the note is not a material variance: *Burdge v. State*, 53 O. S. 512, IV Longsdorf's Notes, 611.

On the trial of an indictment, for carnally knowing a female person under the age of sixteen years with her consent, evidence tending to show that the act was committed without consent does not constitute a fatal variance: *State v. Carl*, 71 O. S. 259, IV Longsdorf's Notes, 982.

Where an affidavit charges the selling of "intoxicating liquors," and the first count in the information charges the selling of "intoxicating liquors, to-wit, beer," the variance

is not fatal: *Schmeltz v. State*, 8 O. C. C. 82, 4 O. C. D. 287.

4. Question Reviewable.

A decision of the trial judge on a question as to the materiality of a variance between an allegation of an indictment and the evidence offered in its support, may be reversed, if erroneous and prejudicial to the accused, and it may be the subject of an exception by the prosecuting attorney with a view to obtaining a decision which shall determine the law for the government of similar cases: *State v. Buechler*, 57 O. S. 95, IV Longsdorf's Notes, 707.

VI. JOINDER OF OFFENSES.

A. WHEN JOINDER IS PROPER.

1. In General.

Distinct offenses may be joined in different counts if arising out of the same transaction or connected with the same subject-matter: *Bailey v. State*, 4 O. S. 440, II Longsdorf's Notes, 113.

Two closely allied offenses arising from the same transaction and provable by substantially the same evidence, may be included in separate counts in the same indictment, as here a count for embezzling goods and another count for embezzling the proceeds of the same goods, and it is error to compel the state to elect: *State v. Bailey*, 50 O. S. 636, IV Longsdorf's Notes, 520.

Several counts describing the same transaction to meet any phase of the testimony is proper, and an election between them will not be compelled: *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472 [reversed on other grounds, *Cottell v. State*, 55 O. S. 666].

The theory that each count of an indictment charges a separate offense is only a fiction, otherwise defendant might be sentenced separately on each. He can not claim the benefit without submitting to the burden: *Brown v. State*, 18 O. S. 496, II Longsdorf's Notes, 911.

G. C., § 13581, enumerating the defects in an indictment that are not fatal, has relation to the form of indictment and the manner of describing the offense, but it does not authorize the charging of more than one offense in a single count: *Barnhouse v. State*, 31 O. S. 39, III Longsdorf's Notes, 561.

Where several counts are for different offenses, which, however, are of the same nature, and of which the punishment is the same, there is no misjoinder, and a general verdict of guilty is good: *Stoughton v. State*, 2 O. S. 562, I Longsdorf's Notes, 1082.

When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant: *Hale v. State*, 58 O. S. 676, IV Longsdorf's Notes, 753.

2. Specific Examples.

G. C., § 13594, provides that an indictment for larceny may contain counts for false pretenses for embezzlement and for receiving or concealing stolen property. Both offenses, committing the crime and abetting it, may be charged in the same indictment, and in the same count: *Hartshorn v. State*, 29 O. S. 635, III Longsdorf's Notes, 506.

Counts for having possession of instruments for counterfeiting and counts for making counterfeits may be joined: *Sutton v. State*, 9 O. 133, I Longsdorf's Notes, 469.

Counts for different offenses, but of the same nature, may be joined, as for making, altering, counterfeiting, etc., for uttering an altered note, for uttering a counterfeit note: *Stoughton v. State*, 2 O. S. 562, I Longsdorf's Notes, 1082.

When an indictment contains one count for forging a warrant and another for uttering the same, and an identical copy of the instrument is pleaded in each count, it is not necessary to aver that the instrument set out in each count is the same. But if necessary that such averment be made, the remedy would be by motion to require the state to elect upon which count it will proceed, not by motion to quash for duplicity. This rule is different from the one governing cases in which a single count is assailed for duplicity: *State v. Mulford*, 12 O. D. (N.P.) 720.

Counts for horse stealing and also grand larceny—in this case for stealing a buggy and harness by carrying off the team—may be joined, both being larcenies but differing in degree, though one is called a misdemeanor: *Barton v. State*, 18 O. 221, I Longsdorf's Notes, 843.

Charging in two counts, covering the same time the keeping a place where liquors are unlawfully sold in violation of G. C., §§ 6131 and 13195, where the defendant keeps only one place is but one offense: *Weaver v. State*, 74 O. S. 53, IV Longsdorf's Notes, 1006. See also INTOXICATING LIQUOR.

Several articles of different owners, stolen at one time, may be a single offense if one transaction, and the jury may find a continuous taking of seven sets of robes, etc., from seven buggies hitched around the town-hall, to be one transaction. In such case, one count and a single verdict of grand lar-

ceny, though no property of one owner was worth \$35, will cover all: *State v. Smith*, 10 Dec. Rep. 682, 23 Bull. 85. See also LARCENY.

Two crimes may be charged in the same count when the same transaction, as burglary with intent to steal and consummation of that intent by actual theft: *Breese v. State*, 12 O. S. 146, II Longsdorf's Notes, 551. See also BURGLARY AND OTHER BREAKINGS.

Several articles, though belonging to different owners, if stolen at the same time, may be embraced in one count and charged as one offense: *State v. Hennessey*, 23 O. S. 339, III Longsdorf's Notes, 127. See also LARCENY.

Where an indictment charges a person over eighteen years of age with rape upon a female under sixteen years with her consent, and in a second count charges the offense to have been committed forcibly and against her will, it is error to charge the jury that they may find a general verdict of guilty upon both counts if they find the evidence warrants a conviction upon either count: *State v. Hensley*, 75 O. S. 255, IV Longsdorf's Notes, 1016. See also RAPE.

The offense of soliciting and accepting a bribe may be charged in a single count, notwithstanding the statute makes it an offense to solicit a bribe and an offense to accept a bribe and specifies these two ways of committing bribery in the disjunctive: *State v. Baschang*, 9 O. L. R. 11.

B. PRESUMPTION FAVORS JOINDER.

The presumption is that different counts in the same indictment are merely different ways of charging the same offense in order to meet the evidence: *Myers v. State*, 4 O. C. C. 570, 2 O. C. D. 712.

Where the record discloses that the property described in the different counts in an indictment is the same property, and that only one transaction was sought to be proved, a reviewing court will not presume any prejudice resulted to the accused because the prosecutor was not required to elect, although the indictment does not directly allege that each of said counts related to the same property and to one transaction: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

C. DUPLICITY.

An indictment which charges in a single count conjunctively several different ways of committing an offense described in the statute disjunctively is not bad for duplicity: *State v. Delivery Co.*, 5 O. N. P. (N.S.) 89, 17 O. D. (N.P.) 515.

An indictment charging several acts in a single count, each and all of which violate the penal statutes but once and incur but

one penalty is not bad for duplicity: *State v. Lang*, 5 O. N. P. (N.S.) 369, 18 O. D. (N.P.) 53.

An indictment which charges in one count the commission of several offenses of the same general character, committed at the same time and forming part of the same transaction, is not bad for duplicity: *State v. Delivery Co.*, 5 O. N. P. (N.S.) 89, 17 O. D. (N.P.) 515.

No one definition of a crime in an indictment can contain two distinct offenses, so as to warrant a conviction for either: *Vanvalkenburg v. State*, 11 O. 404, I Longsdorf's Notes, 572.

An indictment charging that on a certain day and during the interval between that date and the date of the finding of the indictment the defendant kept a room for the purpose of gambling, is not bad for duplicity: *State v. Henry*, 9 O. N. P. (N.S.) 254, 21 O. D. (N.P.) 701.

Charging the receiving and concealing of different chattels stolen from different owners is not bad for duplicity: *Smith v. State*, 59 O. S. 350, IV Longsdorf's Notes, 767.

Charging that the accused "sold and conveyed" does not charge two offenses, where a party is charged with conveying without title: *Kerr v. State*, 36 O. S. 614, III Longsdorf's Notes, 878.

See also the specific crimes.

D. ELECTION.

1. On Indictments.

G. C., § 13578, providing that if there be pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney must elect upon which he will proceed, recognizes the propriety of several indictments for the same criminal act. Hence, the fact that previous indictments have not been disposed of does not afford ground for the quashing of an indictment: *State v. Williams*, 6 O. N. P. (N.S.) 406, 18 O. D. (N.P.) 794 [affirmed, on other points, *Williams v. State*, 77 O. S. 468, IV Longsdorf's Notes, 1034].

A second indictment for the same crime, found pending the first, is not a nullity, and the state may elect on which to proceed: *O'Meara v. State*, 17 O. S. 515, II Longsdorf's Notes, 847.

If different indictments are for the same offense the method of attack is by a plea in bar: *State v. Lewis*, 7 O. N. P. 533, 5 O. D. (N.P.) 552.

When the prosecutor elected upon which indictment he desired to proceed, it was the imperative duty of the trial judge (defendant here) to enter the election upon the minutes of the court without waiting to pass

upon the motion to quash: *State, ex rel., v. Dickson*, 14 O. C. C. (N.S.) 247.

Since the circuit court can control the discretion of the trial judge no further than to require that the election of the prosecutor be noted, and will be without jurisdiction to require him to desist from making entries on the motions to quash pending a hearing in mandamus, the only relief which can be granted is to require that the election of the prosecutor be noted in order that he may preserve any legal right to a review which he may have in the premises: *State, ex rel., v. Dickson*, 14 O. C. C. (N.S.) 247.

A motion to compel an election between two indictments for the same act may be abandoned permanently or temporarily by a motion to quash, or a demurrer may be urged and the motion to elect having been thus abandoned, the state has no right to make an election in order to reserve one indictment for future use, in case the other is set aside: *State v. Cow*, 11 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 535.

When one, who has been indicted two or more times for the same criminal act, moves for an election and also to quash all the indictments against him, he may abandon temporarily or permanently his motion to elect and press the motions to quash. An accused has the right at all times before demurring or pleading in bar of the general issue, to destroy, if possible, all the indictments against him by motions to quash and pleas in abatement, and thus prevent the necessity of an election by the state; and when such an one has thus abandoned his motion to elect, the state has not the right to exercise its election under that motion without the consent of the accused, and especially is this so when the purpose of the state is to reserve one of the indictments for future use in the event the first be set aside by the court: *State v. Cow*, 11 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 535.

2. On Counts.

(a) When Necessary.

Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter. Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court may in its discretion require the prosecutor to elect upon which charge he will proceed: *Bailey v. State*, 4 O. S. 440, II Longsdorf's Notes, 113.

Where two closely allied offenses arise from the same transaction, and may be es-

tablished by substantially the same evidence, both may be included in separate counts of the same indictment. In such cases where the prosecutor is compelled to elect, the state is deprived of a substantial legal right, and it is erroneous unless the defendant may be embarrassed in making some legitimate defense, if the state is permitted to proceed on both counts at the same time: *State v. Bailey*, 50 O. S. 636, IV Longsdorf's Notes, 520.

Where an indictment contains two counts each charging a separate and distinct offense, the defendant is not entitled to have the indictment, or either count quashed, but may move to compel the prosecutor to elect upon which he will proceed to trial: *State v. Mulford*, 12 O. D. (N.P.) 720.

Where there are nine counts in an indictment charging different grades of the same offense, and connected with the same transaction, the prosecutor will not be compelled to make any election before trial: *United States v. Dickinson*, Fed. Cases, 17,632, 2 McLean 322, 2 O. F. D. 93.

Where an indictment contains four counts, each containing a different description of the same transaction, it is not error to refuse to require the prosecutor to elect upon which count he will proceed to trial: *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472 [reversed by the supreme court on other grounds, *Cottell v. State*, 55 O. S. 666].

Where, in an indictment for larceny, a count is added under the provisions of G. C. § 13594, for receiving stolen property, and there is no averment that it is the same property, the state can not be required to elect upon which count it will proceed, where it appears from the description to be the same property, and no motion has been made to quash upon that specific count: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412.

Where the same offense is charged in several counts to meet variations of the evidence no election will be required: *State v. Frantereb*, 2 O. D. (N.P.) 493, 29 Bull. 129.

Where an indictment charges the defendant in one count as an aider and abettor of the murder, and in a second count as a joint principal, an election is not necessary, nor a verdict of guilty as charged invalid: *Hotelling v. State*, 3 O. C. C. 630, 2 O. C. D. 366.

An election is never required between separate counts charging the same crime as accomplished by different instrumentalities, although the circumstances as stated in the different counts be wholly irreconcilable: *Tabler v. State*, 34 O. S. 127, III Longsdorf's Notes, 704.

Where distinct offenses are charged in the counts of an indictment a motion to quash

is not proper, but a motion to require the prosecutor to elect may be sustained: *Myers v. State*, 4 O. C. C. 570, 2 O. C. D. 712.

When the state is not bound to elect upon which of various transactions prior to a specified date it would rely upon for conviction, see *Brown v. State*, 18 O. S. 496, II Longsdorf's Notes, 911; *Gravatt v. State*, 25 O. S. 162, III Longsdorf's Notes, 216; *Hayes v. State*, 14 O. C. C. (N.S.) 497 [affirmed, without opinion, *Hayes v. State*, 83 O. S. 490].

Where, upon the trial of a person over eighteen years of age charged with rape upon the person of a female under the age of sixteen years, the indictment, in the first count, charges the offense to have been committed with the consent of the female, and in a second count, forcibly and against her will, it is not error for the court to overrule a motion by defendant made at the conclusion of the state's evidence in chief to require the state to elect upon which count of the indictment it will rely for a conviction: *State v. Hensley*, 75 O. S. 255, IV Longsdorf's Notes, 1016.

Several charges of distinct sales of liquor contrary to statute may be made in one affidavit and a fine assessed for each offense, even though the aggregate of such fines exceeds the limit of punishment for one offense: *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488. See also INTOXICATING LIQUOR.

(b) Discretionary With Court.

The discretion of the trial court to require the state to elect between counts is judicial, and is reviewable if it may deprive the state of a substantial legal right: *State v. Bailey*, 50 O. S. 636, IV Longsdorf's Notes, 520.

If the different offenses arise out of separate transactions the court may require an election, but its action is discretionary and not reviewable: *Bailey v. State*, 4 O. S. 440, II Longsdorf's Notes, 113.

The question whether a prosecutor will be required to elect between different counts of an indictment is ordinarily one addressed to the discretion of the trial court, and its action thereon can not generally be assigned for error: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

When the prosecutor elected upon which indictment he desired to proceed, it was the imperative duty of the trial judge (defendant here) to enter the election upon the minutes of the court without waiting to pass upon the motion to quash: *State, ex rel., v. Dickson*, 14 O. C. C. (N.S.) 247.

3. On Evidence.

Upon a trial under an indictment containing but a single count, the prosecution should be so restricted as to prevent the case from going to the jury upon evidence of more than one transaction: *Stockwell v. State*, 27 O. S. 563, III Longsdorf's Notes, 376.

Where a single count charges an illegal sale of liquor, and the evidence tends to prove several distinct offenses, either of which would warrant conviction, the prosecutor must elect the particular transaction upon which he will rely before the accused is put upon his defense: *Stockwell v. State*, 27 O. S. 563, III Longsdorf's Notes, 376; *Stick v. State*, 3 O. C. C. (N.S.) 611, 13 O. C. D. 392; *Nickel v. State*, 6 O. C. C. 601, 3 O. C. D. 605.

Where a single count charges A with selling milk, from which the cream had been taken, to a cheese factory, with intent to defraud and the evidence shows several separate and distinct transactions, the prosecutor must elect upon which he will rely: *Bainbridge v. State*, 30 O. S. 264, III Longsdorf's Notes, 528.

Time of an offense is immaterial, and proof of a number of illegal sales of liquor prior to and about the time charged will warrant conviction, no election being demanded: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638.

Where an indictment for embezzlement charges a single act and there is proof as to several separate and distinct acts, the prosecutor must elect upon which he will rely: *Myers v. State*, 4 O. C. C. 570, 2 O. C. D. 712.

VII. JOINDER OF PERSONS.

Both offenses, committing the crime and abetting it, may be charged in the same indictment and in the same count thereof, and both offenders may be arraigned and tried thereon: *Hartshorn v. State*, 29 O. S. 635, III Longsdorf's Notes, 506.

The person charged with a crime and the person charged with procuring him to commit it were jointly indicted: *Allen v. State*, 10 O. S. 287, II Longsdorf's Notes, 436.

The person charged with a crime and the one who advised, aided and participated, may be jointly indicted: *Brown v. State*, 18 O. S. 496, II Longsdorf's Notes, 911.

An aider and abettor may be indicted jointly with the principal offender or separately as for a substantive offense: *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

Where one count charges murder jointly with another, and a second count charges

aiding and abetting the other, the prosecutor need not elect, for a general verdict as charged would be sufficient: *Hotelling v. State*, 3 O. C. C. 630, 2 O. C. D. 366.

Persons may be jointly indicted for having possession of counterfeits. The offense is not in its nature several, for the possession may be joint: *Hess v. State*, 5 O. S., I Longsdorf's Notes, 241.

A count charging two with burglary joined with a count charging one with burglary and the other with aiding and abetting was sustained by the trial court: *Methard v. State*, 19 O. S. 363, II Longsdorf's Notes, 951.

An indictment against three for sodomy on another is not bad on the ground that all could not participate in the same offense, for two could be accomplices and the assault could be joint, but only one act should be proved: *Foster v. State*, 1 O. C. C. 467, 1 O. C. D. 261. See also SODOMY.

Where two persons are jointly indicted for the same offense, neither the court nor the jury engaged in the trial of the second defendant is concluded by the fact that a verdict of not guilty was returned in the case of the first defendant: *Studer v. State*, 9 O. C. C. (N.S.) 185, 19 O. C. D. 33 [affirmed, without opinion, *Studer v. State*, 74 O. S. 519].

Where separate trials are awarded to parties jointly indicted, each is competent witness for the state upon the trial of the other: *Mitchell v. State*, 21 O. C. C. 24, 11 O. C. D. 446 [following *Brown v. State*, 18 O. S. 496, II Longsdorf's Notes, 911].

Two or more corporations charged with conspiracy against trade are properly joined in one information: *State v. Oil Co.*, 51 Bull. 563.

VIII. ATTACKING INDICTMENT.

A. MOTION TO QUASH.

1. Statute and Construction.

G. C., § 13621, provides that a motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. A motion to quash an indictment should not be sustained unless the defect or imperfection complained of is of such nature as to tend to the prejudice of the substantial rights of the defendant upon the merits of the case: *Fisher v. State*, 84 O. S. 360.

A motion to quash an indictment addresses itself to the sound discretion of the court, and is never granted except in very clear cases; the refusal to grant a motion to quash can not be regarded as a final decision of the question raised thereby, the point is one

which, if well taken, would be available on demurrer or in arrest of judgment: *In re Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369; *State v. Henkel*, 11 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 735.

The overruling of a motion to quash an indictment will not be regarded as a final decision of the question presented thereby, when the point is one that, if well taken, would be available on demurrer or upon motion in arrest of judgment: *Picket v. State*, 22 O. S. 405, III Longsdorf's Notes, 87; *Fisher v. State*, 84 O. S. 360 [approving and following *In re Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369].

Defects in the form of an information, or in the manner in which an offense is charged, must be reached by motion to quash. Objections which are ground for such motion must be taken advantage of in the manner prescribed, or they will be deemed waived. After plea, verdict, and judgment, they can not be raised for the first time on error: *Bartlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

"Pleadings," as used in G. C., § 13751, authorizing the review in the supreme court of errors of law "appearing in the pleadings" were held not to embrace motions to quash, but to include the indictment and pleas in abatement as well as in bar: *Wagner v. State*, 42 O. S. 537, IV Longsdorf's Notes, 129.

Where several defendants are jointly indicted for blackmail, a motion to quash is filed by one of them, is not available to the others on error: *Jones v. State*, 14 O. C. C. 363, 7 O. C. D. 724.

Where there are two indictments for the same offense both may be attacked by motions to quash, and the prosecutor can not insist upon the right to elect which indictment the accused may attack: *State v. Coe*, 11 O. N. P. (N.S.) 305, 21 O. D. (N.P.) 535.

The fact that previous indictments have not been disposed of does not afford ground for the quashing of an indictment: *State v. Williams*, 6 O. N. P. (N.S.) 406, 18 O. D. (N.P.) 794 [affirmed, on other points, *Williams v. State*, 77 O. S. 468, IV Longsdorf's Notes, 1034].

A motion to quash an indictment may be made when there is a defect apparent upon the face of the record: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

A motion to quash can not be allowed after demurrer: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

The statutory definition of a motion to quash not only includes defect in form or manner of stating a crime in the indictment, but also the substance of the crime therein,

and this is true notwithstanding that the same defect in substance may be reached by demurrer to the indictment. The accused not only thus has the choice of two remedies, but may use both, each in turn if necessary: *State v. Coe*, 11 O. N. P. (N.S.) 306, 21 O. D. (N.P.) 535.

2. Defects Not Apparent on Record.

(a) Selection of Grand Jury.

Defects in the preliminary steps taken in selecting a grand jury are not proper grounds for a motion to quash, but must be availed of by challenge: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813; *Blaney v. State*, 17 O. C. C. 486, 9 O. C. D. 616.

Any substantial departure from the provisions of the statutes relating to the selection, return, and impaneling of the grand jury is good cause for quashing an indictment found by it: *Stevens v. State*, 3 O. S. 453, II Longsdorf's Notes, 47.

If record does not show impaneling of grand jury, a motion to quash will lie: *Young v. State*, 23 O. S. 577, III Longsdorf's Notes, 145.

A motion to quash will not lie where, after a grand jury has been sworn, a member is discharged on account of sickness and another person having the legal qualifications is sworn in his stead: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813.

An indictment returned by a grand jury impaneled and sworn on Labor Day, is not on that account invalid; and even if it were invalid a motion to quash is not the proper method of attack: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813.

An indictment presented by a new grand jury, selected and impaneled as provided for in G. C., § 13568, without any objection from any one, will not be quashed, or a verdict of guilty set aside solely on this ground: *McCarthy v. State*, 5 O. C. C. 627, 3 O. C. D. 306 [affirmed, without opinion, *McCarthy v. State*, 27 Bull. 332].

(b) Unconstitutionality.

The question of the constitutionality of a penal statute is properly raised by a demurrer, and not by a motion to quash: *State v. Bateman*, 7 O. N. P. 487, 10 O. D. (N.P.) 68.

(c) Misjoinder.

Where the indictment charges several separate and distinct offenses, a motion to quash will not lie, but the proper remedy is a motion to compel the prosecutor to elect: *Myers v. State*, 4 O. C. C. 570, 2 O. C. D. 712.

(d) Jurisdiction.

A judge of the court of common pleas has authority to hold court in any county in his district, though not designated by the judges thereof; and such authority can not be attacked by a motion to quash: *State v. Thomas*, 61 O. S. 444, IV Longsdorf's Notes, 813.

Where a mayor has final jurisdiction, a motion to quash will not lie: *Schlagel v. State*, 3 O. N. P. (N.S.) 429, 16 O. D. (N.P.) 295.

3. Defects in Form.

An objection to an indictment that it is not signed by the prosecuting attorney, if such omission constitutes a defect at all, is waived by pleading the general issue without having first moved to quash: *Rifle-maker v. State*, 25 O. S. 395, III Longsdorf's Notes, 246.

An objection to an indictment on the ground that it is not endorsed as required by G. C., § 13572, should be made by a motion to quash; and when the accused pleads guilty without making such motion, the objection is waived: *Picket v. State*, 22 O. S. 405, III Longsdorf's Notes, 87.

An objection that the record does not show that an indictment was "presented by the foreman to the court," in accordance with G. C., § 13575, is waived by the plea of not guilty, where there was no motion to quash: *Kerr v. State*, 36 O. S. 614, III Longsdorf's Notes, 878.

Where no affidavit has been filed, a motion to quash the information lies: *Weisbrodt v. State*, 50 O. S. 192, IV Longsdorf's Notes, 494.

An indictment need not be signed by the prosecuting attorney: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305.

The failure of the foreman of a grand jury to describe himself as such in indorsing an indictment is not sufficient ground for sustaining a motion to quash: *Whiting v. State*, 48 O. S. 220, IV Longsdorf's Notes, 412.

A motion to quash does not lie where the foreman of the grand jury neglected to sign his full name: *State v. Henry*, 9 O. N. P. (N.S.) 254, 21 O. D. (N.P.) 701.

Signature of the foreman of the grand jury in the place where the clerk should sign, so that he appears as clerk and not as foreman, is not ground to quash: *State v. Lewis*, 7 O. N. P. 533, 5 O. D. (N.P.) 552.

4. Defects in Charging Offense.

(a) Insufficiency.

An indictment is fatally defective if it does not charge the defendant with the of-

fense created by the legislature, and such defect may be taken advantage of either by motion to quash or demurrer: *State v. Yablon*, 11 Dec. Rep. 569, 27 Bull. 324.

Where it is necessary to allege a criminal intent, if the intent is not charged with clearness, the remedy is by motion to quash and not by a demurrer: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478; *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29; *State v. Pohl*, 13 O. D. (N.P.) 386.

Where an intent must be specifically charged, if it is not charged with sufficient clearness a motion to quash is the proper remedy, but if it is not charged at all a demurrer is the proper remedy: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

An indictment under G. C., § 13105, charging the defendant with having unlawfully, knowingly and feloniously made out and presented for payment and certified as correct to the auditor of a municipal corporation, a false and fraudulent payroll against said corporation for the purpose of procuring an allowance of the same by said auditor and said corporation, and for the purpose of procuring an order for payment of the same out of the treasury of such corporation, with intent to defraud, sufficiently charges an offense under said section, and a motion to quash the indictment because it does not show authority in the auditor to allow or pay the payroll should be overruled: *State v. Voute*, 68 O. S. 274, IV Longsdorf's Notes, 943.

A motion to quash will not be sustained on the ground of insufficiency where an indictment under G. C., § 12437, for burglary fails to allege the particular felony intended to be committed by the one breaking and entering: *State v. Groves*, 80 O. S. 351, IV Longsdorf's Notes, 1052.

A motion to quash will not lie because an indictment charging the unlawful sale of liquor within two miles of an agricultural fair fails to charge knowledge on the part of the defendant: *State v. Fromer*, 7 O. N. P. 172, 6 O. D. (N.P.) 374.

(b) Indefiniteness.

Indefiniteness in the averments of an indictment should be taken advantage of by a motion to quash and not by demurrer: *State v. Messenger*, 63 O. S. 398, IV Longsdorf's Notes, 859; *State v. Morrill*, 5 O. N. P. 133, 7 O. D. (N.P.) 52.

A motion to quash is the proper procedure to point out the defects of duplicity and indefiniteness in an indictment, and failure to file such motion and entry of a general plea to the indictment is a waiver of those

defects: *Arnsman v. State*, 11 O. C. C. (N. S.) 113, 20 O. C. D. 445.

A motion to quash reaches not only the form or manner of stating a crime in the indictment, but also the substance of the crime; and this is true even though the same defect in substance may be reached by demurrer: *State v. Cox*, 11 O. N. P. (N. S.) 305, 21 O. D. (N.P.) 535 [exception sustained in *State v. Cox*, 87 O. S. 313].

(c) Duplicity.

A motion to quash is the proper procedure to point out the defects of duplicity and indefiniteness in an indictment: *Arnsman v. State*, 11 O. C. C. (N.S.) 113, 20 O. C. D. 445.

Duplicity in the indictment or affidavit is not ground to quash if the state has elected between the charges: *Patterson v. State*, 1 Dayton Term Rep. (Iddings) 129.

A motion to quash an indictment, which, with other proper averments, charges that three defendants unlawfully made an assault upon another person, and did then and there unlawfully have carnal copulation against nature with such person, will not lie for uncertainty, repugnancy and duplicity: *Foster v. State*, 1 O. C. C. 467, 1 O. C. D. 261.

A charge in an indictment that the defendant with two other defendants, then and there held a pistol, "discharged and shot it off against and upon the deceased," is not ground for a motion to quash: *Jones v. State*, 14 O. C. C. 35, 7 O. C. D. 305.

For duplicity, see *infra*, VI, C.

B. PLEA IN ABATEMENT.

1. Form.

G. C., § 13631, requires a plea in abatement to be in writing, signed by the accused, and sworn to before a competent officer.

The word "pleadings" as used in G. C., § 13751, embraced a plea in abatement as well as in bar, but not a motion to quash: *Wagner v. State*, 42 O. S. 537, IV Longsdorf's Notes, 129.

A plea in abatement to an indictment, while not required to be worded with the strictest technical and verbal accuracy, yet the matter pleaded therein must be clearly and distinctly stated, and must embrace facts as distinguished from conclusions: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

2. Construction.

Pleas in abatement being dilatory pleas, are not favored by the law and must be strictly construed: *State v. Stichtenoth*, 8 O. N. P. (N.S.) 297, 19 O. D. (N.P.) 623.

3. Grounds.

(a) In general.

G. C., § 13622, provides that a plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.

A plea in abatement may be made when there is a defect in the record which is shown by facts extraneous thereto: *Lindsey v. State*, 69 O. S. 215, IV Longsdorf's Notes, 957.

Errors in the charge to the grand jury can not be reached by a plea in abatement: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed on other grounds *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640].

Neither absence from the jurisdiction at the time the investigation was made by the grand jury, nor ignorance that an investigation was in progress, afford ground for a plea in abatement. Persons indicted under such circumstances must vindicate themselves before a petit jury: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672 [affirmed, without opinion, *State v. Gibbs*, 82 O. S. 457].

If the witnesses were in fact sworn before being examined by the grand jury, the vital provision of G. C., § 13564, is complied with, and the court will not say that the indictment was illegally found because a certificate of the oath was not made and presented to the foreman: *Duke v. State*, 20 O. S. 225, II Longsdorf's Notes, 991.

A plea in abatement does not lie to an indictment for murder in the first degree, where based on the ground that the judges of the common pleas court in appointing the jury commission failed to designate the number of names which the commission should place in the jury wheel of persons to serve as grand and petit jurors during the current year: *State v. Cleveland*, 9 O. L. R. 203.

(b) Misnomer.

G. C., § 13626, provides that when a misnomer is pleaded by the defendant he must set out his true name.

A plea in abatement is the proper way to reach an indictment for misnomer of the defendant: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

Where, on an indictment for grand larceny presented against H L a person was arraigned, and pleaded in abatement that his name is not H L but W H L and the plea was found to be true, and the name thus disclosed was entered on the minutes of the court, and the trial and further proceedings were had in pursuance of G. C., § 13628, it was held that this statute is not in contravention of Art. I,

§ 10, of the constitution: *Laure v. State*, 19 O. S. 43, II Longsdorf's Notes, 925.

At common law (and by virtue of G. C., § 13626), a party may plead in abatement that he is not indicted by his true name, but he must give his true name in such plea: *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 553.

Prior to the enactment of our code of civil procedure where the defendant pleads in abatement his misnomer, alleging that he was baptized and has always been known by another name, evidence that he has been known by another name will not sustain the plea: *Davenport v. James*, 1 Dec. Rep. 18, 1 W. L. J. 160.

Where the foreman of the grand jury has not signed the indictment with his full name, a plea in abatement, and not a motion to quash, is proper: *State v. Henry*, 9 O. N. P. (N.S.) 254, 21 O. D. (N.P.) 701.

A plea of misnomer if sustained does not entitle a defendant to a discharge: *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 552 [affirmed, without opinion, *Miller v. State*, 55 O. S. 685].

(c) Defects in Grand Jury.

(aa) Irregular Selection.

Mere irregularities in selecting and drawing grand jurors, which do not relate to or affect their personal qualifications as such, must be taken advantage of, if at all, by challenge for cause, and can not be so pleaded in abatement: *Huling v. State*, 17 O. S. 583, II Longsdorf's Notes, 851; *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242.

Defects in selecting, drawing and summoning a jury, either grand or petit, is a ground of challenge to the whole array, or of individual members, but is not available on a plea in abatement: *Blaney v. State*, 17 O. C. C. 486, 9 O. C. D. 616.

The legality of the selecting and drawing of a grand jury can not be raised by a plea in abatement to the indictment: *State v. Deiter*, 81 O. S. 504 [affirming *Dieter v. State*, 12 O. C. C. (N.S.) 97, 21 O. C. D. 299].

Inquiry by the court or prosecuting attorney as to the qualification of grand jurors is not required, but does not prejudice the rights of the accused, who under a plea in abatement may show disqualification if any exists and thus be relieved from the indictment: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672 [affirmed, without opinion, *State v. Gibbs*, 82 O. S. 457].

The objection of a bias, on supposed interest, etc., on the part of a grand juror can not be taken advantage of by plea in abatement

after an indictment is returned: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638; *State v. Easter*, 30 O. S. 542, III Longsdorf's Notes, 542; *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672.

Mere irregularities in the selection of grand jurors must be taken advantage of, if at all, by challenge for cause, and can not be pleaded in abatement: *Geiger v. State*, 2 O. C. C. (N.S.) 174, 15 O. C. D. 742.

Mere irregularities in selecting and drawing grand juries, which do not affect the qualifications of the jurors, must be objected to by challenge for cause, and can not be made grounds to quash the indictment or be pleaded in abatement: *Lindsay v. State*, 4 O. C. C. (N.S.) 409, 14 O. C. D. 1.

The want of record of the drawing and selecting of the grand jury can not be taken advantage of by plea in abatement: *Blair v. State*, 5 O. C. C. 496, 3 O. C. D. 242.

(bb) Personal Disqualifications.

It is a good plea in abatement in a criminal case that one or more of the grand jurors who found the indictment had not the legal qualifications of grand jurors: *Huling v. State*, 17 O. S. 583, II Longsdorf's Notes, 851.

It is not a good plea to an indictment for murder, that a member of the grand jury which found such indictment, was a nephew of the person who was murdered: *State v. Easter*, 30 O. S. 542, III Longsdorf's Notes, 542.

It is not a good plea that one of the grand jurors was a justice of the peace; G. C., § 11444, exempting public officers from service as jurors, merely extends to them a privilege and does not impose a disqualification: *Glas-singer v. State*, 24 O. S. 206, III Longsdorf's Notes, 169.

That a grand juror has served on a petit jury within the two years preceding does not render invalid an indictment found by such grand jury: *State v. Elson*, 45 O. S. 648, IV Longsdorf's Notes, 301.

That one of the grand jurors has served as a talesman within twelve months next preceding the term at which the indictment is found is not a good plea in abatement: *Roth v. State*, 3 O. C. C. 59, 2 O. C. D. 33.

That a person has subscribed funds for the purpose of legitimately suppressing crime, does not disqualify him from sitting on the grand jury: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638.

The fact that township trustees caused one of their number to be returned as grand juror does not disqualify him from serving as such: *Koch v. State*, 32 O. S. 353, III Longsdorf's Notes, 638.

The fact that one of the grand jurors was the husband of the prosecuting witness; nor that other members of the grand jury were active outside of the grand jury in seeking evidence to secure an indictment; nor that members of the grand jury were personal and political enemies and business rivals of the accused; nor that some of the grand jurors had before being sworn expressed hostility to the accused and declared him guilty; nor that unsworn statements and publications were considered by the grand jury, does not constitute grounds for quashing an indictment on a plea in abatement: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672 [affirmed, without opinion, *State v. Gibbs*, 82 O. S. 457].

A plea that two of the grand jurors were wrongfully excused by the court without lawful reasons will not be considered on error unless it affirmatively appears that the court had no proper reasons: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed, on other grounds, *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640].

To plead that certain of the grand jurors were disqualified, but not stating how, is bad as a legal conclusion: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed, on other grounds, *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640].

(cc) Miscellaneous.

A plea, impeaching the conduct of a grand jury, and alleging facts in contradiction to the journal of records, can not be maintained: *Turk v. State*, 7 O. (pt. 2) 240, I Longsdorf's Notes, 404.

The mere presence of the prosecuting attorney or his assistant in the same room with the grand jury while the grand jurors are deliberating or casting their votes, is not sufficient to sustain a plea in abatement and discharge an indictment, in the absence of any proof as to misconduct on the part of these officers which resulted in prejudice toward the accused, or in the finding of an indictment which would not otherwise have been found: *State v. Stichtenoth*, 8 O. N. P. (N.S.) 297, 19 O. D. (N.P.) 623.

The presence of an assistant to the official stenographer in the grand jury room during the taking of the testimony in a particular case does not invalidate an indictment returned in that case, where it does not appear that the said assistant participated in the discussion, or offered any comment, or was present at the time the vote was taken, or in any other way prejudiced the rights of the defendant: *State v. Metzger*, 10 O. N. P. (N.S.) 97, 21 O. D. (N.P.) 72.

It is the duty of the court to call the attention of the grand jury to matters requiring investigation, and if a mistake were made in that respect, it would not afford ground for a plea in abatement: *State v. Laning*, 7 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 672 [affirmed, without opinion, *State v. Gibbs*, 82 O. S. 457].

(d) *Insufficiency.*

The insufficiency of an indictment to charge a crime must be raised by motion to quash or by demurrer; it can not be raised by a plea in abatement: *Stahl v. State*, 11 O. C. C. 23, 5 O. C. D. 29 [reversed, on other grounds, *Knight v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640].

4. *Insufficient Plea.*

If a special plea to an indictment is determined to be insufficient, the judgment of the court should be *respondet ouster*; as in this state the court can not proceed to final judgment in a criminal case without either a plea of guilty or a finding by a jury: *Hirn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

C. DEMURRER.

1. *Grounds.*

(a) *In general.*

G. C., § 13623, provides that the accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when intent is not alleged and proof thereof is necessary to make out the offense charged.

A demurrer is the proper method to test questions of law raised by a plea in bar: *Beamer v. State*, 10 O. C. C. (N.S.) 131, 19 O. C. D. 578.

(b) *No Offense Charged.*

Where the indictment does not allege that the offense was committed in the county where the indictment is found, a demurrer should be sustained: *Stahl v. State*, 54 O. S. 365, IV Longsdorf's Notes, 640.

The proper method of raising the question of the constitutionality of a statute is by demurrer and not by a motion to quash: *State v. Bateman*, 7 O. N. P. 487, 10 O. D. (N.P.) 68.

The accused may demur to an information where the acts stated therein do not constitute an offense punishable by the laws of this state: *Davis v. State*, 32 O. S. 24, III Longsdorf's Notes, 618.

If any necessary ingredient of the offense be omitted, the defendant may demur, move

in arrest, or bring error: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

An indictment is fatally defective if it does not charge the defendant with the offense created by the legislature, and such defect may be taken advantage of either by motion to quash or demurrer: *State v. Yablon*, 11 Dec. Rep. 569, 27 Bull. 324.

Indefiniteness in the averments of an indictment should be taken advantage of by a motion to quash and not by a demurrer: *State v. Messenger*, 63 O. S. 398, IV Longsdorf's Notes, 859.

Demurrer lies to an indictment for perjury on the part of a witness who falsely stated before the grand jury that he did not know the identity of the person who handed him a bottle of beer, when there is no allegation in the indictment that the alleged offense occurred in a district in which it was contrary to law to sell or give away beer or other intoxicating liquor: *State v. Hill*, 9 O. L. R. 272.

See also the specific crimes.

(c) *Defect as to Intent.*

Where an intent must be specifically charged, if it is not charged with sufficient clearness a motion to quash is the proper remedy, but if it is not charged at all a demurrer is the proper remedy: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

2. *Demurrer to Evidence.*

The practice of demurring to the evidence, does not seem to be sanctioned by the criminal code, and the better practice is, to move the court to exclude the evidence, or instruct the jury that it is insufficient: *Baker v. State*, 31 O. S. 314, III Longsdorf's Notes, 586.

3. *Time of Filing.*

A demurrer or a motion in arrest of judgment may be filed after a motion to quash has been overruled: *In re Bushnell*, 8 O. S. 599, II Longsdorf's Notes, 369.

4. *Effect.*

G. C., § 13625, provides that a demurrer waives all defects which may be excepted to by a motion to quash or plea in abatement.

Where an indictment charges no offense, the defendant may avail himself thereof, although neither a demurrer or a motion in arrest was filed: *Geiger v. State*, 5 O. C. C. 283, 3 O. C. D. 141.

Fatal defects in an indictment are not waived by not demurring or moving in arrest, but are available on error: *Davis v. State*,

19 O. S. 270, II Longsdorf's Notes, 945; *Carper v. State*, 27 O. S. 572, III Longsdorf's Notes, 377.

It is not correct practice to plead specially to an indictment a matter which is competent and proper by way of defense under the plea of not guilty; and if the state demur generally, or take issue on any such special plea, the irregularity is thereby waived: *Hirn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

A demurrer filed before a motion to quash or a plea in abatement, is presumed to admit the facts as stated in an indictment, and such motion or plea will not be allowed thereafter: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

Where two are jointly indicted, and one of them files a motion to quash the indictment, while the other files a demurrer to the indictment, the defendant who had filed the demurrer can not, on error, take advantage of the error of the court below in overruling the motion to quash filed by his co-defendant: *Jones v. State*, 14 O. C. C. 363, 7 O. C. D. 724.

In criminal prosecutions the submission of questions of law on demurrer is not to be considered presumptive either of innocence or guilt: *State v. Bell*, 6 O. N. P. (N.S.) 475, 16 O. D. (N.P.) 602.

If a demurrer is sustained the prisoner should be discharged: *Winnett v. State*, 18 O. C. C. 515, 10 O. C. D. 245 [affirmed, without opinion, *State v. Winnett*, 62 O. S. 650].

IX. AMENDMENT.

The caption of an indictment found at the term of the commission of the crime may be amended after conviction so as to show that it was found after the day of the crime: *State v. Smith*, T. 225.

Permitting the prosecuting attorney to insert the date of the commencement of the term of court at which the indictment was found is an immaterial amendment and does not affect the validity of the indictment: *Smith v. State*, 4 Dec. Rep. 48, Clev. L. Rec. 62.

See also AMENDMENT.

X. WAIVER OF DEFECTS.

A. STATUTORY PROVISION.

G. C., § 13625, provides that the accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment, or pleading in bar or the general issue.

B. WAIVER OF MOTION TO QUASH.

(1) In general.

A demurrer is presumed to admit the facts as stated in an indictment, and after it is filed neither a motion to quash nor a plea in abatement will lie: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

Where a plea of not guilty was entered, and the record does not show that it was subsequently withdrawn, a motion to quash can not thereafter be made: *Moore v. State*, 13 O. C. C. 10, 7 O. C. D. 70.

A plea of guilty waives all defects that could have been objected to by motion to quash or plea in abatement, and only those subject to motion in arrest of judgment can be interposed: *Carper v. State*, 27 O. S. 572, III Longsdorf's Notes, 377.

After the defendant has pleaded to the indictment and the trial of the cause is begun, it is too late to raise objections to any faults in the indictment amounting to mere defects in form or in the manner of charging the offense: *Newberry v. State*, 15 O. C. C. 208, 7 O. C. D. 626.

No leave to withdraw a plea of not guilty will be given in order to attack the indictment for irregularity. That may be done by motion in arrest: *State v. Decker*, 1 Dec. Rep. 527, 10 W. L. J. 328.

Defects in the form of an indictment or in the manner in which an offense is charged must be reached by a motion to quash or they will be deemed waived. After plea, verdict and judgment they can not be raised for the first time on error: *Bartlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

Pleading the general issue waives all defects which may be excepted to by motion to quash, but does not waive the right of the accused to move that the prosecutor elect the count upon which he will go to trial: *State v. Mulford*, 12 O. D. (N.P.) 720.

(2) Defects in Form.

An indictment designating the accused by initial letters, as a baptismal name, is good after verdict: *Smith v. State*, 8 O. 294, I Longsdorf's Notes, 436.

An objection that an indictment is not endorsed as required by G. C., § 13572, should be made by a motion to quash; and where the accused without making such motion pleads guilty the objection is waived: *Pickett v. State*, 22 O. S. 405, III Longsdorf's Notes, 87.

An objection that the record fails to show the impaneling of the grand jury can not be made after the defendant has been convicted and sentenced. Such objection should be made by a motion to quash before pleading

to the indictment: *Young v. State*, 23 O. S. 577, III Longsdorf's Notes, 145.

An objection that an indictment is not properly signed by the prosecuting attorney of the county, if such omission constitutes a defect at all, is waived by pleading the general issue, without having first moved to quash: *Rifemaker v. State*, 25 O. S. 395, III Longsdorf's Notes, 246.

An objection that it does not appear in the record that the indictment found by the grand jury was "presented by the foreman to the court," in accordance with G. C., § 13575, is waived by the plea of not guilty, where there was no motion to quash: *Kerr v. State*, 36 O. S. 614, III Longsdorf's Notes, 378.

An objection that the copy of the indictment served on the defendant was not a true copy must be made before going to trial: *Case v. State*, 12 O. C. C. 158, 5 O. C. D. 194.

(3) Defects in Charging Offense.

Indefiniteness is properly attacked by a motion to quash and is waived by demurrer: *State v. Messenger*, 63 O. S. 398, IV Longsdorf's Notes, 859.

Filing a demurrer waives the right to object on the ground of duplicity, as a motion to quash is the proper remedy: *Jones v. State*, 14 O. C. C. 363, 7 O. C. D. 716.

Duplicity and indefiniteness must be attacked by a motion to quash. An entry of a general plea to the indictment is a waiver of those defects: *Arnsman v. State*, 11 O. C. C. (N.S.) 113, 20 O. C. D. 445.

An indictment for burglary which does not properly describe the building may be attacked by a motion to quash, but where the accused pleads "not guilty" he waives such defect: *State v. Pohl*, 13 O. D. (N.P.) 386.

C. WAIVER OF PLEA IN ABATEMENT.

G. C., § 13625, provides that defects that may be taken advantage of by plea in abatement are waived by demurrer or pleading in bar or the general issue.

By filing a demurrer the right to file a plea in abatement is waived: *Harlow & Krebs v. State*, 1 O. N. P. (N.S.) 323.

One brought to this state by extradition proceedings from another state can not be tried for a different crime than the one for which he was extradited unless he voluntarily waives his privilege. The privilege is not waived by failure to plead it in abatement of the indictment for such different crime, nor by entering a plea of not guilty thereto, when, before the trial, the accused asserts his privilege and objects to the trial on that

ground: *In re McKnight*, 48 O. S. 588, IV Longsdorf's Notes, 431.

It is not correct practice to plead specially to an indictment a matter which is competent and proper by way of defense under the plea of not guilty; and if the state demurs generally, or take issue on any such special plea, the irregularity is thereby waived: *Hirn v. State*, 1 O. S. 15, I Longsdorf's Notes, 931.

INDIGENT.

See PAUPERS, POOR AND POOR-LAWS.

INDIGENT PRISONER.

For the assignment by a court of counsel for indigent prisoner, see ATTORNEY AND CLIENT; TRIAL.

For the discharge of an indigent prisoner by an auditor, see FINES.

Counsel assigned to defend an indigent prisoner who are not satisfied with the amount of fees allowed by the county commissioners have no right to appeal to the court of common pleas: *Commissioners v. Ranney*, 13 O. S. 388, II Longsdorf's Notes, 614.

Counsel assigned to defend indigent prisoners are not entitled to compensation out of the county treasury, for services rendered under such appointment, except in cases where the person defended was indicted for a capital offense, or an offense punishable by imprisonment in the penitentiary for life: *State, ex rel., v. Commissioners*, 26 O. S. 599, III Longsdorf's Notes, 334.

When an attorney for a defendant abandons his client on the day of trial, and the defendant can not give bond and secure a lawyer to look after his interests until his paid attorney has been found, it is proper for the court to appoint counsel for the defendant, if he has no means to employ a lawyer: *State, ex rel., v. Shay*, 3 O. N. P. (N.S.) 657, 16 O. D. (N.P.) 446.

Under the provisions of G. C., § 13618, the amount of compensation to be paid by the county to attorneys for defending indigent prisoners, under appointment by the trial court, is such sum or sums as the commissioners of such county, in the exercise of their discretion, may allow, subject to the limitations mentioned in said section, although the trial court may approve a different amount: *Long v. Commissioners*, 75 O. S. 539, IV Longsdorf's Notes, 1019.

The allowance of compensation for defending indigent prisoners resting in the discretion of the county commissioners, subject to the limitations specified in G. C., § 13618, no right of appeal from their determination to the court of common pleas exists in favor

of the attorney or attorneys who may be dissatisfied with such allowance: *Long v. Commissioners*, 75 O. S. 539, IV Longsdorf's Notes, 1019.

The action of county commissioners upon a claim by an attorney for defending an indigent prisoner in murder cases is a matter of judicial determination as to the facts of its legality, and therefore appeal and not mandamus is the proper remedy to review an attempt on their part to diminish the amount of compensation allowed by the trial judge: *Long v. Commissioners*, 16 O. D. (N.P.) 513.

The determination of the court in fixing the compensation of attorneys assigned to defend indigent prisoners in murder cases is not subject to review by the county commissioners; their duties with reference thereto are confined to ascertaining the fact of such assignment, whether the case was one within the statutory class, whether the amount claimed is the amount certified by the court, and whether the transaction is free from fraud; if these things are determined in favor of the claim, they must allow the same: *Long v. Commissioners*, 16 O. D. (N.P.) 513.

Under G. C., § 13618, the court is authorized to fix the compensation of attorneys assigned to defend indigent prisoners in murder cases: *Long v. Commissioners*, 16 O. D. (N.P.) 513.

G. C., § 2576, makes the county auditor a commissioner of insolvents to hear applications for discharge preferred by insolvent convicts. Under this section the auditor exercises his discretion and acts upon his own ideas of propriety; and upon his own knowledge, derived from personal inquiry, common rumor or otherwise. He must be clearly convinced that the public can gain nothing by prolonging the imprisonment. The convict can not insist upon a hearing before the auditor, or compel him to investigate the question of present or prospective insolvency and the action of the auditor can not be judicially reviewed: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780.

Where an indigent convict is sentenced to remain in the county jail until fine and costs are paid, the refusal of the county auditor to order a discharge from imprisonment in the exercise of the power conferred upon him by G. C., § 2576, does not furnish a legal ground for discharge of the convict upon *habeas corpus*: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780 [not following *In re Moore*, 14 O. C. C. 237, 7 O. C. D. 575].

It is the duty of the auditor, in G. C., § 2576, when it is made to appear that a person imprisoned until a fine and costs are paid is unable to pay, to at once discharge such person; and he is not excused from such duty on the grounds "that the petitioner had

friends or relations who are able and should be willing to help him in the emergency": *In re Mullaney*, 8 O. N. P. 40, 10 O. D. (N.P.) 419. See also SENTENCE.

INDIGNITIES.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

INDIRECT EVIDENCE.

See EVIDENCE.

INDIRECT TAXATION.

See TAXATION.

INDISPENSABLE PARTIES.

See PARTIES.

INDISPUTABLE PRESUMPTIONS.

See PRESUMPTIONS.

INDIVIDUAL BANKER.

See BANKS AND BANKING.

INDIVIDUAL CONTRACTS.

See CONTRACTS.

INDIVIDUAL LIABILITY.

See CORPORATIONS; PARTNERSHIP; JOINT AND SEVERAL LIABILITY.

INDORSEE.

See NEGOTIABLE INSTRUMENTS.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS.

INDORSERS.

For indorsers, see NEGOTIABLE INSTRUMENTS.

For the purpose of fixing the liability of indorsers of commercial paper payable at a bank, demand of payment may be made at the bank on the last day of grace at any time within banking hours, and it is not necessary that such demand be made at the

close of banking hours: *Evans v. Lumber Co.*, 21 O. C. C. 80, 11 O. C. D. 543 [dissenting from *Bank v. McGuire*, 33 O. S. 295, III Longsdorf's Notes, 674].

INDUCEMENT.

See INDICTMENT; PLEADINGS.

INDUCING BREACH OF CONTRACTS.

See CONTRACTS.

INDUCING CRIME.

See AIDERS, ABETTERS AND ACCOMPLICES.

INDUSTRIAL HOME.

See GIRLS' INDUSTRIAL HOME.

INDUSTRIAL POLICIES.

See INSURANCE.

INDUSTRIAL SCHOOLS.

See BOYS' INDUSTRIAL SCHOOL; GIRLS' INDUSTRIAL HOME.

INEBRIATE.

See INTOXICATION.

INEFFECTUAL APPEAL.

See APPEALS.

INELIGIBLE CANDIDATES.

See ELECTIONS, POLITICAL; OFFICE.

INEVITABLE ACCIDENT.

For inevitable accident as discharge of contract, see CONTRACTS.

For questions of negligence, see NEGLIGENCE.

INEXPERIENCED EMPLOYEES.

See MASTER AND SERVANT; NEGLIGENCE.

INFAMOUS CRIME.

For effect of conviction of infamous crime, see WITNESSES.

INFANTS.

Scope Note.—Includes rights and liabilities of infants and legal proceedings affecting them. Excludes testamentary capacity; sale of liquor to infants; adoption of infants.

Cross References.

For offenses against infants, see DELINQUENCY; INTOXICATING LIQUOR; RAPE.

For the adoption of infants, see ADOPTION.

For the commitment of infants to reformatory institutions, see CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

For prosecutions for juvenile delinquency, see COURTS.

For the custody and control of infants by parents, see DIVORCE, ALIMONY AND CUSTODY OF CHILDREN; PARENT AND CHILD.

For personal injuries to infants, see also MASTER AND SERVANT; NEGLIGENCE.

For the capacity of an infant to make a will, see WILLS, LEGACIES AND DEVISES.

ANALYTICAL OUTLINE.

- I. Definition, 8763.
- II. Age of Majority, 8763.
- III. Infants as Witnesses, 8764.
- IV. Citizenship, 8765.
- V. Rights and Liabilities of Infants, 8765.
 - A. Change of domicile, 8765.
 - B. Service of summons, 8765.
 - C. Contracts and conveyances, 8766.
 1. Power of attorney, 8766.

2. Acts which law requires, 8766.
 - a. In general, 8766.
 - b. Necessaries, 8767.
3. Other acts, 8767.
 - a. Validity, 8767.
 - b. Ratification, 8769.
 - c. Disaffirmance, 8770.
 - aa. Necessity, 8770.
 - bb. Personal right, 8770.
 - cc. What constitutes, 8770.
 - dd. Not to be partial, 8772.
 - ee. Recovery by infant, 8772.
 - ff. Restoration of property, 8772.
 - gg. Time to disaffirm, 8773.
 - d. Estoppel, 8774.
- D. *Torts*, 8774.
- E. *Crimes*, 8775.
- VI. **Rights and Liabilities of Parents**, 8776.
 - A. *Custody and control*, 8776.
 - B. *Earnings*, 8776.
 - C. *Criminal liability*, 8777.
- VII. **Persons in Loco Parentis**, 8777.
- VIII. **Rights and Liabilities Between Third Person and Child**, 8779.
 - A. *Contracts and other transactions*, 8779.
 - B. *Statutes concerning the employment of infants*, 8780.
 - C. *Torts*, 8781.
 1. Duty owing to minors, 8781.
 2. Degree of care exercised by infant, 8783.
 - D. *Crimes against infants*, 8783.
- IX. **Abatement of action**, 8784.
- X. **Parties**, 8784.
- XI. **Pleading**, 8785.
- XII. **Evidence**, 8785.
- XIII. **Judgment**, 8787.

I. DEFINITION.

G. C., § 8023, provides that, all male persons of the age of twenty-one years, and upward, and all female persons of the age of eighteen years, and upward, shall, to all intents and purposes be of full age. Prior to G. C., § 8020, a female was not of age until she reached the age of twenty-one: *M'Clintock v. Chamberlin*, W. 547, 1 Longsdorf's Notes, 43.

II. AGE OF MAJORITY.

A testator, resident of New York, required his real estate to be partitioned when his youngest daughter became of age, which would be at twenty-one years in New York. It was held that Ohio lands could be partitioned when she became eighteen: *Craig-*

head v. Pike, 5 Dec. Rep. 273, 4 Am. L. Rec. 199. See also CONFLICT OF LAWS.

III. INFANTS AS WITNESSES.

The court will take judicial notice that children seven years of age do not know the meaning of such words as "sexual intercourse" and "carnal knowledge": *In re Fairman*, 3 O. N. P. (N.S.) 485, 50 Bull. 34. See also EVIDENCE; JUDICIAL NOTICE.

Where an action is brought by an infant through his next friend for recovery of damages on account of personal injuries, the infant is the party plaintiff and is not competent to testify where imbecility on the part of the defendant has intervened: *Ransom v. Haberer Co.*, 13 O. C. C. (N.S.) 511, 22 O. C. D. 592 [affirmed, without opinion, *Ran-*

som v. Haberer Co., 85 O. S. 483]. See also WITNESSES.

IV. CITIZENSHIP.

A foreign born minor does not become a citizen of the United States or entitled to the privileges of an elector upon attaining his majority, by appearing before a court of record, prior to arriving at majority, and making oath that it is his *bona fide* intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to the state of his nativity, etc.: *State v. Collister*, 6 O. C. C. (N.S.) 33, 17 O. C. D. 529. See also CITIZENSHIP.

V. RIGHTS AND LIABILITIES OF INFANTS.

A. CHANGE OF DOMICILE.

A minor has no power to change a settlement from the township in which his father was legally settled: *Trustees v. Trustees*, 3 O. 99, I Longsdorf's Notes, 151. See also DOMICILE.

A person during minority has not the capacity to change his domicile, and a student domiciled outside the state must remain in Ohio one year after attaining his majority in addition to the necessary intent to change his domicile to acquire a residence for voting purposes: *Wickham v. Coyner*, 12 O. C. C. (N.S.) 433, 20 O. C. D. 765.

A minor can not change his domicile, and as the residence of a minor is determined by the domicile of a parent or some person standing in the relation of a parent to him, the word "resident" as used in G. C., § 10915, relating to the appointment of guardians, means domicile: *In re Guardianship of Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652 [affirming *In re Guardianship of Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612]. See also GUARDIAN AND WARD.

B. SERVICE OF SUMMONS.

Summons on the ward can not be waived by the guardian: *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802. See also GUARDIAN AND WARD.

Where the record of the probate court discloses that, in a proceeding brought by an administrator to sell property to pay debts, the court found that "the other defendants," which included certain minors "have been legally served with summons," said minors will not be permitted in a subsequent action in foreclosure, brought against the purchaser at the administrator's sale, to deny that the probate court obtained jurisdiction over them as to assert rights as tenants in common in

the premises: *Loan Co. v. Whitehead*, 9 O. N. P. (N.S.) 501. See also MORTGAGES.

Where the order of sale shows due notice to have been given to interested parties, it is to be presumed that infant heirs received proper notice and the court had jurisdiction: *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130 [affirmed, without opinion, by circuit court, see *Hamilton v. Stewart*, 5 O. N. P. (N.S.) 553, 18 O. D. (N.P.) 130].

C. CONTRACTS AND CONVEYANCES.

1. Power of Attorney.

A power of attorney by an infant conveying no present interest, as a power to sell land, is void and not voidable, but a buyer will have the benefit of the occupying claimant law: *Lawrence v. McArter*, 10 O. 37, I Longsdorf's Notes, 486.

The appointment of an agent or attorney to make contracts is, perhaps inconsistent and repugnant to the privilege of infancy, for the reason, among others, that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562.

An infant has no authority or right to give a proxy for the voting of his stock in a corporation: *State, ex rel., v. Voight*, 1 O. C. C. A. 125.

2. Acts Which Law Requires.

(a) In General.

An agreement by an infant to do what it would be bound legally to do without such agreement can not be rescinded after performance by the infant: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982.

If an infant to whom property has been conveyed, in order to defraud the creditors of the grantor, reconveys such property on authority of the creditor to bring action to set the conveyance aside, and such property is applied to the discharge of the grantor's debts, the infant can not subsequently have such conveyance rescinded: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982.

A father made a voluntary conveyance of land to a son under twenty-one years of age. The land was encumbered by a mortgage, and was afterward further charged by a decree against the father and the son with a claim due from the father. The son during his infancy reconveyed the land to his father to sell for the purpose of paying the debts so charged on the land. The father then sold it to a purchaser who paid full value therefor, and out of the purchase-money paid the liens on the land. Soon thereafter the son

became of age and brought suit against the purchaser to recover the land. It was held that the son held the land in trust for the creditors of the father and holders of liens thereon, and he might be compelled by law to submit to a sale thereof for their benefit. Having voluntarily conveyed the land during his minority to discharge the trust, he can not, as against a *bona fide* purchaser for that purpose, be permitted to disaffirm his conveyance after he attains his majority: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982.

(b) *Necessaries.*

In a suit against an infant on his express contract for necessities, recovery can only be had for the fair value of the executed part of the contract: *Test Book Co. v. Alberton*, 10 O. C. C. (N.S.) 583, 20 O. C. D. 352.

3. *Other Acts.*

(a) *Validity.*

The state has plenary power to legislate regarding minors, as wards of the state; they have only such right to contract as the state awards them: *Bolton v. State*, 11 O. C. C. (N.S.) 472, 21 O. C. D. 14.

Contracts by minors are voidable, and may be disaffirmed by the minor at any time up to and before and at the time of reaching majority: *Foredyce v. Easthope*, 8 O. N. P. 585, 10 O. D. (N.P.) 610 [affirmed, without opinion, *Easthope v. Foredyce*, 52 O. S. 663]. See also *CONTRACTS*.

All contracts of an infant, except those acts which the law requires are violable at the infant's option: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562; *Rush v. Wick*, 31 O. S. 521, III Longsdorf's Notes, 602; *Lemmon v. Beeman*, 45 O. S. 505, IV Longsdorf's Notes, 294.

An infant can not become a member of a mutual burial association: *State v. Burial Association*, 8 O. C. C. (N.S.) 233, 18 O. C. D. 397.

A mortgage executed by a minor to secure a debt for which she was in no way liable, is voidable, and may be repudiated, in some way sanctioned by law upon becoming of age: *Hetterick v. Porter*, 20 O. C. C. 110, 11 O. C. D. 145.

A contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is violable at his election: *Rush v. Wick*, 31 O. S. 521, III Longsdorf's Notes, 602.

Infancy is a valid plea in defense to an action for breach of promise of marriage:

Rush v. Wick, 31 O. S. 521, III Longsdorf's Notes, 602.

An assignment of a lease by an infant lessee binds the assignee to pay rent to the lessor until the infant disaffirms the assignment, and the disaffirmance does not relate back: *Rothschild v. Hudson*, 8 Dec. Rep. 259, 6 Bull. 752.

A father conveyed land in fraud of creditors to his infant son, who, before majority, reconveyed to him to sell to pay prior liens on it, and the father sold it for full value and paid the liens. The son coming of age, now brings ejectment against the buyer. It was held that: (1) the buyer, though not a creditor, nor a buyer without notice, can show the fraud in the first conveyance as showing the son to be a mere trustee; (2) the son as trustee, could have been compelled to submit to sale for the benefit of his father's creditors, and his voluntary reconveyance to discharge the trust can not be disaffirmed by him as against a buyer: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982.

If an infant heir bid in property at an administrator's sale for the purpose of conveying to the administrator, and does so during infancy, though the sale would be annulled if attacked, he can not disaffirm (as by deed to a third person after majority), for an infant may execute a power as absolutely as an adult: *Sheldon v. Newton*, 3 O. S. 494, II Longsdorf's Notes, 57.

On a note made by an infant and then endorsed by his father, coming into the hands of an innocent holder, no mention of non-age being made, the infant can not be held, though his silence was fraudulent, but the endorser can be held without notice as upon an original undertaking: *Shurragar v. Conklin*, 3 Dec. Rep. 350, 1 Gaz. 350.

A contract, such as suretyship, which is prejudicial to an infant, is nevertheless voidable and not void; and if ratified by him after he reaches the age of majority is valid: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562.

An infant can not be compelled by a court to convey with covenants of special warranty; since an infant's contracts are voidable: *St. Clair v. Smith*, 3 O. 355, I Longsdorf's Notes, 178.

Under the act of 1805, a deed executed by a husband and wife, the wife being at that time under the age of eighteen, does not bar her right of dower: *Hughes v. Watson*, 10 O. 127, I Longsdorf's Notes, 494.

A deed executed by a married woman who is a minor, in conformity with the statute then in force with reference to conveyances by married women, is not absolutely void,

but is merely voidable: *Card v. Patterson*, 5 O. S. 319, II Longsdorf's Notes, 189.

A deed made by a married woman who was between the ages of eighteen and twenty-one, and which attempted to convey land in Ohio, is valid: *Sell v. Miller*, 11 O. S. 331, II Longsdorf's Notes, 506.

An infant's deed is not void until ratification, but transmits title until disaffirmed: *Drake v. Ramsay*, 5 O. 251, I Longsdorf's Notes, 275.

The signature of a minor owning an interest in abutting property to a consent to the building of a street railway in the street in front is of no effect: *Schwab v. Traction Co.*, 13 O. D. (N.P.) 116. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

A minor entering into a contract of enlistment with the Ohio National Guard, and receiving pay under said contract from the government, becomes a soldier subject to the duly authorized rules and regulations of the organization: *In re Kuchta*, 8 O. N. P. (N. S.) 613, 19 O. D. (N.P.) 749 [affirmed, without opinion, *In re Kuchta*, 81 O. S. 508]. See also MILITIA.

A judgment by confession entered in the court of a justice of the peace to carry into effect a compromise and settlement made on behalf of an infant by his next friend is not binding upon the infant when there has been no hearing of the case by the justice of the peace, and the only purpose of the judgment is to give an apparent legal sanction to the compromise: *Caine v. Lamp Co.*, 14 O. N. P. (N.S.) 369. [For hearing on demurrer, see *Caine v. Lamp Co.*, 14 O. N. P. (N.S.) 47].

(b) Ratification.

Where a person of full age promises to perform a contract entered into during his minority, he thereby ratifies the contract, although he does not know at the time of the promise, that by reason of his minority at the time of the contract, he is not legally liable thereon: *Anderson v. Soward*, 40 O. S. 325, IV Longsdorf's Notes, 26.

If an infant affirms a voidable contract after arriving at the age of majority, such ratification is binding upon him, and he can not afterward disaffirm such a contract: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract: *Harner v. Dipple*, 31 O. S. 72, III Longsdorf's Notes, 562.

An heir not of age can not ratify a defective administrator's sale of lands as by set-

ting or accepting money: *Longworth v. Goforth*, W. 192, I Longsdorf's Notes, 17.

Silence, or even acquiescence does not amount to a ratification. And where an infant who had conveyed his interest in land, was on friendly terms with and frequently visited the grantee and gave advice as to the management of the land after he had attained majority, this is not an affirmation: *Lanning v. Brown*, 84 O. S. 385.

Where an infant conveys land, mere lapse of time, after he arrives at full age, will not amount to a confirmation, unless after twenty-one years. But lapse of time for a less period, in connection with other facts and circumstances, may amount to confirmation and in such case, the grantor is not bound to refund or offer to refund the purchase-money before he disaffirms the contract: *Cresinger v. Welok*, 15 O. 156, I Longsdorf's Notes, 703.

The right to disaffirm may be lost by express recognition of the deed, enjoyment of any benefit thereunder, or any act of acquiescence. But receiving part of the purchase money without being apprised of the right, and having reason to suppose the money was for other things, is no assent: *Drake v. Ramsay*, 5 O. 251, I Longsdorf's Notes, 275.

An infant purchaser of stock, which he holds after majority and after insolvency of the company, is probably liable: *Hardman v. Railway Co.*, 9 Dec. Rep. 578, 15 Bull. 164. See also CORPORATIONS.

(c) Disaffirmance.

(aa) Necessity.

If a wife be an infant when she joined in her husband's deed, it does not release her dower, and no disaffirmance is necessary before suit to recover it: *Hughes v. Watson*, 10 O. 127, I Longsdorf's Notes, 494. See also DOWER.

(bb) Personal Right.

The right to disaffirm is a right personal to the infant, and can not be exercised by his grantee or vendee: *Curtiss v. McDougal*, 26 O. S. 66, III Longsdorf's Notes, 286.

The privilege of disaffirming a contract is personal to the infant and not available to others: *Lemmon v. Beeman*, 45 O. S. 505, IV Longsdorf's Notes, 294.

(cc) What Constitutes.

A conveyance of land which has been executed by an infant may be rescinded by him; and a decree of the court of equity canceling such deed is not necessary but the infant may sue at law in ejectment: *Drake v. Ramsay*,

5 O. 251, I Longsdorf's Notes, 275; *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703.

Where an infant conveys land, and, after his arrival at full age, conveys the same land to a third person, such subsequent conveyance is a disaffirmance of the former conveyance: *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703.

A conveyance to an infant in trust is voidable at his election, and his reconveyance during minority to his grantor is a disaffirmance: *Starr v. Wright*, 20 O. S. 97, II Longsdorf's Notes, 982. See also TRUSTS.

A conveyance by quitclaim deed of property mortgaged by a minor to secure a debt for which she was not liable, after such minor becomes of age, without any other act affirming or repudiating the mortgage, and without reference to the mortgage in the conveyance, the consideration being the full value of the property free from the mortgage, though to a person having knowledge thereof, amounts to a repudiation of the mortgage: *Hetterick v. Porter*, 20 O. C. C. 110, 11 O. C. D. 145.

After having so conveyed the property after becoming of age, the grantee is estopped from subsequently ratifying and validating the mortgage referred to: *Hetterick v. Porter*, 20 O. C. C. 110, 11 O. C. D. 145.

Disaffirmance may be by entry, action, a subsequent conveyance, or any act unequivocally manifesting such intention: *Drake v. Ramsay*, 5 O. 251, I Longsdorf's Notes, 275.

That disaffirmance before action is not necessary, the action being a disaffirmance, was also held in *Hughes v. Watson*, 10 O. 127, I Longsdorf's Notes, 494.

Bringing a suit to partition realty which was conveyed by the plaintiff while he was an infant is a disaffirmance of such conveyance: *Lanning v. Brown*, 84 O. S. 385.

On the 12th day of March, 1888, B, an infant eighteen years of age, executed deeds conveying his interests in certain real estate situate in this state to grantees therein named, who did not file such deeds for record until the year 1909. B arrived at majority on the 24th day of October, 1890, and thereafter did no act to ratify or confirm said conveyances, but on the contrary brought suit on the 17th day of April, 1909, to obtain partition of said real estate, in which action he also prayed that the deeds he had executed be canceled. It was held that B's action so commenced operated to disaffirm the deeds and it was not barred by the twenty-one year statute of limitations. He is entitled to partition and the other relief prayed for: *Lanning v. Brown*, 84 O. S. 385.

(dd) Not to be Partial.

A disaffirmance can not be partial of the burdens and not of the benefit, accordingly, where an infant buyer of a chattel gives back a purchase-money mortgage, he can not avoid the mortgage without avoiding the purchase; therefore a buyer of the chattel from the infant takes subject to the mortgage if it was duly filed: *Curtiss v. McDougal*, 26 O. S. 66, III Longsdorf's Notes, 286.

The infancy of the mortgagor is no defense to a foreclosure, for it is an attempt to disaffirm the burdensome part of the contract alone: *Robinson v. Bergholz*, 4 Dec. Rep. 103, 1 Clev. L. Rep. 29.

(ee) Recovery by Infant.

An infant is not precluded from recovery on a *quantum meruit* for services rendered under a contract for a given time, which he has avoided on the ground of his infancy after part performance; and this is true, notwithstanding he discontinued the employment without fault on the part of his employer: *Fisher v. Kissinger*, 6 O. C. C. (N.S.) 218, 17 O. C. D. 13. See also SERVICES.

An infant may rescind a partnership of which he is a member. If he does, he can only recover his capital, less what he has received from the firm, and all partnership creditors must be first paid, and he can not recover any allowance for services in the absence of express stipulations: *Lyghtel v. Collins*, 25 Bull. 125. See also PARTNERSHIP.

Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon without deduction for the expense of carrying the risk: *Insurance Co. v. Fuller*, 9 O. C. C. (N.S.) 441, 19 O. C. D. 415. See also INSURANCE.

(ff) Restoration of Property.

An infant may, before or on arriving at age, disaffirm a purchase of personalty, other than necessities made by him during his minority, and recover back the consideration paid without restoring the property sold and delivered him, where it has been taken from him, whether rightfully or not, upon an execution against a third person. In such case he is not required, as a condition of his right to recover, to take any steps to recover the property taken from him. It is sufficient, in such case, that the property ceases to be in his possession or subject to his control: *Lemmon v. Beeman*, 45 O. S. 505, IV Longsdorf's Notes, 294.

If the infant has lost or squandered the property, he may disaffirm and recover without restitution, otherwise his privilege would be no shield against the improvidence of youth. But if he is in possession or control, he must restore, else his privilege would be a sword rather than a shield: *Lemmon v. Beeman*, 45 O. S. 505, IV Longsdorf's Notes, 294.

Failure to restore purchase money will not prevent disaffirmance of a deed unless the grantor still has the money or had it after majority: *Mills v. Rodgers*, 2 Dec. Rep. 481, 3 W. L. M. 262.

An infant who has not received anything of value as consideration for a conveyance made by him has nothing to restore before disaffirming his conveyance. Whether he would be obliged to make restitution if he had received anything of value was not decided: *Lanning v. Brown*, 84 O. S. 385.

If the infant has in his hands the property received by him under the contract, he must restore such property upon disaffirming the contract: *Curtiss v. McDougal*, 26 O. S. 66, III Longsdorf's Notes, 286.

The disaffirmance may be by a subsequent conveyance to another and the minor is not bound to return or tender the purchase money: *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703.

(gg) Time to Disaffirm.

A conveyance of realty by an infant may be disaffirmed at any time within twenty-one years from the time that he reaches his majority: *Drake v. Ramsay*, 5 O. 252, I Longsdorf's Notes, 275; *Hughes v. Watson*, 10 O. 127, I Longsdorf's Notes, 495; *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703; *Lanning v. Brown*, 84 O. S. 385.

An infant may disaffirm a conveyance of land made by him during his minority at any time before the expiration of twenty-one, after he reaches the age of majority: *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703.

An infant's right to disaffirm a conveyance need not be exercised in a reasonable time after majority, but continues until the statute of limitations bars ejectment, but lapse of time in connection with other circumstances may amount to confirmation: *Drake v. Ramsay*, 5 O. 251, I Longsdorf's Notes, 275; *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703; *Mills v. Rodgers*, 2 Dec. Rep. 481, 3 W. L. M. 262.

The infant must exercise his right to disaffirm within a reasonable time after coming of age: *Robinson v. Bergholz*, 4 Dec. Rep. 103, 1 Clev. L. Rep. 29.

Contracts by minors are voidable, and may be disaffirmed by the minor at any time up to and before and at the time of reaching majority: *Foredyce v. Easthope*, 8 O. N. P. 585, 10 O. D. (N.P.) 610 [affirmed, without opinion, *Easthope v. Fordyce*, 52 O. S. 663].

On the 12th day of March, 1888, B. an infant eighteen years of age executed deeds conveying his interests in certain real estate situate in this state, to grantees therein named, who did not file such deeds for record until the year 1890. B arrived at majority on the 24th day of October, 1890, and thereafter did no act to ratify or confirm said conveyances, but on the contrary brought suit on the 17th day of April, 1909, to obtain partition of said real estate, in which action he also prayed that the deeds he had executed be canceled. It was held that B's action so commenced operated to disaffirm the deeds and it was not barred by the twenty-one year statute of limitations. He is entitled to partition and the other relief prayed for: *Lanning v. Brown*, 84 O. S. 385.

(d) Estoppel.

The doctrine of estoppel is not applicable to infants, and at law an infant is not liable for fraudulent representations as to his age: *Mulholland v. Berlinsky*, 16 O. D. (N.P.) 183, 3 O. L. R. 350.

A minor who sells his land by fraudulently representing himself of age is not estopped, but can disaffirm after majority: *Mills v. Rodgers*, 2 Dec. Rep. 481, 3 W. L. M. 262 [so held in the court below in *Cresinger v. Welch*, 15 O. 156, I Longsdorf's Notes, 703].

An infant is not precluded from recovery on a *quantum meruit* for services rendered under a contract for a given time, which he has avoided on the ground of his infancy after part performance; and this is true, notwithstanding he discontinued the employment without fault on the part of his employer: *Fisher v. Kissinger*, 6 O. C. C. (N.S.) 218, 17 O. C. D. 13.

D. TORTS.

An infant is responsible for his own torts, and a father can not be held for the independent wrong of his child, but is liable if he was in any way connected with the infant's wrong-doing, either actively or passively: *Lacker v. Ewald*, 8 O. N. P. 204, 11 O. D. (N.P.) 337.

A father is not liable for the wrongful act of his child in wilfully and maliciously shooting and killing a taxed and licensed dog, simply by reason of the fact that he carelessly and negligently left his gun exposed:

Lacker v. Ewald, 8 O. N. P. 204, 11 O. D. (N.P.) 337.

An infant can not be held liable in tort in an action for deceit which consisted in false representations as to his age, where the proof shows a contract, the making and performance of which was induced by such representations: *Mulholland v. Berlinsky*, 16 O. D. (N.P.) 183, 3 O. L. R. 350.

To make an infant liable for a tort connected with contract, the tort must be a distinct and substantive wrong in itself: *Mulholland v. Berlinsky*, 16 O. D. (N.P.) 183, 3 O. L. R. 350.

A minor in liable in tort for damages caused by his negligence in handling a gun which resulted in discharging it, and thereby caused serious injury to the plaintiff: *Grau v. Magis*, 19 O. D. (N.P.) 856.

A father is not liable for an assault by a demented and dangerous son seven years old unless he knew his condition and knowingly permitted him to be at large unwatched: *Cluthe v. Svendsen*, 9 Dec. Rep. 458, 13 Bull. 633.

An infant who sells property held by him as bailee is liable in tort. This liability is a chose in action of the bailor, and a creditor's bill by a creditor of the bailor can subject such liability: *Denning v. Nelson*, 1 Dec. Rep. 503, 10 W. L. J. 215. See also CREDITOR'S BILL.

If a father promotes and encourages his minor son in discharging skyrockets in the street, as where he gave a son of 18 years money for July 4th knowing the son would buy rockets and would discharge them in front of the house, an injured person suing both can not be nonsuited as to the father: *Cameron v. Heister*, 10 Dec. Rep. 651, 22 Bull. 384 [leave to file petition in error refused, *Heister v. Cameron*, 22 Bull. 453]. See also PARENT AND CHILD.

The question as to whether a child of six years is capable of a negligent act is for the jury: *Ludtke v. Railway Co.*, 14 O. C. D. 120. See also NEGLIGENCE.

E. CRIMES.

A proceeding before the probate judge under G. C., § 2107, providing for the commitment to the Girls' Industrial Home, of girls over nine and under fifteen years of age charged with having committed crimes or with living vicious and criminal lives, is summary in its character but it is not a criminal prosecution: *State, ex rel., v. Stiles*, 12 O. D. (N.P.) 338. See also GIRLS' INDUSTRIAL HOME.

The law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime:

Loeffner v. State, 10 O. S. 598, II Longsdorf's Notes 469; *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472; *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 553; *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

The law presumes every person of the age of fourteen years to be of sufficient capacity to form a criminal purpose and to deliberate and premeditate with malice: *State v. Summons*, 1 Dec. Rep. 416, 9 W. L. J. 407 [affirmed, in *Summons v. State*, 5 O. S. 325, II Longsdorf's Notes, 190].

The law presumes that an infant under the age of fourteen years is incapable of committing or attempting to commit the crime of rape; but this presumption may be rebutted by proof that such person has arrived at the age of puberty: *Williams v. State*, 14 O. 222, I Longsdorf's Notes, 663.

The crime of embezzlement punished by G. C., § 12467, can not be committed by a person under eighteen years of age or an apprentice: *Grillo v. State*, 9 O. C. C. 394, 6 O. C. D. 90.

VI. RIGHTS AND LIABILITIES OF PARENTS.

A. CUSTODY AND CONTROL.

The state has the right, where parents are incapable of taking care of their children, especially in the case of incorrigibles, to provide proper and wholesome restraints, and wise and humane provisions for their education which necessarily involves restraint upon the freedom of such children, but such restraint can not be regarded as imprisonment: *State, ex rel., v. Stiles*, 12 O. D. (N. P.) 338.

The right to the custody and society of children in the parent is a natural one which the state claims no right to take away except when the interests of the child or of society require it. It is the latter interest which authorizes the state to invoke its police power to prevent them becoming hardened and unredeemable criminals: *Travis v. State*, 12 O. C. C. (N.S.) 374, 21 O. C. D. 492 [affirmed, without opinion, *Travis v. State*, 82 O. S. 430].

The enlistment of an infant in the United States army without the consent of his parents is unlawful, as to them, and his oath, as to his age, can not bind them: *In re Wiesenberger*, 7 Dec. Rep. 529, 3 Bull. 766. See also PARENT AND CHILD.

B. EARNINGS.

Where a father as next friend has prosecuted an action for his son, for injuries, including his loss of earning capacity during minority, the father will be presumed to have

relinquished his right to the son's earnings and he can not after the determination of that action prosecute another on his own behalf for loss of services of the son during minority: *Furste v. Lithographing Co.*, 13 O. C. C. (N.S.) 536. See also JUDGMENT; PARENT AND CHILD.

C. CRIMINAL LIABILITY.

The intent of G. C., § 12974, is to secure the trial of parents, charged with having failed to cause their children to attend school, within the district where the offense occurs and the court may insert proper punctuation to give that effect to the section: *Grahn v. State*, 6 O. N. P. 182, 9 O. D. (N.P.) 816.

A parent may be guilty of the crime of failing to provide for his minor children although he is a resident of another state during the time laid in the indictment, and the venue of the crime is in the county where the child is when the complaint is made: *State v. Sanner*, 81 O. S. 393, IV Longsdorf's Notes, 1057.

A parent who sends his child to a public school and is willing to continue to do so, but the child is excluded for failure to comply with a rule of the board of education requiring vaccination, is not liable to conviction under the compulsory education act (G. C., § 12974): *State v. Turney*, 12 O. C. C. (N.S.) 33, 21 O. C. D. 222. See also SCHOOLS, PUBLIC.

It is no defense to a prosecution against the father for failing to properly maintain his child that an agreement was entered into between him and his wife, by which the wife was given the custody of their minor children, and agreed for a valuable consideration to support them, and that after the mother became unable to support the children, the accused offered to support them if the mother would surrender their custody, which she refused to do: *Bowen v. State*, 56 O. S. 235, IV Longsdorf's Notes, 689.

A parent is liable under G. C., § 12970, for administering corporal punishment to a child if the punishment is beyond the bounds of reason or humanity, or by the use of an improper instrument or with excessive severity or without due regard to the age and physical and mental condition of the child: *State v. Kalish*, 7 O. L. R. 447. See also PARENT AND CHILD.

VII. PERSONS IN LOCO PARENTIS.

After the death of both father and mother, the grandfather or grandmother respectively becomes the natural guardian of a child: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D.

(N.P.) 612 [affirmed, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652].

Where the father who is the last surviving parent of a minor dies while domiciled with the father's parents, and the minor continues for a time after the death of his father to reside with the grandfather, the minor is a "resident" of the county in which the grandfather is domiciled, within the meaning of G. C., § 10915: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612 [affirmed, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652]. See also GUARDIAN AND WARD.

Where the grandparent of a minor stood in the relation of parent to him, the residence, and jurisdiction to appoint a guardian is in the probate court of the county of their residence: *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652 [affirming *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612].

Where a minor five years old domiciled with his grandfather is removed by his aunt, with the consent of said grandfather, to another county to live in and as a part of the family of such aunt, the domicile of such minor is not changed so as to give the probate court of the county in which said aunt has her domicile jurisdiction to appoint a guardian for said minor, while said grandfather is living and has not changed his domicile: *In re Murray*, 4 O. N. P. (N.S.) 233, 16 O. D. (N.P.) 612 [affirmed, *In re Murray*, 8 O. C. C. (N.S.) 498, 18 O. C. D. 652].

One standing in *loco parentis* to a minor, as a stepfather, in possession of the minor's property, must use all his efforts for the minor's benefit and not for his personal gain, and all increase and profit from his management belong to the minor: *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631 [reversing *Berkmeyer v. Kellerman*, 13 Dec. Rep. 968, 2 C. S. C. R. 390]; *Jaeger v. Herancourt*, 7 Dec. Rep. 1, 1 Bull. 10.

An attempted settlement with the minor on coming of age will be jealously scrutinized. If the fiduciary obtains any benefit by the settlement, the burden is on him to show full disclosure, absence of undue influence, and that the settlement is just; and a conveyance by such minor to the fiduciary on the day of coming of age, to carry out a settlement, can not be upheld without clear proof of its justice: *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631.

A settlement with two fiduciaries, if distinct, may be upheld as to one and set aside as to others: *Berkmeyer v. Kellerman*, 32 O. S. 239, III Longsdorf's Notes, 631.

VIII. RIGHTS AND LIABILITIES BETWEEN THIRD PERSON AND CHILD.

A. CONTRACTS AND OTHER TRANSACTIONS.

A family arrangement for the benefit of an infant's estate will be supported, though it alters the distribution on his death: *Turpin v. Turpin*, 16 O. S. 270, II Longsdorf's Notes, 773. See also FAMILY ARRANGEMENTS.

A settlement by the widow and administratrix of a decedent killed by a wrongful act is void as against the minor children of the deceased, where it does not appear that the probate court consented to and approved the settlement: *Railroad Co. v. Hottman*, 1 O. C. C. (N.S.) 17, 15 O. C. D. 140. See also DEATH BY WRONGFUL ACT.

Where the record fails to disclose the consent of the probate court under G. C., § 10773, to a settlement with defendant for death caused by wrongful act, the conclusive presumption is that such consent was not given: *Railroad Co. v. Hottman*, 1 O. C. C. (N.S.) 17, 15 O. C. D. 140. See also NEGLIGENCE.

One who gave a mortgage to secure repayment by a trustee of misappropriated trust funds, which settlement was not authorized by the court but was accepted by the adult beneficiaries and guardian of the minors, can not dispute its validity, though the minors might sue on his bond. The settlement at most is merely voidable at his election: *Withers v. Ewing*, 40 O. S. 400, IV Longsdorf's Notes, 34. See also TRUSTS.

A lease containing a covenant and agreement for the quiet possession of property as against minors having an interest in said property, and guaranteeing the ratification and performance of the terms of the lease by said minors, will bind the lessors to the performance of said covenant upon their subsequently acquiring the interests of said minors: *Soap Co. v. Railroad Co.*, 7 O. C. C. (N.S.) 218, 18 O. C. D. 254 [affirmed, without opinion, *Railroad Co. v. Soap Co.*, 76 O. S. 577]. See also LANDLORD AND TENANT.

The two years' limitation within which actions may be brought against an executor or administrator under G. C., § 10746, runs against a creditor, notwithstanding infancy: *Arday v. Shell*, 77 O. S. 218, IV Longsdorf's Notes, 1032. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

Where, in partition proceedings, the parties are practically represented by one attorney, and the guardian *ad litem* a son of such attorney does nothing except to file a formal answer, and the property is sold to one of the adult parties at the appraisalment who within a few months sold the same at more

than double the appraised value and divided the proceeds among the adult parties. Such partition proceedings are at least constructively fraudulent as to the minor, and the adult parties to the extent that they have profited by such partition are accountable to the extent of the minor's interest: *Murr v. Murr*, 17 O. D. (N.P.) 773, 5 O. L. R. 125. See also PARTITION.

If a party suing an infant for whom no defense is made, has an influence and control over him, he should surrender the advantage of his fiduciary character if he intends to insist on adversary rights: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

Equity jurisdiction to protect infants is not confined to strictly fiduciary cases but extends to all where influence is abused or confidence betrayed: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

Influence is presumed in fiduciary cases but must be proved in others: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

A stepfather of minor children in 1830 brought them and their money from Germany and invested it in a home here in his own name, one of them, the plaintiff, being about a year old. It was held that so taking the title was a breach of trust and to the extent that their money went into it is held in trust for them. The occupancy was not adverse during the minority, and neither the statute of limitations nor lapse of time operated: *Paschall v. Hinderer*, 28 O. S. 568, III Longsdorf's Notes, 423.

Continuing to occupy for less than twenty-one years after the children came of age without professing to hold adversely, neither bars them of enforcing the trust nor raises a presumption of its discharge: *Paschall v. Hinderer*, 28 O. S. 568, III Longsdorf's Notes, 423.

Where adult coparceners conceal from an infant coparcener the true value of the land, and after taking it at its appraised value, sell it at a greatly enhanced figure, they will be required to account to the minor for the profits thus derived: *Murr v. Murr*, 11 O. C. C. (N.S.) 439, 20 O. C. D. 808 [affirming *Murr v. Murr*, 17 O. D. (N.P.) 773, 5 O. L. R. 125].

See also PERSONS IN LOCO PARENTIS, VII herein.

See also CONTRACTS AND CONVEYANCES, V, c, herein.

B. STATUTES CONCERNING THE EMPLOYMENT OF INFANTS.

R. S., § 6986-8 (amended 99 v. 30, for analogous statute see G. C., §§ 12996 *et seq.*), regulating the employment of minors at night is within the police power of the state and

not unconstitutional as violating the fourteenth amendment of the constitution of the United States: *State v. Rodefer*, 5 O. N. P. (N.S.) 337, 18 O. D. (N.P.) 76.

The provision of the act of 99 v. 30 (G. C., §§ 12906 *et seq.*), which makes it an offense to permit girls under eighteen years of age to work more than eight hours in one day in factories, etc., is constitutional: *Bolton v. State*, 11 O. C. C. (N.S.) 472, 21 O. C. D. 14.

The constitutionality of a statute similar to G. C., § 13001, G. C., § 12996, forbidding the employment of girls under eighteen to work in factories more than eight hours a day was upheld: *Bolton v. State*, 11 O. C. C. (N.S.) 472, 21 O. C. D. 14.

Providing that minor children under certain ages shall not be employed at any work later than seven o'clock in the evening or earlier than six o'clock in the morning is not an unreasonable exercise of police power of the state and is constitutional: *State v. Rodefer*, 5 O. N. P. (N.S.) 337, 18 O. D. (N.P.) 76.

An employers' liability insurance company is not liable for injuries to employees who are within the age inhibited by statute (see G. C., § 12968): *Unnewehr Co. v. Insurance Co.*, 16 O. F. D. 292, 7 O. L. R. 30 [affirmed, *Unnewehr Co. v. Insurance Co.*, 8 O. L. R. 338].

In cases of violation of G. C., § 12970, the jurisdiction of a police judge or mayor of any city or village is confined to offenses committed within his city or village: *State v. Peters*, 67 O. S. 494, IV Longsdorf's Notes, 934.

C. TORTS.

1. Duty owing to minors.

It is not the duty of an occupier of land to exercise care to make it safe for infant children to come upon it without invitation, but merely by sufferance: *Railroad Co. v. Harvey*, 77 O. S. 235, IV Longsdorf's Notes, 1032 [reversing *Railroad Co. v. Harvey*, 7 O. C. C. (N.S.) 57, 17 O. C. D. 672; affirming *Waterworks v. Swartz*, 8 O. C. C. (N.S.) 509, 18 O. C. D. 627].

A waterworks company is not liable for death by drowning of an infant who comes upon its land without invitation, and there falls into a reservoir or basin of water while playing about it without the knowledge of the company: *Railroad Co. v. Harvey*, 77 O. S. 235, IV Longsdorf's Notes, 1032 [reversing *Railroad Co. v. Harvey*, 7 O. C. C. (N.S.) 57, 17 O. C. D. 672, affirming *Waterworks v. Swartz*, 8 O. C. C. (N.S.) 509, 18 O. C. D. 627].

A railroad company is not liable to an infant who comes upon its premises without invitation and who is injured there while playing, without its knowledge, with a turntable. The doctrine of the turntable cases is disapproved: *Railroad Co. v. Harvey*, 77 O. S. 235, IV Longsdorf's Notes, 1032 [distinguishing *Harriman v. Railroad*, 45 O. S. 11, IV Longsdorf's Notes, 248; reversing *Railroad Co. v. Harvey*, 7 O. C. C. (N.S.) 57, 17 O. C. D. 672; affirming *Waterworks v. Swartz*, 8 O. C. C. (N.S.) 509, 18 O. C. D. 627].

The owner of dangerous machinery, or appliances, can not permit the same to remain in a public place where children are liable to congregate, and be attracted thereby, and be injured; or even upon his own premises when the place is not public, if he has reason to anticipate that children will get upon the same and be injured, without taking proper and reasonable precaution to so protect such machinery, or appliances, that children will not be injured in the innocent use of the same: *Railway Co. v. Duer*, 21 O. C. C. 512, 11 O. C. D. 761.

Permitting travel over a track by the public, including children, at a given point, without objection, requires a railroad, so long as it acquiesces, to anticipate a continuance thereof, and it is bound in operating trains to use a care proportioned to the probable danger to persons so crossing: *Harriman v. Railway*, 45 O. S. 11, IV Longsdorf's Notes, 248.

If a fence round a railroad yard would be a protection, and there is no fence, the company does not discharge its duty by simply ordering away a child of four and a half years playing there, but must send it away: *Devereaux v. Thornton*, 4 Dec. Rep. 449, 2 Clev. L. Rep. 177, 4 Bull. 355 [affirmed, without opinion, *Devereaux v. Thornton*, 10 Bull. 266]. See also NEGLIGENCE.

Employers of children with dangerous machinery or in dangerous places, must anticipate that they will only use the care and judgment usual to their ages, and must use due care to protect them, and as part of such care, instruct them concerning the dangers: *Rolling Mill Co. v. Corrigan*, 46 O. S. 283, IV Longsdorf's Notes, 324.

The master of a minor servant is chargeable with notice of such lack of capacity as is usual among minors of the same age to understand and appreciate the perils to which he is exposed in the course of his employment, and the burden of proving a greater capacity than this is upon the master: *Guin v. Mirick*, 1 Hosea, 475. See also MASTER AND SERVANT.

The refusal of a master to permit his employe, a lad of fourteen years, who had become suddenly ill, to leave his work for medical assistance except at the risk of discharge, is not a breach of duty growing out of the employment, which would make the master liable for so doing unless a contract of apprenticeship exists: *Rohrer v. Culbertson*, 3 O. N. P. (N.S.) 197, 16 O. D. (N.P.) 98.

A charge to the jury is improper when it states the rule of care applicable to an ordinarily prudent person, without referring to the infancy of the plaintiff: *Railway v. Connors*, 6 O. C. C. (N.S.) 361, 17 O. C. D. 229.

2. Degree of Care Exercised by Infant.

An infant over fourteen years of age is presumed to be *sui juris* in that he is charged with his own negligence and the consequences thereof; but the measure of his capacity in that regard is a question for the jury: *Railway v. Connor*, 6 O. C. C. (N.S.) 361, 17 O. C. D. 229; *Railway v. Gulla*, 24 O. C. D. 101 [affirmed, without opinion, *Railway v. Gulla*, 86 O. S. 341].

An infant's ordinary care which it is his duty to exercise to avoid being injured is not measured by an adult's duty, but is only the care which children of the same age of ordinary care and prudence are accustomed to exercise under similar circumstances: *Mill Co. v. Corrigan*, 46 O. S. 283, IV Longsdorf's Notes, 324.

If a child of two and a half years runs into the middle of the street which has an unobstructed view for about four hundred feet, and is at the same instant run over by defendant's team going at a run, it is error to take the case from the jury: *Theal v. Ice Co.*, 9 Dec. Rep. 163, 11 Bull. 122.

D. CRIMES AGAINST INFANTS.

The crime of contributing to the delinquency of a female child is not committed by acts, however numerous, which merely tend to contribute to her delinquency, unless as the result of such acts such female child actually becomes delinquent: *Fisher v. State*, 84 O. S. 360.

A person owning and conducting a house of ill-repute is guilty of contributing to the delinquency of a minor under seventeen years of age, where it is shown that such minor was admitted by a person apparently acting as a servant or employe and making no inquiry as to the age of the minor: *Smith v. State*, 14 O. C. C. (N.S.) 257.

An affidavit charging that A, on or about a given date, and at divers times, between then and a later given date, did unlawfully aid, abet, etc., to the delinquency of B, a

female minor child, and further stating the methods by which he contributed to the delinquency, states an offense under G. C., § 1654, and is not bad for duplicity, although the statute makes each day of contribution a separate offense: *Fisher v. State*, 84 O. S. 360.

Before a school teacher can be convicted of torture in punishing a pupil, it must be shown that the punishment administered was immoderate and excessive, and that the teacher was actuated by malice express or implied: *Martin v. State*, 11 O. N. P. (N.S.) 183, 21 O. D. (N.P.) 520 [affirmed, by the circuit court, which was affirmed, without opinion, *State v. Martin*, 87 O. S. 459].

In a prosecution for torture, the offense is insufficiently described by an affidavit charging unlawful, wilful or cruel torture, even though aided by the words by "beating and striking said person with a stick": *Martin v. State*, 11 O. N. P. (N.S.) 183, 21 O. D. (N.P.) 520 [affirmed by the circuit court, which was affirmed, without opinion, *State v. Martin*, 87 O. S. 459].

IX. ABATEMENT OF ACTION.

The ward coming of age pending a suit by A, guardian of B, on an instrument payable to A, guardian of B, does not abate it: *Gard v. Neff*, 39 O. S. 607, III Longsdorf's Notes, 1052.

X. PARTIES.

Where a joint promise is made by an adult and an infant, the plaintiff may sue the adult alone, or, if he sues both, may dismiss the infant and go on with the case as against the adult. He need not dismiss and begin over again: *Rohrer v. Morningstar*, 18 O. 579, I Longsdorf's Notes, 863.

An action may be maintained in this state by a minor through his guardian, appointed in the state of Pennsylvania, to recover damages for personal injuries, although such minor lives in such foreign state: *Pennsylvania Co. v. Raub*, 11 O. C. C. (N.S.) 157, 20 O. C. D. 542 [not following *Smith v. Madden* (U. S. circuit court), 37 Bull. 291; affirmed, without opinion, *Pennsylvania Co. v. Raub*, 79 O. S. 454]. See also GUARDIAN AND WARD.

That the original plaintiff was an infant and the second debtor is the next friend makes no difference, for the infant is the real plaintiff and a *bona fide* payment to his attorneys discharges the judgment, and the reversal of a judgment does not invalidate what was done by order of court under it: *Burkham v. Cooper*, 2 O. C. C. 77, 1 O. C. D. 371.

Funds in the hands of a guardian may be reached. He is "any person" under G. C.

§ 11828, as where a minor charged in bastardy has absconded: *Arbaugh v. Myers*, 8 Dec. Rep. 617, 9 Bull. 64. See also ATTACHMENT.

The next friend of an infant can make the affidavit, and averring that he has commenced action as the next friend of A sufficiently avers the agency: *McDowell v. Nims*, 9 Dec. Rep. 624, 15 Bull. 359.

XI. PLEADING.

If plaintiff sues by *prochein ami* but it is nowhere alleged he is a minor, this is not error, and the curatorship may be rejected as surplusage, for he will be presumed of age: *Hanly v. Levin*, 5 O. 227, I Longsdorf's Notes, 271.

A suit can not be maintained against an infant on his express contract for necessities, without an averment and proof that the price to be paid for such necessities was reasonable: *Test Book Co. v. Alberton*, 10 O. C. C. (N.S.) 583, 20 O. C. D. 352.

If an action is begun by a guardian of infants, and they come of age *pendente lite*, after issue joined, such change should be shown by supplemental pleadings, or it will be disregarded. No notice of the change being made except by motion after the testimony closed, the judgment must determine the parties' rights as stated in the pleadings: *Railroad Co. v. Hutchins*, 37 O. S. 282, III Longsdorf's Notes, 912.

A petition on the note of an infant may aver infancy and that the note was for necessities, or if the note is declared on generally and the answer avers infancy, the reply may aver it was for necessities. The burden to prove this is on the plaintiff in any case: *Hosler v. Beard*, 54 O. S. 398, IV Longsdorf's Notes, 641.

In an action against a minor defendant, the petition is not subject to demurrer where it is alleged that the plaintiff sustained personal injury through the discharge of a gun negligently handled by the defendant: *Gran v. Magis*, 19 O. D. (N.P.) 856, 6 O. L. R. 597. See also PLEADINGS.

XII. EVIDENCE.

The burden of proof as to the disaffirmance of a contract made by a minor rests upon said minor: *Fordyce v. Easthope*, 8 O. N. P. 585, 10 O. D. (N.P.) 610 [affirmed, without opinion, *Easthope v. Fordyce*, 52 O. S. 663].

Where a person is charged under G. C., § 1654, with contributing to the delinquency of a minor under seventeen years of age, by renting a room to her for the purpose of illicit intercourse, and the testimony shows that the minor went there for that purpose, it is not error to permit testimony to be

given as to the reputation of the house in which such room is located: *Smith v. State*, 14 O. C. C. (N.S.) 257.

Violation of a statute, as here of the statute forbidding the employment of a minor under twelve years old in a factory, may be considered by the jury in determining whether defendant was negligent in employing plaintiff for work in a factory. But it has never yet been held in Ohio to be negligence *per se*: *Hoppe v. Parmalee*, 20 O. C. C. 303, 11 O. C. D. 24. See also NEGLIGENCE.

As to the admissibility in evidence in an action by an injured minor that his employer was violating the provisions of G. C., § 12972, and similar sections, see *Breckenridge v. Reagan*, 22 O. C. C. 71, 12 O. C. D. 50; *Jacobs v. Fuller & Hutsinpillar Co.*, 67 O. S. 70, IV Longsdorf's Notes, 924.

Where one is arrested upon a warrant charging him with the violation of G. C., § 12970, in Greene county, and on *habeas corpus* proceedings in Hamilton county where the arrest was made, offers evidence that during the entire time charged he was a resident of Hamilton county, such evidence is incompetent, but it would be competent and appropriate as a part of his defense in a trial in Greene county: *Burns v. Tarbox*, 76 O. S. 520, IV Longsdorf's Notes, 1027.

It is error to charge the jury that the plaintiff being under sixteen years of age and having been employed in violation of G. C., § 12972, which provides that the employment of a child under sixteen years of age by any person, firm or corporation in this state, at any employment whereby its life or limb may be endangered, etc., shall be deemed guilty of a misdemeanor and shall be fined or imprisoned, that fact may be considered by the jury as a circumstance in connection with other evidence in the case as bearing on the question of the negligence of the employer in causing the injury: *Jacobs v. Fuller Co.*, 67 O. S. 70, IV Longsdorf's Notes, 924 [distinguishing *Meek v. Pennsylvania Co.*, 38 O. S. 632, III Longsdorf's Notes, 997; *Davis v. Guarnieri*, 45 O. S. 470, IV Longsdorf's Notes, 289]. See also MASTER AND SERVANT.

G. C., § 12972, prohibits the employment of a child under sixteen years of age to operate a dangerous machine, and it also makes such employment a misdemeanor and fixes a penalty therefor, the employment of a girl fifteen years old to operate such a machine is therefore some evidence of negligence against the employer: *Breckenridge v. Reagan*, 22 O. C. C. 71, 12 O. C. D. 50. See also MASTER AND SERVANT.

When the father brings an action for his minor son as next friend, and includes in the

action loss of services of the boy during minority, it must be presumed that by so doing he has relinquished to the son whatever right the law gave him for such services: *Furste v. Lithographing Co.*, 13 O. C. C. (N.S.) 536.

XIII. JUDGMENT.

A decree requiring infant defendants to convey to complainant is erroneous if it requires a warranty from them. Infants can not covenant: *St. Clair v. Smith*, 3 O. 355, I Longsdorf's Notes, 178.

No decree should be taken against an infant without giving him a day in court after coming of age to show cause against it. Accordingly, an absolute decree for specific performance against him on an alleged contract of his ancestor is erroneous and impeachable by original petition: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

Where adult heirs obtained a decree on insufficient evidence against infant coheirs for a large portion of the estate, as if purchased from the ancestor, but in fact given as advancement, and obtained partition of the rest of the estate, no defense being made for the infants, and no day to show cause being reserved in the decree, the partition will be set aside, and a new one ordered. Deeds in accordance with the partition obtained from infants on becoming of age by representing them to be in accordance with the order of court will be set aside, for the decree being void the deeds are clearly fraudulent: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

Lapse of time to bar the rights of infants to attack a decree and deeds obtained from them by those in influence over them does not commence until their discovery of the fraud, and the burden to charge them with knowledge is on such persons: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845.

If a cognovit judgment has been taken against an infant as principal and his surety it may be opened up on motion at the term at which it was rendered; but if no lien has attached under such judgment which could be preserved by statute the court has power to require the defense to give bond for the payment of the original judgment or any modification thereof as finally determined as a condition upon which such judgment may be set aside and defendants given an opportunity for a trial on the merits: *Metzger v. Zeissler*, 13 O. N. P. (N.S.) 49, 22 O. D. (N.P.) 63.

Offer to reconvey land adjudged to a minor by a void or erroneous judgment is not necessary to his petition in error after at-

taining majority to reverse the same. It is only necessary to do this before recovering the property in lieu of which the lands were conveyed to him: *Roberts v. Roberts*, 61 O. S. 96, IV Longsdorf's Notes, 802.

A judgment entered below by order of a reviewing court on reversal and remand is the judgment of the court to which the case is remanded. Accordingly, if it is against an infant and he desires to show cause against it after coming of age, under G. C., § 11631, he must begin his proceeding in the court below and not in the reviewing court: *Carey v. Kemper*, 45 O. S. 93. See also JUDGMENT.

Error does not lie to review a judgment rendered against a nonresident minor on the ground that no guardian *ad litem* was appointed or the requisite answer filed, where the fact of infancy appears only in the precept for summons and not in the record: *Palmer v. Palmer*, 5 O. C. C. (N.S.) 242, 15 O. C. D. 660. See also ERROR.

Notwithstanding no error is apparent upon the face of the record, an erroneous proceeding against an infant in the court of common pleas may be vacated or modified by such court after the term, under G. C., § 11631: *Palmer v. Palmer*, 5 O. C. C. (N.S.) 242, 15 O. C. D. 660. See also JUDGMENT.

The infancy of one of numerous complainants who does not sue by next friend, and no guardian *ad litem* was appointed, is no reason for sustaining his bill of review to the decree where no benefit could result to him: *Tremper v. Barton*, 18 O. 418, II Longsdorf's Notes, 905. See also BILL OF REVIEW.

If infants file a bill to enforce an equity in the defendant's legal title, and it is on hearing dismissed, the statutory right to file a bill of review on coming of age does not make the cause a *lis pendens*, and though on bill of review the dismissal is reversed, intermediate buyers are not *lis pendens* buyers: *Ludlow v. Kidd*, 3 O. 541, I Longsdorf's Notes, 193. See also LIS PENDENS.

INFECTIOUS DISEASES.

See HEALTH.

INFERENCES.

For inference, see PRESUMPTIONS.

In the absence of a justifiable occasion for the publication of defamatory matter, malice is but an inference of law and should not be left as a question for the jury: *Mauk v. Brundage*, 68 O. S. 89, IV Longsdorf's Notes, 939. See also LIBEL AND SLANDER.

Purpose to kill, malice, deliberation or premeditation may be proved by deduction and inference from the fact of the unlawful

killing of another, the manner and means by which death was caused, and other facts and circumstances preceding, attending and surrounding the crime, provided such deductions and inferences are warranted from the facts and consistent with the elements of the crime and inconsistent with every other reasonable hypothesis: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94 [affirmed (circuit court) without opinion, *State v. Mueller*, 54 Bull. 94]. See also HOMICIDE.

Negligence is not absolute or intrinsic, but is always relative to some circumstance of time, place or person: *Clarke v. Telephone Association*, 16 O. D. (N.P.) 431, 3 O. L. R. 482, 1 Hosea, 431. See also DEATH BY WRONGFUL ACT.

INFERIOR COURTS.

See COURTS.

INFIDELITY.

See DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

INFIDELS.

For competency of infidels as witnesses, see WITNESSES.

INFIRMARY.

For support of poor, see also PAUPERS, POOR AND POOR-LAWS.

A nonresident insane or imbecile pauper can not compel admission to the county infirmary. The rule is not different in Hamilton county as to such pauper admitted into Longview, but discharged therefrom as incurable, unless a certificate under G. C., §§ 2024, *et seq.*, is given: *State, ex rel., v. Ritt*, 8 Dec. Rep. 65, 5 Bull. 412, 6 Dec. Rep. 940, 8 Am. L. Rec. 750.

The probate judge has no power to commit a person to the county infirmary as a pauper, nor to remove an insane person from the insane asylum to the infirmary: *Brown v. Infirmary Directors*, 49 O. S. 578, IV Longsdorf's Notes, 471.

Sequestration of a pauper's property is not allowed except when he is admitted to the infirmary as a pauper, and, hence, is not allowed if sent there by the probate judge: *Brown v. Directors*, 49 O. S. 578, IV Longsdorf's Notes, 471.

The superintendent of a county infirmary is not the holder of a public office within the meaning of G. C., § 12303, and *quo warranto* is not the proper remedy to oust him from the office: *Palmer v. Zeigler*, 76 O. S. 210, IV Longsdorf's Notes, 1023 [affirming *Zeigler*

v. Palmer, 10 O. C. C. (N.S.) 545, 20 O. C. D. 292].

One who has been duly appointed superintendent of a county infirmary has qualified according to law, and has been put in possession of the infirmary by the board of directors at the beginning of his term, may maintain injunction to protect himself in the possession of the office against an adverse claimant whose term has expired, but who threatens and attempts to interfere with and obstruct him in the discharge of his duties: *Palmer v. Uigler*, 76 O. S. 210, IV Longsdorf's Notes, 1023 [affirming *Zeigler v. Palmer*, 10 O. C. C. (N.S.) 545, 20 O. C. D. 292].

When the term for which the superintendent of a county infirmary was appointed has expired, no order of the board of directors for his removal is necessary, and no cause need be assigned for the termination of his term: *Palmer v. Zeigler*, 76 O. S. 210, IV Longsdorf's Notes, 1023 [affirming *Zeigler v. Palmer*, 10 O. C. C. (N.S.) 545, 20 O. C. D. 292].

The directors of a county infirmary may sue another county for support of a lunatic pauper settled there after returning the pauper to the commissioners and requesting them to accept her: *Commissioners v. Infirmary*, 7 O. S. 65, II Longsdorf's Notes, 269.

The rule of damages is the expense of such removal, and of support after refusal to receive her, and not support from the time of admission to the infirmary: *Commissioners v. Infirmary*, 7 O. S. 65, II Longsdorf's Notes, 269.

Infirmary directors may sue a city of another county in which the township is merged under R. S., § 1623 (repealed 96 v. 96), as successor of the township, for temporary relief furnished one of its paupers in the common pleas of either county (altered now by G. C., § 3482): *Muskingum Co. Infirmary v. Toledo*, 15 O. S. 449.

Directors of an infirmary having supplied a pauper whose settlement is in a township of another county must sue the township trustees in their county, and not in plaintiff's county: *Trustees v. Directors*, 2 Dec. Rep. 382, 2 W. L. M. 573.

Infirmary directors are not guardians of insane pauper patients, and where an insane patient falls heir to property, whatever rights the board of directors has thereto under G. C., §§ 2548, 2551, do not supersede the mandatory requirements of G. C., § 10988, that the court "shall" appoint a guardian: *Kissell v. Gram*, 4 O. N. P. 333, 7 O. D. (N.P.) 233. See also GUARDIAN AND WARD.

Where a guardian of an insane person, not dangerous and having abundant means,

consents to his remaining in a county infirmary, whither he had been sent by the probate judge, she impliedly contracts to pay to the infirmary what his support is reasonably worth, for her duty is being performed by the infirmary, and he was not entitled to be there except as a pay patient: *Directors v. Merkle*, 3 O. N. P. 169, 4 O. D. (N.P.) 190.

As infirmary directors have explicit power under an earlier form of G. C., § 2526, to remove a superintendent, injunction against such removal, until title can be adjudged at law, thereby prolonging the tenure, will not be granted: *Littleton v. Directors*, 18 O. C. C. 891, 9 O. C. D. 850. See also OFFICE.

An infirmary director is not required to give bond before the first Monday of January, when his term of office begins, but must give bond before entering on the discharge of his duties as such director: *State, ex rel., v. Nash*, 65 O. S. 549, IV Longsdorf's Notes, 891 [distinguishing *State, ex rel., v. Commissioners*, 61 O. S. 506, IV Longsdorf's Notes, 815].

The poor fund, over which the infirmary directors are given full control, is the fund raised by taxes levied upon the general duplicate in such sum as they certify to the county auditor to be sufficient for support of the infirmary for the ensuing year: *Directors v. Commissioners*, 6 O. N. P. (N.S.) 347, 18 O. D. (N.P.) 403.

The county commissioners are "the proper authorities," under G. C., § 5669, to order transferred to some other county fund where it is needed any surplus in the poor fund arising from the tax on intoxicating liquors: *Directors v. Commissioners*, 6 O. N. P. (N.S.) 347, 18 O. D. (N.P.) 403.

No extra compensation can be allowed to an infirmary director who acts by selection as clerk of his board under G. C., § 2521 (repealed, 102 V. 433): *State v. Brown*, 20 O. C. C. 57, 11 O. C. D. 163.

Funds bequeathed in trust to the directors of a county infirmary and their successors in office, to be used for caring for the poor and inmates of said infirmary, do not become the property of the county, and an indictment charging the infirmary directors with embezzlement of said funds as the funds of the county, does not properly allege ownership, and a demurrer should be sus-

tained: *State v. Forbes*, 4 O. N. P. (N.S.) 394, 17 O. D. (N.P.) 102. See also EMBEZZLEMENT.

An "accounting officer" includes the infirmary directors of a city, within G. C., § 13105, to punish presenting a false claim to the auditor or other accounting officer of a municipal corporation: *Hauck v. State*, 45 O. S. 439, IV Longsdorf's Notes, 285; *Kennedy v. State*, 34 O. S. 310, III Longsdorf's Notes, 718; R. S., § 7675. See also FALSE CLAIM.

INFRINGEMENTS.

For infringement of trade-marks, see TRADE-MARKS AND TRADE NAMES.

For infringement of trade name, see TRADE-MARKS AND TRADE NAMES.

INHERITANCE.

Words of inheritance are not necessary to transmit real property by will under G. C., § 10580. Hence the omission of words of limitation in a devise of land will not defeat the fee therein in the devisees named: *Halley v. Hengstler*, 3 O. C. C. (N.S.) 161, 13 O. C. D. 504. See also WILLS, LEGACIES AND DEVISES.

INFLUENCE.

See DURESS; UNDUCE INFLUENCE.

INFLUENCING COURT.

See CONTEMPT; COURTS.

INFLUENCING ELECTION.

See ELECTIONS, POLITICAL.

INFLUENCING LEGISLATION.

For contracts claimed to influence legislation, see CONTRACTS.

INFORMALITY.

See ERROR.

INFORMATION.

Scope Note.—Includes formal written accusations of public offenses, presented by public officers; constitutionality and requisites of such accusations, and objections thereto. Excludes indictment and preliminary complaint in criminal cases; organization of and inquiries by the grand jury; and arraignment and pleas to indictment.

Cross References.

For kindred topics, see **AFFIDAVIT**; **INDICTMENT**, and the cross references thereunder.
 For arraignment of accused, see **ARRAIGNMENT**.
 For rights of accused, see **ACCUSED**.
 For information in any particular offense, see that **Offense**.
 For the organization and workings of the grand jury, see **GRAND JURY**.

ANALYTICAL OUTLINE.

- I. Constitutional Provisions.
- II. When Brought.
- III. Formal Requirements.
- IV. Sufficiency.
- V. How Attacked.

I. CONSTITUTIONAL PROVISIONS.

Under the Ohio constitution of 1802, a criminal prosecution could not be begun by an information: *United States v. Campbell*, T. 29.

Under Art. I, § 10, of the Ohio constitution, in cases where the punishment is less than imprisonment in the penitentiary, an indictment is unnecessary unless provided for by statute. But in so ordaining, the framers of the constitution did not intend to substitute, in such cases, the proceeding by criminal information as it exists at common law: *Eichenlaub v. State*, 36 O. S. 140, III Longsdorf's Notes, 836.

Art. I, § 10 of the Ohio constitution, does not require the prosecution of petit larceny to be without indictment. It is an indictable offense: *In re Grand Jury*, 9 W. L. J. 570.

II. WHEN BROUGHT.

Misdemeanor cases may be instituted and tried before justices of the peace and mayors, upon the filing of an affidavit, and it is not necessary that an information be lodged with the magistrate: *Kubach v. State*, 2 O. C. C. (N.S.) 133, 15 O. C. D. 488 [affirming *Kubach v. State*, 1 O. N. P. (N.S.) 405, 14 O. D. (N.P.) 726].

III. FORMAL REQUIREMENTS.

G. C., § 13581, enumerating what defects in an indictment are not fatal, and which provides that any defect or imperfection which does not tend to the prejudice of the

substantial rights of the defendant upon the merits, is not fatal, applies to an affidavit or information in the police court: *Neifeld v. State*, 3 O. C. C. (N.S.) 551, 13 O. C. D. 246.

One charged with the commission of a misdemeanor was prosecuted by information, and the information being unsupported by oath or affirmation, the accused moved to quash it for that cause, which motion was overruled. It was held that in overruling such motion there was error: *Eichenlaub v. State*, 36 O. S. 140, III Longsdorf's Notes, 836.

The oath need not be by the city prosecutor. Anyone else can make the affidavit: *O'Brien v. Cleveland*, 4 Dec. Rep. 189, 1 Clev. L. Rep. 100.

It is not necessary that the information authorized by G. C., § 13441, shall be sworn to where there is a preliminary affidavit, and the latter is sufficient to carry the charge through all the courts: *Oberer v. State*, 8 O. C. C. (N.S.) 93, 18 O. C. D. 620.

One can not be placed on trial for a crime unless the charge thereto is supported by oath or affirmation, and the mere unverified information of the prosecutor is not sufficient: *Smith v. State*, 12 O. C. C. 458, 4 O. C. D. 35.

The filing of an affidavit is a necessary prerequisite to the presentation of an information, but no allegation of the filing of such affidavit is necessary in the information itself. If it is claimed that no affidavit has been filed, a motion to quash will lie: *Weis-*

brodt v. State, 50 O. S. 192, IV Longsdorf's Notes, 494.

A heading stating that the information is issued in the name of and by the authority of the state does not show that it is for violation of a state law when it concludes "contrary to an ordinance of said city," etc.: *O'Brien v. Cleveland*, 4 Dec. Rep. 189, 1 Clev. L. Rep. 100.

It is not necessary that an information should be indorsed with the name of the prosecuting witness: *Bartlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

The affidavit of the prosecuting attorney attached to an information which declares that the statements contained in the information "are true as he verily believes" is sufficient; it is not necessary that he swears from his own knowledge, in order that it be sworn to positively on oath: *State v. Oil Co.*, 51 Bull. 563.

Corporations may be served with summons on information for violation of anti-trust law: *State v. Oil Co.*, 51 Bull. 563. See also MONOPOLIES AND UNLAWFUL COMBINATIONS.

Jurisdiction is given to justices of the peace under G. C., §§ 13478-13480, to proceed with the trial of one accused of cruelty to animals upon the filing of the proper affidavit, and without the filing of an information: *Muhlhauser v. State*, 1 O. C. C. (N.S.) 273, 15 O. C. D. 81. See also COURTS.

In prosecutions begun in the probate court, under favor of G. C., §§ 13195 and 13225, the information must be filed by the prosecuting attorney in accordance with G. C. § 13441, before the probate court has jurisdiction to try such prosecutions: *Rogers v. State*, 87 O. S. 308 [affirming in part *Rogers v. State*, 14 O. C. C. (N.S.) 177, 22 O. C. D. 389].

An information for violating a city ordinance providing for resisting a city officer not being necessary by the constitution and not being described by any statute, need not set out the facts constituting the offense, and is sufficient if it follows the words of the ordinance: *Potter v. Cincinnati*, Daily Court Bulletin, 18.

IV. SUFFICIENCY.

An affidavit or information charging the proprietor of a junk shop with "failing to retain the metal for thirty days," as required by G. C., §§ 6370 and 6371, substantially charges that he did not retain it, and is sufficient to notify the defendant of the offense with which he is charged; he is not prejudiced in his substantial rights because the provision of the statute is not negated:

Neifeld v. State, 3 O. C. C. (N.S.) 551, 13 O. C. D. 246.

The affidavit does not require the same strictness as the indictment or information, and if the latter charges sales of liquor to a person in the habit of getting intoxicated, which habit was known to the defendant, it will not be quashed for want of the averment of such knowledge in the affidavit: *Parker v. State*, 4 O. S. 563, II Longsdorf's Notes, 131.

Strict conformity of affidavit and information is not necessary, but a variance is allowed; as where, under the liquor laws, the former charges keeping open a "house" on Sunday, and the latter a "room": *State v. Shumann*, 8 Dec. Rep. 373, 7 Bull. 240.

Several offenses may be charged in the same complaint, but they must be separately stated in such a form as to provide a complete and separate setting forth of each offense: *Muhlhauser v. State*, 1 O. C. C. (N.S.) 273, 15 O. C. D. 81.

Two or more corporations charged with conspiracy against trade may be properly joined in one information: *State v. Oil Co.*, 51 Bull. 563. See also MONOPOLIES AND UNLAWFUL COMBINATIONS.

The information charging a person with operating an automobile at a greater rate of speed than fifteen miles per hour within the limits of a municipality, does not with the certainty required in criminal pleadings show a violation of G. C., § 12604: *Brown v. State*, 10 O. N. P. (N.S.) 238, 20 O. D. (N. P.) 348.

Where an ordinance forbade street cars to be run without both a driver and conductor, an information in the police court for driving a car without a conductor charges no offense. Driving does not mean running, which implies operating: *Thornhill v. Cincinnati*, 4 O. C. C. 354, 2 O. C. D. 592.

An information in the police court for violating a statute applicable to a city of a certain grade and class must aver the city to be of such grade and class. The court can not judicially notice it: *Massa v. State*, 3 O. C. C. 9, 2 O. C. D. 6.

An averment of coercing from belonging to a labor union by threatening to discharge and discharging is sufficient: *State v. Davis*, 11 Dec. Rep. 786, 29 Bull. 305 [affirmed, *Davis v. State*, 11 Dec. Rep. 894, 30 Bull. 342].

Conviction on an information for practicing a trick game which does not specify the kind of a trick game will be reversed: *In re Trick Game*, 7 O. N. P. 604, 5 O. D. (N.P.) 572.

An information must substantially conform to the affidavit, but where the affidavit charges selling "intoxicating liquors" in a brothel, while the information charges sell-

ing "intoxicating liquors, to wit, beer", in a brothel, it is not substantially variance: *Schmeltz v. State*, 8 O. C. C. 82, 4 O. C. D. 287.

The words "not a drug store" sufficiently negative the statute as to keeping open a place where intoxicating liquors are sold, but not as to the selling of liquors by druggists: *Oberer v. State*, 8 O. C. C. (N.S.) 93, 18 O. C. D. 620. See also INTOXICATING LIQUOR.

See also the titles of the particular offenses.

Informations for violating the Sunday laws need not negative an application to those observing the seventh day: *Billigheimer v. State*, 32 O. S. 435, III Longsdorf's Notes, 642.

An information under the common labor law, G. C., § 13047, against a barber for shaving on Sunday, which charges no specific act of shaving, is bad for uncertainty: *Spaith v. State*, 10 Dec. Rep. 639, 22 Bull. 323. See also SUNDAY LAWS.

V. HOW ATTACKED.

Formal defects not objected to by motion to quash are waived, and this applies to informations: *Bartlett v. State*, 28 O. S. 669, III Longsdorf's Notes, 431.

The accused may demur to an information where the facts stated therein do not constitute an offense punishable by the laws of this state: *Davis v. State*, 32 O. S. 24, III Longsdorf's Notes, 618.

A prisoner may waive an examination before a justice, and submit to be bound over, although he has pleaded not guilty, and it is error in the probate court to quash the information because its truth had not been inquired into by the justice: *State v. Ritty*, 23 O. S. 562, III Longsdorf's Notes, 145. See also EXAMINATION OF ACCUSED.

INFORMATION AND BELIEF.

See AFFIDAVIT.

INFORMERS.

See PENAL AND QUI TAM ACTIONS.

INFRINGEMENT.

See COPYRIGHT; PATENT; TRADE-MARKS AND TRADE NAMES.

INFRINGEMENT OF JURY TRIAL.

See TRIAL.

IN FUTURO.

See FUTURE INTERESTS.

IN GOOD FAITH.

See BONA FIDE BUYER; FRAUD AND DECEIT.

INGRESS AND EGRESS.

See WAYS; LANDLORD AND TENANT.

IN GROSS.

See EASEMENT.

INHABITANCY.

See DOMICILE.

INHABITANTS OF ADMITTED TERRITORY.

See MUNICIPAL CORPORATIONS.

INHABITED DWELLING.

See ARSON AND OTHER BURNINGS; BURGLARY AND OTHER BREAKINGS.

INHERITABLE BLOOD.

See DESCENT AND DISTRIBUTION.

INHERITANCE.

See DESCENT AND DISTRIBUTION.

INHERITANCE TAX.

Scope Note.—Includes definition; collateral inheritance tax and direct inheritance tax. Excludes taxation in general.

Cross Reference.

For inheritance tax, see also TAXATION.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Collateral Inheritance Tax.
- III. Direct Inheritance Tax.

I. DEFINITION.

A tax on inheritance is an excise tax, that is, it is a tax on the rights to receive property as distinguished from a tax on the property itself: *State v. Guilbert*, 70 O. S. 229, IV Longsdorf's Notes, 973; *State v. Ferris*, 53 O. S. 314, IV Longsdorf's Notes, 602; *Hagerty v. State*, 55 O. S. 613, IV Longsdorf's Notes, 675 [affirming *Dyer v. Hagerty*, 12 O. C. C. 606, 5 O. C. D. 701].

II. COLLATERAL INHERITANCE TAX.

An earlier form of G. C., § 5331 (91 v. 169; act of April 20, 1894), was not unconstitutional by reason of its discrimination between collateral kindred: *Hagerty v. State, ex rel.*, 55 O. S. 613, IV Longsdorf's Notes, 675.

The property "which shall pass by sale" within the meaning of the act is such only as passes in transactions which are in fact gifts, though in form sales, and the act does not restrict the right to dispose of property by sale for a valuable consideration, which the parties, in good faith, deem adequate: *Hagerty v. State, ex rel.*, 55 O. S. 613, IV Longsdorf's Notes, 675.

Personal property which is located in Ohio is subject to the inheritance tax, whether the owner resides within the state or without it: *In re Estate of Speers*, 4 O. N. P. 238, 6 O. D. (N.P.) 398.

A bequest to the wife of an adopted son is subject to this tax: *In re Hunnewell*, 3 O. L. R. 52.

A legacy to a stepson is subject to this tax: *In re Hooper*, 4 O. N. P. 186, 6 O. D. (N.P.) 560.

If the testator has bequeathed a debt due from the executor to him to such executor, in lieu of his statutory compensation, such debt is not taxable upon the excess thereof over the statutory compensation, if it is not clear that the amount of such debt is more than reasonable compensation for

the work necessary to settling such estate: *In re Hooper*, 4 O. N. P. 186, 6 O. D. (N.P.) 560.

The amount of the tax is not to be computed upon the amount of the legacy after deducting the amount of the tax: *In re Hooper*, 4 O. N. P. 186, 6 O. D. (N.P.) 560.

A contingent devise is not taxable until it becomes vested: *In re Hooper*, 4 O. N. P. 186, 6 O. D. (N.P.) 560.

Compensation for services for which provision is made by will is not subject to this tax: *In re Hooper*, 4 O. N. P. 186, 6 O. D. (N.P.) 560.

A bequest to a priest for the purpose of saying masses is subject to this tax: *Editorial*, 38 Bull. 304.

Where the probate court, in the settlement of the estate of a decedent, determines the liability of a devise, legacy, bequest or inheritance to pay a collateral inheritance tax, under the provisions of G. C., § 5331, appeal may be taken by either party to the controversy regarding the tax, from the judgment of the probate court, to the court of common pleas as authorized by G. C., § 5344; and where the state, or the prosecuting attorney in behalf of the state, takes the appeal, it may be done without giving an undertaking for such appeal, and without filing the written notice of an intention to appeal provided for in G. C., § 11207. The appeal may be perfected by either party according to the provisions of G. C., §§ 11212 and 12226: *Humphreys v. State*, 70 O. S. 67, IV Longsdorf's Notes, 968.

Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for "purposes of purely public charity or other exclusively public purposes," are not "institutions" of that class in this state within the meaning of G. C., § 5331; and where they are entitled to receive property within the jurisdiction of this state, by deed of gift, bequest or devise, such gift, bequest or de-

vise is liable to a collateral inheritance tax as provided in this section, although some of the charitable work, operations and enterprises of the institutions so incorporated and organized are carried on within this state. The statute so construed is not obnoxious to the second section of our bill of rights, nor to the fourteenth amendment to the constitution of the United States: *Humphreys v. State*, 70 O. S. 67, IV Longsdorf's Notes, 968.

If a will which is executed in this state, passes to one who is not related to the testator, real and personal property situated in this state, and such legatee and devisee is appointed executrix, and after accepting such trust resigns without complying with the provisions of G. C., § 5331, and the following section, it is the duty of the probate court to appoint an administrator *de bonis non* with the will annexed to comply with the requirements of such statute: *Chamberlain v. Stecher*, 78 O. S. 271.

Bequests to the Presbyterian Church part to be used in Ohio, but the greater part thereof to be used elsewhere, are not exempt since they are not for the benefit of the inhabitants of this state: *In re Brown*, 13 O. D. (N.P.) 168 [affirmed, *Humphreys v. State*, 1 O. C. C. (N.S.) 1, 14 O. C. D. 238].

III. DIRECT INHERITANCE TAX.

A law of a general nature, which is in full force in every part of the state, complies with Art. II, § 26, of the constitution, requiring laws of a general nature to have uniform operation throughout the state: *State, ex rel., v. Ferris*, 53 O. S. 314, IV Longsdorf's Notes, 602 [affirming, *State, ex rel., v. Ferris*, 9 O. C. C. 298, 6 O. C. D. 158].

The act of April 20, 1894, entitled: "An act to impose a direct inheritance tax," (91 v. 166), by its exemption from taxation of the right to receive or succeed to estates not exceeding twenty thousand dollars in value, and taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and in taxing at a higher rate per centum the right to receive or succeed to estates of larger value than to estates of smaller value, is in conflict with section 2 of the bill of rights of the constitution of this state, which declares that: "All political power is inherent in the people. Government is instituted for their equal protection and benefit;" and the whole act is therefore unconstitutional and void: *State, ex rel., v. Ferris*, 53 O. S. 314, IV Longsdorf's Notes, 602 [affirming, *State, ex rel., v. Ferris*, 9 O. C. C. 298, 6 O. C. D. 158].

The direct inheritance tax law of April 25, 1904 (97 v. 398), was held to be uncon-

stitutional: *State, ex rel., v. Guilbert*, 70 O. S. 229, IV Longsdorf's Notes, 973.

See also *Hostetter v. State*, 5 O. C. C. (N.S.) 337, 16 O. C. D. 702 [reversed, *Eury v. State*, 72 O. S. 448, IV Longsdorf's Notes, 992].

The act passed and approved April 25, 1904 (97 v. 398), entitled: "An act to impose a tax upon the right to succeed to, or inherit, property," is not retroactive, and applies only to such rights arising on a death occurring on or subsequent to that day: *Eury v. State*, 72 O. S. 448, IV Longsdorf's Notes, 992 [reversing *Hostetter v. State*, 5 O. C. C. 337, 16 O. C. D. 702].

The direct inheritance tax law was held not to apply to vested estates where the death had occurred prior to the passage of this act: *In re Bushnell*, 2 O. N. P. (N.S.) 673, 50 Bull. 87.

The act of April 2, 1906 (98 v. 229), which repealed the direct inheritance tax law of April 25, 1904 (97 v. 398), was not affected in its operation by G. C., § 26, with reference to the effect of repealing statutes; and accordingly the right to collect such tax terminated when the act took effect: *Friend v. Levy*, 76 O. S. 26, IV Longsdorf's Notes, 1022.

INHUMAN TREATMENT.

See ASSAULT AND BATTERY; ASSAULT WITH INTENT; DIVORCE, ALIMONY AND CUSTODY OF CHILDREN; PARENT AND CHILD.

INITIAL CARRIERS.

See CARRIERS.

INITIALS.

For initials, see also NAMES.

For suing by initials, see ATTACHMENT; PLEADINGS; JUDGMENT.

The filing with the clerk of the court of common pleas of the transcript of a magistrate's judgment does not create a lien upon the real estate of the debtor as against title of a subsequent *bona fide* vendee, where the debtor was sued by initial letter and the action was not one which fell within the statutory exception for the naming of a party defendant by initial letter or a contraction of his name and the purchaser was without actual knowledge of the filing of such lien or judgment: *Meade v. Hawkins*, 12 O. N. P. (N.S.) 605, 22 O. D. (N.P.) 729.

In attachment proceedings before a justice of the peace jurisdiction is not defeated by the fact that the defendant was sued by his initials instead of his full name: *Kinsey Co.*

v. Heimerdinger, 13 O. C. C. (N.S.) 195, 23 O. C. D. 32.

Where initials have been commonly used by any individual in the transaction of his business affairs, and he has been commonly designated by such and he had been known to the plaintiff by his initials, a motion to set aside an attachment will not be on the ground that he had been sued by his initials

instead of his Christian and middle names: *Daniels v. Taylor*, 13 O. C. C. (N.S.) 116, 21 O. C. D. 611 [affirmed, without opinion, *Daniels v. Taylor*, 86 O. S. 307].

INITIATIVE AND REFER- ENDUM.

See CONSTITUTIONAL LAW.

INJUNCTION.

Scope Note.—Includes definition, nature and classification, general principles governing, rights protected by injunction, jurisdiction, parties, pleading, notice, interlocutory hearing, final hearing, evidence, decree, accounting, dissolution and modification, review, bond, and injunction as basis for action of malicious prosecution. Excludes jurisdiction and proceedings in equity in general, and proceeding in cases of contempt.

Cross References.

- For injunction as a remedy against illegal taxation, see also TAXATION.
- For injunction as a remedy against illegal assessments, see also ASSESSMENTS.
- For injunction as a remedy against nuisances, see also NUISANCES.
- For injunction as a means of protecting rights in waters and watercourses, see WATERS AND WATERCOURSES.
- For injunction as a remedy against the unlawful exercise of the power of eminent domain, see also EMINENT DOMAIN.
- For injunction as a remedy against the unlawful construction of ditches, see also DITCHES.
- For injunction as a remedy against a fraudulent judgment, see JUDGMENT.
- For injunction as a remedy against illegal public contracts or the illegal expenditure of public funds, see also PUBLIC CONTRACTS; TAXATION.
- For injunction as a remedy against boycotts or strikes, see BOYCOTTS AND STRIKES.
- For injunction as a means of enforcing conveyances in deeds, see also DEEDS.
- For injunction as a remedy against the misuse of trade-marks or trade names, see also TRADE-MARKS AND TRADE NAMES.
- For injunction as a remedy for enforcing conveyances in leases, see LANDLORD AND TENANT.
- For injunction as a remedy in cases involving street railways or interurban railways, see STREET RAILWAYS AND INTERURBAN RAILWAYS.
- For injunction as a remedy against waste, see also WASTE.
- For injunction as a remedy against the obstruction of easements, see EASEMENT.
- For injunction as a means of protecting property-rights in streets, see also STREETS.
- For injunctions as a means of enforcing rights in parks, see also PARKS AND PUBLIC GROUNDS.
- For injunction as a means of enforcing contracts, see also CONTRACTS.
- For injunction as a means of restraining wrongful actions by municipal corporations or the officers thereof, see also MUNICIPAL CORPORATIONS.
- For injunction as a remedy against the wrongful interferences with contracts, see also CONTRACTS.
- For the protection of interests in partnership by injunction, see PARTNERSHIP.
- For injunction as a remedy against the unauthorized practice of medicine, see PHYSICIANS AND SURGEONS.
- For injunction as a remedy against the unlawful orders of the public service commission, see PUBLIC SERVICE COMMISSION.
- For injunction as a remedy to protect the rights of abutting or adjoining owners, see ABUTTING OWNERS; ADJOINING OWNERS.
- For control of corporations by injunction, see also CORPORATIONS.
- For control of common carriers by injunction, see also CARRIERS.
- For the appointment of receivers, see RECEIVERS.
- For proceedings to quiet title, see QUIETING TITLE.
- For questions of specific performance, see SPECIFIC PERFORMANCE.

- For jurisdiction of courts in matters of injunction, see **COURTS; JURISDICTION**.
For questions of abatement and revivor, see **ABATEMENT AND REVIVOR OF ACTIONS**.
For questions of parties, see also **PARTIES**.
For questions of pleadings, see also **PLEADINGS**.
For disobedience of an order of injunction, see **CONTEMPT**.
For review of injunction by proceedings in error, see also **ERROR**.
For questions of appeal, see also **APPEALS**.
For injunction as affecting the running of the statute of limitations, see also **LIMITATIONS, STATUTE OF**.
For questions of costs, see **COSTS**.
For questions of estoppel, see **ESTOPPEL**.

ANALYTICAL OUTLINE.

I. Definition, 8813.

II. Nature and Classification, 8813.

- A. *Nature*, 8813.
- B. *Prohibitory injunctions*, 8814.
- C. *Mandatory injunctions*, 8814.
- D. *Temporary injunctions*, 8814.
- E. *Permanent injunctions*, 8815.

III. General Principles Governing Injunction, 8815.

- A. *Caution required*, 8815.
- B. *Existence and nature of right*, 8815.
 - 1. In general, 8815.
 - 2. Clearly established, 8816.
 - 3. Doubtful rights, 8817.
 - 4. Civil rights protected, 8817.
- C. *Existence and nature of injury*, 8818.
 - 1. Threatened injury, 8818.
 - 2. Continuing, 8819.
 - 3. Nature, 8820.
 - a. Special, 8820.
 - b. Substantial, 8820.
 - c. Irreparable, 8822.
- D. *Motive of complainant*, 8823.
- E. *Relative inconvenience and injury*, 8824.
- F. *Application of equitable maxims*, 8825.
- G. *Existence of other remedies*, 8826.
 - 1. At law, 8826.
 - a. In general, 8826.
 - b. Damages, 8829.
 - 2. Statutory, 8830.
 - 3. Bond, 8830.
 - 4. Petition in error, 8831.
 - 5. Remedy outside the courts, 8831.
- H. *Former injunction*, 8832.
- I. *Effect of former judgment*, 8832.
- J. *Multiplicity of suits*, 8832.
- K. *Laches, waiver and estoppel*, 8833.
- L. *Courts in which relief may be had*, 8838.
 - 1. Injunction by state courts, 8838.
 - 2. Injunction by federal courts, 8838.
- M. *Bar*, 8839.
- N. *Other questions*, 8839.

IV. Rights Protected by Injunction, 8840.**A. Public officers, boards and municipalities, 8840.**

1. Power to enjoin, 8840.
 - a. In matters of discretion, 8840.
 - b. Other questions, 8842.
2. Particular officers, 8842.
 - a. State officers, 8842.
 - b. County officers, 8843.
 - aa. Commissioners, 8843.
 - bb. Auditor, 8845.
 - cc. Treasurer, 8845.
 - dd. Other officers, 8845.
 - c. Township trustees, 8846.
 - d. Board of education, 8847.
 - aa. Injunction against, 8847.
 - bb. Injunction for, 8849.
 - e. Board of equalization, 8849.
 - f. Election officers, 8849.
 - g. Receiver of national bank, 8850.
3. Elections, 8851.
4. Exercise of office, 8851.
5. Removal of officers, 8852.
6. Inspection of public records, 8853.
7. Injunction against municipality, 8853.
 - a. In general, 8853.
 - b. Appropriation of property, 8855.
 - c. Nuisance, 8856.
 - d. Illegal ordinance, 8856.
 - e. Unauthorized contracts and expenditures, 8858.
 - aa. Suit by taxpayer, 8858.
 - bb. Payment of public money, 8859.
 - cc. Abuse of corporate power, 8862.
 - dd. Irregular contracts, 8864.
 - ee. Letting contracts to lowest bidder, 8867.
 - ff. Contracts in contravention of law or procured by fraud, 8869.
 - gg. Issuance of bonds, 8870.
 - hh. Public improvement on private property, 8871.
 - ii. Grant and misuser of franchise, 8871.
 - jj. Vacation of streets, 8873.
 - kk. Use and improvement of streets, 8873.
 - ll. Criminal proceedings, 8874.

B. Acts of private corporations, 8874.

1. Management, 8874.
 - a. Acts of officers, 8874.
 - b. Transfer of stock, 8876.
 - c. Inspection of books, 8877.
 - d. Expulsion, 8877.
 - e. Election of officers, 8878.
 - f. Retirement and voting of stock, 8878.
2. Protection of property-rights against corporation, 8879.
 - a. Abutting owners, 8879.
 - aa. Where act done without consent, or compensation, 8879.
 - bb. Interference with ingress and egress, 8881.
 - cc. Where owner has right to sue for damages, 8883.

- b. Act illegal or unauthorized, 8884.
 - c. Act legal and authorized, 8885.
 - d. To restrain discrimination, 8886.
 - 3. Acts for protection of the public, 8887.
 - 4. To compel performance of conditions of franchise, 8889.
- C. *Against interference with franchises*, 8890.
- D. *Contracts*, 8892.
 - 1. Relief against contract, 8892.
 - 2. Breach, 8893.
 - a. In general, 8893.
 - b. Inconsistent contract, 8897.
 - c. Particular covenants, 8897.
 - aa. Negative covenants, 8897.
 - bb. Covenants in a lease, 8899.
 - cc. Building restrictions, 8901.
 - d. Illegal and unconscionable contracts, 8902.
 - e. Personal services, 8902.
 - f. Building contracts, 8904.
 - 3. Against wrongful interference with contract, 8904.
- E. *To prevent injury to trade or business*, 8905.
 - 1. Unlawful business, 8905.
 - 2. Trade secrets, 8905.
 - 3. Trade name, 8908.
 - 4. Trade-marks, 8910.
 - 5. Misleading device, etc., 8910.
 - 6. Agreement not to compete, 8911.
 - 7. Interference with mail, 8912.
 - 8. Unlawful competition, 8913.
 - 9. Acts of labor-unions, 8914.
 - 10. Against public officers, 8917.
- F. *Against execution, levy and sale*, 8917.
 - 1. In general, 8917.
 - 2. To restrain sales, 8918.
- G. *To restrain the disposition or removal of property*, 8922.
- H. *To protect easements*, 8922.
 - 1. In general, 8922.
 - 2. Extent of abutting owner's easement, 8925.
 - 3. What acts may be enjoined, 8925.
 - a. Acts by individuals, 8925.
 - b. Acts by corporations, 8926.
 - 4. Abutting owner's right to use the street, 8932.
 - 5. Water-rights, 8933.
- I. *Against trespass*, 8935.
- J. *Against nuisance*, 8937.
 - 1. In general, 8937.
 - 2. Specific nuisances, 8938.
- K. *Against appropriation proceedings*, 8942.
- L. *Against assessments*, 8945.
 - 1. In general, 8945.
 - 2. Street and road assessments, 8947.
 - 3. Ditch and sewer assessments, 8949.
- M. *Against Taxation*, 8950.
- N. *Against actions at law*, 8953.
 - 1. When proper, 8953.
 - 2. Effect on statute of limitations, 8956.

- O. *In aid of an action at law*, 8956.
- P. *Against arbitration*, 8957.
- Q. *Against judgments*, 8958.
 - 1. When proper, 8958.
 - a. Valid judgments, 8958.
 - b. Voidable and erroneous judgments, 8959.
 - c. Void judgment, 8961.
 - 2. Laches of complainant, 8962.
- R. *To restrain criminal proceedings*, 8963.
- S. *Against illegal and criminal acts*, 8965.
- T. *To restrain a libel*, 8967.
- U. *Other questions*, 8968.
- V. **Jurisdiction**, 8970.
 - A. *In supreme court*, 8970.
 - B. *In circuit court*, 8971.
 - C. *In superior court of Cincinnati*, 8971.
 - D. *In probate court*, 8972.
 - E. *Concurrent jurisdiction*, 8972.
 - F. *On appeal*, 8972.
- VI. **Parties**, 8972.
 - A. *Plaintiff*, 8972.
 - 1. In general, 8972.
 - 2. Solicitor, 8976.
 - 3. Taxpayer, 8977.
 - a. Non-resident taxpayer, 8977.
 - b. Interest, 8977.
 - c. Motive, 8980.
 - d. Request, 8982.
 - e. Attorneys' fees and costs, 8985.
 - f. Property-owners in villages, 8986.
 - B. *Defendant*, 8986.
- VII. **Pleading**, 8987.
- VIII. **Notice**, 8990.
- IX. **Interlocutory Hearing**, 8990.
- X. **Final Hearing**, 8992.
- XI. **Evidence**, 8992.
- XII. **Decree**, 8993.
 - A. *Order and service*, 8993.
 - B. *Effect of decree*, 8994.
 - C. *Enforcing decree*, 8995.
 - 1. What constitutes violation, 8995.
 - 2. Necessity for undertaking, 8997.
 - 3. Necessity for service, or knowledge thereof, 8997.
 - 4. Affidavit of attachment, 8998.
 - 5. Contempt, 8998.
 - D. *Effect of refusal to grant injunction*, 9000.
- XIII. **Accounting and Compensation**, 9001.
- XIV. **Dissolution and Modification**, 9001.
 - A. *In general*, 9001.
 - B. *Evidence and burden of proof*, 9002.
 - C. *Nature and effect of order modifying injunction*, 9003.
 - D. *Review*, 9003.

XV. Review, 9004.

- A. *Error*, 9004.
- B. *Appeal*, 9005.

XVI. Bond, 9007.

- A. *Necessity for bond*, 9007.
- B. *Effect of failure to give bond*, 9007.
- C. *Construction of bond*, 9007.
- D. *Additional bond*, 9008.
- E. *Action on bond*, 9009.

- 1. Preliminary requisites, 9009.
 - a. Decision that injunction should not have been issued, 9009.
 - b. Necessity for issuance of execution, 9010.
- 2. Damages, 9011.
- 3. Pleading and proof, 9012.

XVII. Injunction as Grounds for Malicious Prosecution, 9013.**I. DEFINITION.**

An injunction is an order made by a court commanding the parties to whom it is addressed to refrain from doing certain designated acts which, if done, would violate either the personal or property rights of others: *Engine Co. v. Benner*, 14 O. D. (N. P.) 357.

An injunction is an extraordinary remedy granted only where the proof is clear that the injury is certain, material and substantial: *Batsche v. Iron Co.*, 15 O. D. (N.P.) 30.

II. NATURE AND CLASSIFICATION.**A. NATURE.**

An injunction is classified under the code as a provisional remedy, a temporary order, and when granted a temporary remedy. It is not a judgment: *Mannington v. Railway*, 8 O. L. R. 451, 16 O. F. D. 552.

A writ of injunction is remedial in its nature and can not be used to control personal conduct beyond the limits of the jurisdiction of the court issuing it: *Baseball Co. v. Lajoie*, 13 O. D. (N.P.) 504.

Injunction and specific performance are interdependent remedies: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136.

Injunction will only lie against that which has already been done, not against what may be done: *Aydelote v. Cincinnati*, 10 O. D. (N.P.) 710.

A court will grant a perpetual injunction only when a party shows a clear right thereto: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

The power to grant an injunction is one of the extraordinary powers of a court of equity and should be exercised only where the law on account of its universality of

application is insufficient to afford a remedy: *Powell v. Ashville*, 11 O. N. P. (N.S.) 369, 21 O. D. (N.P.) 434.

B. PROHIBITORY INJUNCTIONS.

A prohibitory injunction is a command to refrain from doing a particular act: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181; *Newton v. Commissioners*, 26 O. S. 618, III Longsdorf's Notes, 334; *Lembeck v. Nye*, 47 O. S. 336, IV Longsdorf's Notes, 376.

C. MANDATORY INJUNCTIONS.

"Mandatory injunctions being framed in an indirect form, compel the defendant to restore things to their former condition, and virtually direct the defendant to do an act": *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500.

The practice of granting mandatory injunctions or provisional injunctions prohibiting in form, but in substance requiring some positive act to be done, is so well established as a part of ordinary chancery practice, that it will not be understood to be prohibited by the code, unless the language of the code is clearly inconsistent with it. The code limits provisional injunctions to the prohibition of the doing or the continuance of an act: *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500.

D. TEMPORARY INJUNCTIONS.

A temporary restraining order or a preliminary injunction is a provisional remedy, and is allowed or disallowed without intention on the part of the court of thereby forecasting what may be the final decree on full hearing: *Gould v. Railway*, 10 O. N. P. (N.S.) 129, 21 O. D. (N.P.) 733.

The office of a temporary injunction is to forbid the doing of the threatened acts until the case can be heard upon its merits, and a final decree entered: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

E. PERMANENT INJUNCTIONS.

A court will grant a perpetual injunction only when a party shows a clear right thereto: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

The burden of establishing a right to a perpetual injunction claimed by a party to an action, is upon such party: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

III. GENERAL PRINCIPLES GOVERNING INJUNCTION.

A. CAUTION REQUIRED.

The power to grant writs of injunction is one of the extraordinary powers of a court of equity and should only be exercised in cases where a great and important public work is to be restrained or suspended, to prevent injuries which would otherwise be irreparable, or when the magnitude of the injury to be dreaded is so great, and the risk so imminent, that no prudent person would think of incurring it: *Stewart v. Railroad*, 14 O. 353, I Longsdorf's Notes, 674.

The power to grant an injunction is one of the extraordinary powers of a court of equity and should be exercised only where the law on account of its universality of application is insufficient to afford a remedy: *Powell v. Ashville*, 11 O. N. P. (N.S.) 369, 21 O. D. (N.P.) 434.

B. EXISTENCE AND NATURE OF RIGHT.

1. In General.

The court will look to the substantial rights of parties, and not to mere irregularities in the exercise of such rights, in granting an injunction: *Hamilton v. Gas Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513.

On motion for a preliminary injunction the court will consider, not whether the applicant has actually a right but whether he has a fair question to raise as to its existence: *Hotel Co. v. McClain*, 2 O. N. P. 247, 4 O. D. (N.P.) 309.

To enable a taxpayer to sue on behalf of a municipal corporation under G. C., §§ 4311 and 4314, such taxpayer must be shown to have an interest: *Buning v. Cincinnati*, 1 O. C. C. 323, 1 O. C. D. 178; *Yaple v. Morgan*, 2 O. C. C. 406, 1 O. C. D. 557 [affirmed, without opinion, *Yaple v. Morgan*, 25 Bull. 333]; *Johnson v. Street Railroad Co.*, 9

Dec. Rep. 71, 10 Bull. 345; *Webb v. Gas Fuel Co.*, 9 Dec. Rep. 662, 16 Bull. 121; *Cincinnati v. Allison*, 12 O. D. (N.P.) 376.

In order that a taxpayer may bring an action under G. C., § 4311, specifying the grounds upon which a city solicitor shall apply for injunction he need not have a private interest to protect an injury peculiar to himself in order to proceed under G. C., § 4314: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136.

Where an abutting property owner brings an action to enjoin an obstruction of the public highway, he must rely upon his private right to sustain his action: *Mondle v. Plow Co.*, 6 O. N. P. 294, 9 O. D. (N.P.) 281.

Where land is designated on a duly recorded plat as a "public square," this does not of itself vest title in the city, unless such "public square" is accepted by ordinance or some other act. And in this situation an owner of property abutting on the space designated as "public square" has not such an interest as to give him title in fee, but he has such an interest therein as to entitle him to an injunction to restrain an interference with his interest therein: *Lunkemeier Co. v. Cincinnati*, 3 O. C. C. (N.S.) 143, 13 O. C. D. 617.

The prosecution of a lawful business can not be enjoined until the plaintiff has first established his right by an action at law: *Downs v. Clay Co.*, 9 O. C. C. (N.S.) 345, 19 O. C. D. 328.

Injunction and not mandamus is the proper remedy for a member illegally expelled from a club: *Cheney v. Ketcham*, 5 O. N. P. 139, 7 O. D. (N.P.) 183. See also CORPORATIONS.

2. Clearly Established.

A court of equity will grant a perpetual injunction only when a party shows a clear right thereto: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181; *Walker v. Railroad Co.*, 8 O. 38, I Longsdorf's Notes, 410; *Goodall v. Crofton*, 33 O. S. 271, III Longsdorf's Notes, 672; *Schaaff v. Railway Co.*, 16 O. C. C. 252, 8 O. C. D. 688; *Fisher v. Hotel Co.*, 4 O. N. P. 329, 7 O. D. (N.P.) 67; *Furniture Co. v. Railway*, 7 O. N. P. 640, 10 O. D. (N.P.) 218; *Stewart v. Railroad*, 14 O. 353, I Longsdorf's Notes, 674.

The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

To entitle a party to an injunction *pendente lite*, he must show a clear right thereto, and must further show that he can not obtain complete justice on the final decree,

if everything is not kept in *statu quo* until final decision: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

The construction of a street railroad will not be enjoined at the suit of one, whose title is disputed: *Swing v. Traction Co.*, 15 O. D. (N.P.) 70, 1 *Hosea*, 260.

A party, to have an extraordinary remedy, as attachment or injunction, must make out a clear case: *Egan v. Lumsden*, 13 Dec. Rep. 103, 4 *Gaz.* 161, 2 *D.* 168. See also ATTACHMENT.

3. Doubtful Rights.

Equity will not assume the functions of a court and disentangle a complicated real estate title as a basis for granting an injunction, especially where the plaintiff is not in possession. Where his right is doubtful and the facts not definitely ascertained, his right must first be established at law: *Swing v. Traction Co.*, 15 O. D. (N.P.) 70, 1 *Hosea*, 260.

Injunction will not lie if there is any doubt about complainant's rights: *Bryan v. Chyne*, 10 Dec. Rep. 599, 22 *Bull.* 165.

An injunction will not lie to restrain a tenant in possession of a permanent leasehold from the commission of waste, where there is no showing that the lease provides against waste, or averment or proof that the security will be impaired or that the tenant under the lease is insolvent: *Fowler v. Children's Home*, 10 O. N. P. (N.S.) 557.

The purchaser of a specified amount of land, cut off by accurate survey from one side of a larger tract belonging to the grantor, does not acquire title to an additional strip lying outside of his surveyed line, to which he contends his predecessor acquired title by adverse possession through a mistake as to the location of the true boundary line; and in the absence of the predecessor in title as a party to the case, the owner of the adjoining lands will be granted an injunction against occupancy of said strip by the grantee of said predecessor in title: *Loughridge v. Hartshorn*, 14 O. C. (N.S.) 161, 23 O. C. D. 547.

4. Civil Rights Protected.

There is no rule or principle of equity that warrants the interference by injunction to restrain the exercise of a function of a co-ordinate branch of a government: *Railway Co. v. Board of Equalization*, 8 O. N. P. 487, 11 O. D. (N.P.) 629.

Injunction will not lie where interference with property rights does not go beyond a reasonable exercise of executive discretion: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

Equity has no jurisdiction, in matters political, illegal or immoral, as to enforce a penal statute, or redress a public wrong: *Fisher v. Hotel Co.*, 4 O. N. P. 329, 7 O. D. (N.P.) 67.

An injunction restraining the officers of election from counting certain ballots cast at an election for delegates to such convention is void for want of jurisdiction, and the parties enjoined are not punishable for contempt for violating such order: *In re Contempt Proceedings v. Grear*, 6 O. N. P. 312, 9 O. D. (N.P.) 299.

Courts of equity can not restrain the members of political conventions or members of the committee on credentials from arbitrarily seating a certain delegate therein: *In re Contempt Proceedings v. Grear*, 6 O. N. P. 312, 9 O. D. (N.P.) 299.

It is the duty of a widow as the heir or next of kin of her deceased husband to dispose of his body in a reasonable and sanitary manner, and where in conformity with his expressed desire she elects to cremate his body, injunction will not lie against that method of disposal, where based only on sentimental objections to cremation on the part of other near relatives: *Evans v. Evans*, 12 O. N. P. (N.S.) 619, 23 O. D. (N.P.) 375.

C. EXISTENCE AND NATURE OF INJURY.

1. Threatened Injury.

An injunction will not be granted, unless the evidence shows a probability of the defendant doing the act which is sought to be restrained: *Fritter v. Bohl*, 2 O. N. P. (N.S.) 365, 14 O. D. (N.P.) 710.

An action to enjoin is not prematurely brought where defendant has made no threats or declarations of intention to act, if there is good reason to believe that the defendant will proceed to act and complete measures then in progress for such act: *Newton v. Commissioners*, 26 O. S. 618, III *Longsdorf's Notes*, 334.

A threat to do the wrong, with the power to do it, is sufficient. The court will not wait for the actual commencement of the work: *McArthur v. Kelly*, 5 O. 139, I *Longsdorf's Notes*, 254.

Where in a dispute over a boundary, an injunction was granted to enjoin an actual or threatened trespass—such as throwing down plaintiff's fences, closing up his roads, etc.: *Culver v. Rodgers*, 33 O. S. 537, III *Longsdorf's Notes*, 688.

An electric light company will not be enjoined from putting wires within three or four feet of plaintiff's wires, if the bulk of evidence is against sensible diminution of current by induction, and the linemen will

not be in danger if careful, except in certain work when the defendant's current must on notice be stopped. The danger from breaks, etc., during storms is too uncertain to consider. But the injunction must be with these limitations and with leave to move to modify if actual experiment shows injury: *Telegraph Co. v. Light Co.*, 9 Dec. Rep. 540, 14 Bull. 327.

Well-founded apprehension of mischief is not sufficient. The mischief must be certain and its approach imminent. Temporarily laying a track in a street along the river front until the bank could be filled out wider is a mere apprehended evil, not enjoined, and if it prove injurious the injunction can go to compel other motive power or a regulation of trains: *Sargent v. Railway*, 12 Dec. Rep. 23, 1 H. 52.

The practice of medicine or surgery will not be enjoined merely because such practice is unskillful and patients may be injured rather than benefited thereby, or because the patients are deceived by false claims of skill: *Merz v. Murchison*, 11 O. C. C. (N.S.) 458, 20 O. C. D. 646. See also PHYSICIANS AND SURGEONS.

Threatened or probable waste will be enjoined, but no injunction will issue because of previous waste if there is no intention to commit it or reason to apprehend such intention: *Crockett v. Crockett*, 2 O. S. 180, I Longsdorf's Notes, 1038. See also WASTE.

Injunction will only lie against that which has already been done, not against what may be done: *Aydelote v. Cincinnati*, 10 O. D. (N.P.) 710.

2. Continuing.

Where numerous acts are being committed, and their continuance threatened, under a claim of right, by one person on the land of another, which acts constitute trespass, and the injury resulting from each act is, or would be, trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the owner may resort, in the first instance, to a court of equity for appropriate relief: *Lembeck v. Nye*, 47 O. S. 336, IV Longsdorf's Notes, 376.

Injunction lies where the cause of action is continuing and the nature of the damages are not susceptible of proper assessment by a jury: *Stines v. Dorman*, 25 O. S. 580, III Longsdorf's Notes, 265.

But where there is no claim of a right to commit waste, or any intention to commit it, or reason to apprehend such intention, an injunction ought not to be allowed merely because the tenant in possession did, at a previous time, commit waste: *Crockett v. Crockett*, 2 O. S. 180, I Longsdorf's Notes, 1038.

The fact that illegal or fraudulent acts have been committed by the directors is no grounds for an injunction. There must be a repetition of the fraudulent acts: *Savings Co. v. Rehn*, 6 O. N. P. 185, 8 O. D. (N.P.) 594.

3. Nature.

(a) Special.

To entitle a party to any relief by injunction, the inconvenience he suffers must differ in kind from that of the general public, and not only in degree: *Manufacturing Co. v. Beatty*, 65 O. S. 264, IV Longsdorf's Notes, 885.

An injunction will not lie on the petition of a property owner against the connecting of buildings on opposite sides of the street by a bridge twenty feet above the pavement, where the ingress and egress of the plaintiff is in no wise impaired, and the injury which he will sustain, if any, is not different in kind from that suffered by the public at large: *Offutt v. Cincinnati*, 11 O. C. C. (N.S.) 357, 21 O. C. D. 58.

The laying of a spur track across the sidewalk on the opposite side of the street from plaintiff's property, and the building of an overhead track above it, does not entitle him to relief on the ground that he has suffered injury of a special kind peculiar to him and not shared by him in common with the other lot owners: *Smedes v. Railroad Co.*, 16 O. D. (N.P.) 743, 1 Hosea, 10, 4 O. L. R. 44.

(b) Substantial.

In granting the extraordinary remedy of injunction the court will look to the substantial rights of the parties, and not to mere irregularities in the exercise of such rights: *Hamilton v. Gas Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513.

Taking merest legal figment of property without real substance will not entitle to injunction: *Railway Co. v. Transportation Co.*, 1 O. C. C. (N.S.) 117, 15 O. C. D. 146.

Court of equity will not grant an injunction for a mere trespass on land: *Bank v. Debolt*, 1 O. S. 591, I Longsdorf's Notes, 1009; *Ross v. Page*, 6 O. 166, I Longsdorf's Notes, 330; *Young v. Spangler*, 2 O. C. C. 549, 1 O. C. D. 639.

Injunction lies though trespasses are small and trifling and damages so small that suits at law to recover would be impracticable: *Pollock v. Ship Building Co.*, 56 O. S. 655, IV Longsdorf's Notes, 700.

A court of equity ought not to enjoin an important improvement, when the prospect of injury to private property is very doubt-

ful: *Simonson v. Richardson*, 2 O. N. P. (N.S.) 170, 15 O. D. (N.P.) 33.

An injunction will not lie to prevent the carrying forward of a public work of such importance as the changing of grade crossings of steam railways, where no danger exists of substantial loss to an abutting property owner, and the mode open to him for recovering compensation is alone involved: *Banking Co. v. Cleveland*, 1 O. N. P. (N.S.) 493, 14 O. D. (N.P.) 33.

Inasmuch as a private corporation, engaged in a private business, has no right to impose an additional burden upon the easement in the street of an abutting owner against his consent and without making compensation to him therefor, notwithstanding the grant of a municipal franchise to so use the street, an injunction at the suit of the corporation to restrain such owner from interfering with it in such use of the street will not lie where it appears that the injury to his property would be appreciable, but beyond this the amount of the damages he would sustain thereby is immaterial: *Gas Co. v. Townsend*, 1 O. N. P. (N.S.) 289, 14 O. D. (N.P.) 5.

An oil lease, i. e., an exclusive grant for a term of the right to bore for oil and gas, with right of way for access and pipes, the rent being a share of the product, and the owner reserving a right to farm the land, grants no interest in the land but only an incorporeal hereditament. Accordingly, a railroad obtaining a right of way from the owner need not condemn the lessees' right, for that would admit an interest in the land. But the lessee is entitled to protection, as it has valuable rights. Injunction will not issue if the railroad will protect pipes laid and to be laid, nor on account of the danger of fires, if such danger will only arise from negligence of the railroad, and the presumption is that the use will be careful: *Oil Co. v. Railroad*, 4 O. C. C. 210, 2 O. C. D. 505.

Where a city has paid damages assessed for change of grade, but has not appropriated the right to slope for the fill upon plaintiff's land, and the improvement has progressed without objection by plaintiff, and a slope upon his ground will be no real injury, but to require the city to put up a retaining wall will be a great expense and is not practical, an injunction against sloping upon plaintiff will not be granted, but he will be left to his legal remedies: *Fogarty v. Cincinnati*, 7 O. N. P. 100, 9 O. D. (N.P.) 753.

The laying of a railway track across a street which forms a cul-de-sac constitutes an injury which may be enjoined if it appear that the injury is material and substantial in character: *Lumber Co. v. Railway*, 11 O. N. P. (N.S.) 289.

On the question of allowing a temporary restraining order and permitting it to continue until a full hearing is had, the relative rights of the parties and the injury to each by a continuance of the order will be considered, and the *status quo* will be maintained by granting the order where the injury to the moving party will be immediate, certain, and great if it is denied, while the loss or injury to the opposing party by its continuance will be comparatively insignificant: *Gould v. Railway*, 10 O. N. P. (N.S.) 129, 21 O. D. (N.P.) 733.

(c) Irreparable.

A mere averment of irreparable injury is not sufficient on demurrer to entitle plaintiff to an injunction: *Van Wert v. Webster*, 31 O. S. 420, III Longsdorf's Notes, 594; *Wood v. Pleasant Ridge*, 12 O. C. C. 177, 5 O. C. D. 516.

To entitle complainant to a permanent injunction the injury must be irreparable. An authorized railroad track across a street is not an irreparable injury. But trains on such tracks may be restrained until trial: *Railroad Co. v. Cincinnati*, 8 Dec. Rep. 554, 8 Bull. 334.

An averment of irreparable injury alleged to be threatened by exercising a disputed appointing power is not made out if the injury is to result from the usurpation of the future appointees, thus requiring a new agency to act: *Keemelin v. Mosby*, 47 O. S. 570, IV Longsdorf's Notes, 395.

While a court of chancery will restrain by injunction the doing of an act from which irreparable injury may be done to individuals, or great public injury ensue, the surveyors of a public road can not have an injunction, to prevent the obstructing of a public road: *Putnam v. Valentine*, 5 O. 187, I Longsdorf's Notes, 262.

Suspension of a member from a Chamber of Commerce until he submits to a public reprimand, is not an irreparable injury, and injunction will be refused. If he had a defense he should have made it at the trial: *Bishop v. Chamber of Commerce*, 5 O. N. P. 365, 5 O. D. (N.P.) 356.

An election about to be held to fill the place of a director alleged to be ineligible will not be enjoined, for no irreparable injury will result: *Hooe v. Hall*, 9 O. C. C. 654, 4 O. C. D. 547.

A court of equity will determine the validity of a license ordinance upon application for an injunction against its enforcement, where the injury threatened would be irreparable or a multiplicity of actions may arise: *Handley v. Westerville*, 10 O. N. P. (N.S.) 521, 21 O. D. (N.P.) 491 [for deci-

sion on merits, see *Handley v. Westerville*, 12 O. N. P. (N.S.) 105].

The arrest of one who is maintaining a bakery below ground would not cause him such irreparable injury as would warrant a court of equity in preventing a threatened arrest by injunction: *Bernhardt v. Kearns*, 12 O. N. P. (N.S.) 298, 22 O. D. (N.P.) 707.

A public work, as building a railway, will not be enjoined unless injuries would otherwise be irreparable or so great that no prudent person would incur it, nor if the complainant's right is doubtful or an ordinary action or suit adequate: *Stewart v. Railroad*, 14 O. 353, 1 Longsdorf's Notes, 674.

In the present state of knowledge of controlling natural gas it is so probable that its perils can not be mastered that the owner of a freehold in subsurface coal can enjoin the surface owner from sinking a gas well from its surface through the mine into the gas region below the mine. He is not obliged to submit to the perils of its escape into the mine, in view of the obstacles to surmounting its hazards: *Iron Works v. Gill*, 9 Dec. Rep. 481, 14 Bull. 112.

Injunction against the owner of the servient estate resuming possession of a strip claimed to be a right of way from plaintiff to the highway will not be granted unless irreparable damages are done, and this is not shown if the way is not averred to be the only access, or that plaintiff will not be able to move the threatened obstruction, or that a multiplicity of suits will be prevented: *Young v. Spangler*, 2 O. C. C. 549, 1 O. C. D. 636. See also EASEMENT.

D. MOTIVE OF COMPLAINANT.

There is no requirement in the statute G. C., § 4314, that the taxpayer shall be free from personal motive; and a complaint in such a suit at bar that the plaintiff is not sincere in his action for the protection of the public but is in fact acting for other street car lines will be disregarded: *Raynolds v. Cleveland*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215 [reversing, *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125].

A taxpayer suing under G. C., § 4314, to enjoin the sale of municipal bonds, whose sole purpose is to favor a water company as against the municipality and prevent the municipality from building its own water-works, and who has been indemnified from the payment of costs and expenses of such suit, has no standing in court and the suit should be dismissed: *Vadakin v. Crilly*, 7 O. C. C. (N.S.) 341, 18 O. C. D. 634 [affirming, *Vadakin v. Crilly*, 3 O. N. P. (N.S.) 609, 16 O. D. (N.P.) 719, and affirmed, without opinion, *Vadakin v. Crilly*, 73 O. S. 380].

E. RELATIVE INCONVENIENCE AND INJURY.

An injunction will not be granted when it is unconscionable to grant the same, even though a legal right is about to be violated; and where the legal right arises out of a decree of court, rendered by mistake, an injunction is properly refused: *Parsons v. Ohio Pail Co.*, 6 O. C. C. (N.S.) 116, 17 O. C. D. 162 affirmed, without opinion, *Parsons v. Ohio Pail Co.*, 74 O. S. 464].

On motion for a preliminary injunction, the court will consider, not whether the applicant has actually a right, but whether he has a fair question to raise as to its existence; also whether, on balance of convenience or inconvenience to one or the other party interference is expedient: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N.P.) 309.

Where grave questions of law are involved, including the constitutionality of the statute under which defendants claim to be acting, and the property rights of the plaintiff will be jeopardized by enforcement of the statute while comparatively slight injury will result from delay in its enforcement, a preliminary injunction will be granted to preserve the *status quo* until the court has been given opportunity to properly consider and determine the questions in issue: *Chemical Co. v. Calvert*, 8 O. N. P. (N.S.) 361, 19 O. D. (N.P.) 571.

On the application to the court for an injunction, it is the duty of the court, where the rights are at all doubtful, to look to the balance of inconvenience between the parties which would be caused by granting the writ: *Hepburn v. Route*, 7 O. N. P. 290, 5 O. D. (N.P.) 311.

In granting an injunction all the equities should be considered, and the injury which would be done to the defendant by granting it should be compared with the injury which would result to the complainant by withholding it: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N.P.) 309; *Disette v. Lowrie*, 6 O. N. P. 392, 9 O. D. (N.P.) 545.

Preponderance of harm and inconvenience, as small damages on one side and great on the other, can not avail to prevent injunction where a substantial legal right is invaded and the rights and its violation are clear: *Shaw v. Forging Co.*, 7 O. N. P. 254, 10 O. D. (N.P.) 107.

A temporary restraining order or a preliminary injunction is a provisional remedy, and is allowed or disallowed without intention on the part of the court of thereby forecasting what may be the final decree on full hearing; and on the question of allowing such an order and permitting it to continue until a full hearing is had, the relative rights of the parties and the injury to each

by a continuance of the order will be considered, and the *status quo* will be maintained by granting the order where the injury to the moving party will be immediate, certain and great if it is denied, while the loss or injury to the opposing party by its continuance will be comparatively insignificant: *Gould v. Railway*, 10 O. N. P. (N.S.) 129, 21 O. D. (N.P.) 733.

To grant a temporary order the balance of inconvenience or mischief must preponderate on plaintiff's side, and the defendant must not be deprived of his rights, in case the order is wrong. The public inconvenience also will be considered. A refusal of the order may be conditioned on defendant doing acts or securing profits: *Railroad v. Cincinnati*, 7 Dec. Rep. 125, 1 Bull. 134.

Where a party's rights have been invaded for a public purpose he will be remitted to an action for damages rather than injunction if the public inconvenience will be great. Thus, if a street railway has, without appropriating plaintiff's rights, run its cars every half hour for 60 days, though under prompt protest, until its line has become a route of public travel, injunction will be refused: *Railway v. Railway*, 7 O. N. P. 211, 1 O. D. (N.P.) 33 [otherwise *contra* on appeal, *Railway v. Railway*, 10 O. C. C. 168, 6 O. C. D. 578].

A temporary injunction against a public improvement, as levees, new river channels, etc., will be dissolved if this will best subserve general safety and produce the lesser of two evils: *Kearns v. Dayton*, 1 Dayton Term Rep. (Iddings) 19.

If greater injury may result from granting than from refusing injunction, or the inconvenience seems equal, injunction will be refused until the rights of the parties are determined by action at law: *Disette v. Lowrie*, 6 O. N. P. 392, 9 O. D. (N.P.) 545.

A preliminary mandatory injunction amounting to ordering specific performance will be refused where defendant desires to answer to the merits, and the public might be more incommoded than benefited: *Cincinnati v. Railroad*, 7 Dec. Rep. 249, 2 Bull. 17.

F. APPLICATION OF EQUITABLE MAXIMS.

An injunction will be denied on the ground that plaintiff does not come into court with clean hands, where the plaintiff who is not an abutting owner, purchased the fee of a small section of land subject to a railroad right of way for the sole purpose of taking advantage of the necessities of a pipe line company by enjoining the use of such right of way under a license from the railroad company: *Hawkins v. Pipe Line Co.*, 6 O.

N. P. (N.S.) 553, 16 O. D. (N.P.) 333. See also EQUITY.

G. EXISTENCE OF OTHER REMEDIES.

1. At Law.

(a) In General.

An injunction should not be granted where there is an adequate remedy at law: *Coe v. Railroad Co.*, 10 O. S. 372, II Longsdorf's Notes, 442; *Arnold v. Van Wert*, 3 O. C. C. 545, 2 O. C. D. 314; *Turnpike Co. v. Commissioners*, 5 O. N. P. 423, 7 O. D. (N.P.) 509; *Fogarty v. Cincinnati*, 7 O. N. P. 100, 9 O. D. (N.P.) 753; *Engine Co. v. Benner*, 14 O. D. (N.P.) 357.

Equity is not the forum to enforce criminal laws where specific provision has been made for the arrest, restraint, and punishment of those who commit or threaten acts of violence toward the person or property of another; nor is jurisdiction conferred by reason of the failure or refusal of the proper officers to enforce the law: *Engine Co. v. Benner*, 14 O. D. (N.P.) 357.

A threatened arrest of a baker for maintaining his bakery below ground, as forbidden by G. C., § 1012, can not be enjoined on the ground of unconstitutionality of the statute, when no seizure of property is threatened, for the remedy at law is adequate: *Bernhardt v. Kearns*, 12 O. N. P. (N.S.) 298, 22 O. D. (N.P.) 707.

A writ of injunction will be denied where the plaintiff's right is doubtful, or where an action at law or in equity, prosecuted in the ordinary mode, will afford adequate redress: *Stewart v. Railroad*, 14 O. 353, I Longsdorf's Notes, 674.

A forfeiture can not be enforced by injunction, but the party will be left to his remedy at law: *Coe v. Railway Co.*, 10 O. S. 372, II Longsdorf's Notes, 442.

Injunction will not lie to compel payment of money only: *Sampsell v. Fischer*, 11 Dec. Rep. 351, 26 Bull. 156.

Enforcement of a midnight-closing ordinance by the officers will not be enjoined on the ground of its invalidity until declared invalid at law, for the remedy at law is adequate: *Cavanaugh v. Cleveland*, 6 O. N. P. 423, 8 O. D. (N.P.) 329.

Injunction will not lie where proceedings are instituted to appropriate part of railroad's lands for street purposes. It has an adequate remedy at law: *Railroad Co. v. Hyde Park*, 4 O. N. P. 296, 6 O. D. (N.P.) 327.

Where it is possible to acquire rights under a contract by a partial assignment thereof, injunction would not lie to enforce such rights but the assignee would be restricted

to his action at law: *N. Y. & Bermudez Co. v. Herrmann*, 6 O. C. C. (N.S.) 431, 17 O. C. D. 694.

A court of equity will not entertain a suit to enjoin the stringing of additional wires by a telegraph company upon a pole in the street in front of premises. The owner will be remitted to his remedy at law: *Wirth v. Cable Co.*, 7 O. C. C. 290, 4 O. C. D. 601.

Injunction is the proper remedy for the abutting owner on a highway against a telegraph or telephone company which attempts to construct its line on the highway without obtaining his consent or otherwise acquiring the right to do so, and the abutting owner's right thereto is not defeated by a right of action to sue for the amount claimed as damages: *Denver v. Telephone Co.*, 8 O. N. P. 666, 10 O. D. (N.P.) 273.

The general rule is, that "an account for waste committed is only consequential upon an injunction, or upon some other matter of original jurisdiction; it is not in itself a substantive ground of equitable relief, as the remedy at law is adequate": *Crockett v. Crockett*, 2 O. S. 180, I Longsdorf's Notes, 1038.

Injunction will be refused to abutting owner against constructing railroad trestle in streets when there is an adequate remedy at law and no material injury to property is shown: *Railway Co. v. Railway Co.*, 2 O. N. P. (N.S.) 237, 15 O. D. (N.P.) 112.

The right to appear before council and object to the passage of a resolution to appropriate property, etc., is not an adequate remedy at law: *Railway Co. v. Greenville*, 69 O. S. 487, IV Longsdorf's Notes, 963.

In the absence of express provision authorizing suits for injunction in cases of obstruction in streets under a license, the ordinary rule as to adequate remedy at law is not available to defeat an action to restrain such obstruction: *Elyria v. Railway Co.*, 12 O. D. (N.P.) 609 [affirmed, *Elyria v. Railway*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482].

Equity has jurisdiction, notwithstanding there may exist a legal remedy, to interfere by injunction to prevent a continuing injury when the legal remedy therefor may involve a multiplicity of suits or the injury threatens an irreparable damage: *Hillenbrand v. Building Trades Council*, 14 O. D. (N.P.) 628, I Hosea, 327.

The fact that in an action for an injunction, one of the grounds of complaint is that the defendants acting under the provisions of an unconstitutional statute are about to publish a libel, does not deprive a court of equity of jurisdiction in that behalf: *Chemical Co. v. Calvert*, 7 O. N. P. (N.S.) 103, 18 O. D. (N.P.) 583.

An illegal assessment by county commissioners, no appeal being given, is enjoinable: *Southard v. Stephens*, 27 O. S. 649, III Longsdorf's Notes, 381.

If a city holds a check or certificate of deposit to its own order and is not entitled to the money, the owner will not be left to his legal remedy, for that may not be adequate, but may obtain injunction against payment or collection: *Light Co. v. Cincinnati*, 11 Dec. Rep. 581, 28 Bull. 29 [petition in error refused without opinion, *Cincinnati v. Light Co.*, 27 Bull. 412].

Where driving-wheels, detached from a locomotive and sent here for repairs, were attached, all the railroad property being mortgaged, the trustee, for the bondholders, is entitled to injunction against the attachment, for he has no adequate remedy at law, either by replevin, because the right of possession is in the railroad company and not in him, nor by action for damages, for the intrinsic value does not equal the loss and inconvenience to the use. Injunctions lie to enforce a trust and to stay waste: *Winslow v. Iron Factory*, 12 Dec. Rep. 591, 1 D. 229.

An injunction against an erroneous execution, issued to another county, will, after answer to the merits, without objecting that a motion to set it aside is an adequate remedy, be granted: *Miller v. Longacre*, 26 O. S. 291, III Longsdorf's Notes, 305.

A preliminary injunction against an execution on a dormant judgment will not be dissolved merely because the court would have recalled the execution on motion: *Krinkle v. Parish*, 9 O. C. C. 141, 6 O. C. D. 30.

Failing to object that there is an adequate remedy at law until after two trials below and one on appeal to the district court, in a suit for injunction against actual and threatened trespasses, growing out of a dispute as to a boundary line and a road between the parties, by throwing down plaintiff's fence, closing the road, putting fences on his land, etc., under a claim of right, is too late, although it might have been good before trial on the merits: *Culver v. Rodgers*, 33 O. S. 537, III Longsdorf's Notes, 688.

It is too late to claim that the only remedy against an execution was to have it recalled in the court issuing it, and that injunction does not lie after two trials, on the theory that there was jurisdiction: *Meyer v. Meyer*, 6 Dec. Rep. 847, 8 Am. L. Rec. 426.

The remedy at law by setting aside the judgment on motion being adequate, injunction will not lie: *Critchfield v. Porter*, 3 O. 518, I Longsdorf's Notes, 189; *McKee v. Bank*, 7 O. (pt. 2) 175, I Longsdorf's Notes, 399. See also APPEARANCE.

If one tenant in common excludes his cotenants from part of the land, injunction will not lie, for there is an adequate remedy at law by ejectment or trespass: *Clay v. Cline*, 18 O. C. C. 89, 9 O. C. D. 871. See also TENANTS IN COMMON.

For the violation of the rights of such ownership, as, for example, those of hunting and trapping, the law affords no adequate remedy, and injunction lies: *Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 544. See also WATERS AND WATERCOURSES.

Where a perpetual injunction against the construction and operation of a spur-track across the sidewalk on the opposite side of the street from plaintiff's property, and the building of an overhead track above it, is sought, a court of equity acquires jurisdiction only upon proof that: (1) An injunction is necessary to preserve the status and a continuance will result in irreparable injury to the plaintiff; (2) inadequacy of legal remedies; and (3) that upon consideration of relative expense and inconvenience an injunction would not be inequitable or oppressive to the defendant or the public whom it is organized to serve: *Smodes v. Railway*, 16 O. D. (N.P.) 743, 1 *Hosea*, 10, 4 O. L. R. 44. See also RAILROADS.

(b) Damages.

An injunction will be denied where adequate relief can be had in an action at law for damages: *Rosenstiel v. Jones Bros.*, 20 O. C. C. 705, 6 O. C. D. 27; *Sipe & Sigler v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 226.

Where a consumer in contracting with a gas company to use their lights only and not to introduce into or on his premises electric lights, or other material or power for general illuminating purposes it was held that injunction did not lie on the breach of said contract as it was not shown that the company did not have full and adequate remedy in damages, by a suit at law: *Steinau v. Gas Co.*, 48 O. S. 324, IV Longsdorf's Notes, 417.

Injunctions are granted for the prevention of irreparable injury or such an injury as can not be adequately estimated in damages at law. Injunction will lie, therefore to protect the franchise of a street railway company from invasion or disturbance inasmuch as the value of the right or cost of disturbance is not reducible to a pecuniary measure: *Railway Co. v. St. Bernard*, 8 O. N. P. 288, 11 O. D. (N.P.) 454.

Breach of an oral agreement between adjoining lessees of oil lands not to sink wells within 200 feet of the division line, so as to avoid interference, is enjoined, for the remedy by action is inadequate owing to the

uncertainty of damages: *Warc v. Langmade*, 9 O. C. C. 85, 6 O. C. D. 43.

If the wrong is continuous, and not susceptible of proper assessment of damages—as an agreement not to keep hotel on property—the remedy at law is not adequate: *Stines v. Dorman*, 25 O. S. 580, III Longsdorf's Notes, 265.

An agreement that a party will not do certain specified acts may be enforced in a negative manner by enjoining the commission of such acts, especially where the acts prohibited relate to or interfere with property rights or business, and damages therefor, being speculative, conjectural or uncertain, would be inadequate: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136.

The drilling and operating of an oil well on a city lot, in close proximity to a dwelling house on the adjoining lot, is dangerous and annoying, practically destroying the use of the adjoining property for residence purposes so long as the well is operated, and it appearing that such injury will be a continuous one, and an action at law for damages will not afford a complete and adequate remedy, a perpetual injunction against such use of the property will be granted at the suit of the adjoining owner: *Cline v. Kirkbride*, 22 O. C. C. 527, 12 O. C. D. 517. See also OIL AND GAS.

If land is sold by the acre and a deficiency in the acreage is discovered, injunction against negotiating the purchase notes, the amount of which just covers the deficiency, will be allowed, although a money judgment would compensate the buyer: *Proctor v. Bell*, 9 Dec. Rep. 853, 17 Bull. 380.

2. Statutory.

Injunction will not lie to prevent the enforcement of the Rose county local option law, as an adequate remedy at law is afforded in a criminal prosecution under the act: *Gassman v. Kerns*, 7 O. N. P. (N.S.) 626, 19 O. D. (N.P.) 317.

Injunction will not lie at the suit of a food inspector to compel a manufacturer and seller of an article of food or drink, to furnish for analysis, as provided by G. C., § 12758, samples of the article manufactured or sold. The remedy for refusal to comply with the requirements of that section is by prosecution under the succeeding section: *State, ex rel., v. Dairy Co.*, 62 O. S. 123, IV Longsdorf's Notes, 826.

3. Bond.

If the ultimate relief is compensation, and this can be adequately granted by requiring a bond, injunction will be refused and a

bond required: *Turnpike Co. v. Commissioners*, 5 O. N. P. 423, 7 O. D. (N.P.) 509.

Writs of *habeas corpus*, petitions in error, and suits on official bonds afford ample remedy to any person unlawfully arrested or whose property is unlawfully seized under G. C., §§ 6169, *et seq.* (98 v. 12): *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623. See also INTOXICATING LIQUOR.

The possession of the sheriff on attachment against one partner is necessarily exclusive, but the suspended right of the other revives after sale in connection with the vendee. As the partner has an adequate remedy to retain possession by giving bond, no injunction will issue, the property not being removed: *Stewart v. Hunter*, 12 Dec. Rep. 6, 1 H. 22. See also PARTNERSHIP.

4. Petition in Error.

The final orders of the township trustees, establishing ditches, drains, and water courses, may be reviewed by petition in error, and reversed for errors apparent on the record. Such procedure, and not injunction restraining the construction of the ditch, drain or watercourse, is the appropriate remedy for the correction of such errors: *Haff v. Fuller*, 45 O. S. 495, IV Longsdorf's Notes, 293.

An injunction will not be allowed if error lies: *Haff v. Fuller*, 45 O. S. 495, IV Longsdorf's Notes, 293; *Lewis v. Laylin*, 46 O. S. 663, IV Longsdorf's Notes, 352.

The proper remedy for one unlawfully arrested and whose vessels and fixtures are about to be seized under the statute, is a petition in error, or a suit against the officials and their bondsmen for damages, or for a writ of *habeas corpus*, and not an action for an injunction: *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623.

Injunction is not the proper remedy to correct errors in proceedings to construct and alter ditches, drains and water courses; where the plaintiff was made a party to such proceedings and the errors complained of appear of record; a remedy exists by petition in error, and there is no reason why equity should depart from the universal rule of withholding aid where there is a complete remedy at law: *Gease v. Carlisle*, 15 O. D. (N.P.) 435. See also DITCHES.

5. Remedy Outside the Courts.

An injunction against a proposed expenditure by a society or fraternal order will not lie unless the petition alleges affirmatively that the plaintiff has exhausted all the remedies provided by the constitution

and by-laws of the organization: *Coss v. Lodge*, 4 O. C. C. (N.S.) 11, 14 O. C. D. 36.

H. FORMER INJUNCTION.

A second injunction in the same cause can not be allowed unless new matter has arisen: *Bank v. Schultz*, 3 O. 61, I Longsdorf's Notes, 148.

A decree for an injunction restraining the construction of a dam of a certain size and cost at a definite location is not a bar to a subsequent construction of a dam at a different location and of a different size and cost, such dam being constructed under a different law: *Knauss v. Columbus*, 13 O. D. (N.P.) 200.

The fact that the plaintiff was a non-resident of the city at the time of the determination of a previous suit brought by a taxpayer to enjoin the issue of certain municipal bonds, does not remove from a similar action the bar of the previous determination: *Hallock v. Columbus*, 1 O. N. P. (N.S.) 205, 13 O. D. (N.P.) 488.

I. EFFECT OF FORMER JUDGMENT.

A judgment of ouster in a forcible entry and detainer proceedings is not a bar to an injunction to prevent interference with possession: *Raitz & Co. v. Dow*, 10 O. C. C. (N.S.) 249, 20 O. C. D. 284.

The final judgment of the probate court in a condemnation proceeding commenced by an interurban electric railway company under G. C., §§ 11038, *et seq.*, to appropriate a right of way over the tracks and property of a steam railroad company is *res judicata* as to all questions involving the private rights of each company in, about, and over the crossing; and such questions can not be relitigated in an action commenced by the latter to restrain the former company from appropriating and using such right of way, notwithstanding such action was commenced prior to the commencement of the appropriation proceeding: *Railroad Co. v. Traction Co.*, 4 O. C. C. (N.S.) 329, 16 O. C. D. 1 [affirming, *Railroad Co. v. Traction Co.*, 1 O. N. P. (N.S.) 296, 14 O. D. (N.P.) 143]. See also RAILROADS.

J. MULTIPLICITY OF SUITS.

A court of equity will intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that the plaintiff should have first established his rights by an action at law: *Schofield v. Railway Co.*, 43 O. S. 571, IV Longsdorf's Notes, 183; *Railway Co. v. Copenhaver*, 12 O. C. C. (N.S.) 69, 21 O. C. D. 515; *Mining Co. v. Railroad Co.*, 1 O. N. P. (N.S.) 385, 14 O. D.

(N.P.) 209; *Hillenbrand v. Building Trades Council*, 14 O. D. (N.P.) 628, 1 *Hosea*, 327.

A court of equity will interfere to prevent a multiplicity of suits, where there is a continued repetition of the trespass: *Young v. Spangler*, 2 O. C. C. 549, 1 O. C. D. 636.

It is proper practice in actions founded on trespass to first establish the legal rights of the plaintiff, and when that has been done, in order to avoid a multiplicity of suits to have the repeating of the trespasses enjoined, and this may be done in the same action, upon sufficient averments, for that purpose: *Fisher v. Bower*, 79 O. S. 248, IV Longsdorf's Notes, 1045.

Repeated acts of trespass, which in time would ripen into a prescriptive right will entitle the owner to an injunction: *Pollock v. Ship Building Co.*, 56 O. S. 655, IV Longsdorf's Notes, 700.

Where it appears that as many as six actions are being prosecuted by the same plaintiff as administrator of as many different estates against the same defendant, which can result only in void judgments, a court of equity will intervene by injunction to prevent a multiplicity of suits and vexatious litigation: *Railway v. Copenhagen*, 12 O. C. C. (N.S.) 69, 21 O. C. D. 515.

A court of equity will determine the validity of a license ordinance upon application for an injunction against its enforcement, where the injury threatened would be irreparable or a multiplicity of actions may arise: *Handley v. Westerville*, 10 O. N. P. (N.S.) 521, 21 O. D. (N.P.) 491.

A single action at law for damages for the violation of a contract for rent and use of power is sufficient, and so an injunction will not be authorized to relieve from a multiplicity of suits: *Sipe v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 226.

K. LACHES, WAIVER AND. ESTOPPEL.

A court of equity will not interfere by injunction to enforce a stale equity: *Water Co. v. Defiance*, 68 O. S. 520, IV Longsdorf's Notes, 947 [following, *Kellogg v. Ely*, 15 O. S. 64, II Longsdorf's Notes, 703]; *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500.

Mere delay, which may prevent granting interlocutory injunction, will not prevent final injunction if the injury was constantly increasing: *Cilly v. Cincinnati*, 7 Dec. Rep. 344, 2 Bull. 135. See also EQUITY.

Where a party, on whose lands a ditch has been wholly or partially constructed, has stood by and failed to resort to any remedy, legal or equitable, until such ditch is completed, a court of equity will not interfere by injunction to prevent the collection of the assessment therefor even though the con-

struction of the ditch was wholly void or illegal in law: *Kellogg v. Ely*, 15 O. S. 64, II Longsdorf's Notes, 703.

The erection and maintenance of a permanent building can not be enjoined unless the utmost promptness and diligence is exercised by the party seeking relief: *Mondle v. Plow Co.*, 6 O. N. P. 294, 9 O. D. (N.P.) 281; *Columbus v. Bohl*, 1 O. N. P. (N.S.) 469, 13 O. D. (N.P.) 569.

Injunction will not lie against the laying of a spur track in a street, where it does not appear that any rights of the abutting owner will be materially interfered with and such abutting owner, having notice of the proposed construction, did not file his petition for several months, or until the work was nearly completed: *Gunning v. Street Railway Co.*, 2 O. N. P. (N.S.) 411, 14 O. D. (N.P.) 660.

A taxpayer is guilty of laches who stands by while an improvement of a serious character is undertaken and carried half through to completion and then attempts to enjoin it at the peril of the public health and welfare: *Columbus v. Bohl*, 1 O. N. P. (N.S.) 469, 13 O. D. (N.P.) 569.

If a trespasser is permitted to expend large sums of money in the erection of a permanent building without protest from the owner of the land, or any attempt by the owner to assert his rights for a long period of time, a court of equity will not favor a late assertion of such stale rights by injunction, but will leave the parties to their remedy at law, or if estoppel is pleaded will lean favorably toward such defense: *McCleery v. Alton*, 8 O. C. C. (N.S.) 481, 19 O. C. D. 97.

An owner of land standing by and permitting a railroad to be constructed is estopped to enjoin its use: *Goodin v. Canal Co.*, 18 O. S. 169, II Longsdorf's Notes, 874.

A taxpayer's suit to enjoin an unconstitutional road act is too late after he has paid in all taxes assessed without objection: *State v. Bader*, 56 O. S. 718, IV Longsdorf's Notes, 701 [affirming, *State v. Bader*, 13 O. C. C. 15, 7 O. C. D. 11].

If the award of a contract is protested against when made and suit to enjoin is filed within a week, there is no estoppel by delay to assert the invalidity of the award by reason of not moving for a temporary restraining order which involves the risk of a bond or from not applying for immediate hearing: *Hertenstein v. Herrman*, 6 O. N. P. 93, 9 O. D. (N.P.) 205.

Injunction lies against the tearing up of railroad tracks originally laid with full knowledge of a turnpike company: *Bridge Co. v. Railroad Co.*, 12 O. C. D. 723 [affirmed,

without opinion, *Bridge Co. v. Railroad Co.*, 62 O. S. 635].

Where a taxpayer brings action under G. C., §§ 4311, *et seq.*, relief will be denied only when he has delayed his action until the granting of relief would be inequitable to others who have acted in reliance upon the validity of the thing sought to be enjoined: *Crawford v. Madigan*, 13 O. D. (N.P.) 494.

It is too late to question the validity of a special law, under which a school district has been created, after twelve years, by seeking to enjoin a tax to maintain the school, it not being shown that the plaintiffs have not been availing themselves of the benefits of it: *Clark v. Board of Education*, 44 O. S. 595, IV Longsdorf's Notes, 236. See also **ESTOPPEL**.

The rule that a person through whose lands an improvement has been laid out and constructed, can not, after it has been completed, have an injunction to restrain the collection of the tax or assessment to pay for the same, is not applicable to a landowner who had no actual notice that the improvement was being made, and was not guilty of any want of diligence in asserting his rights before the work was completed: *Teegarden v. Davis*, 36 O. S. 601, III Longsdorf's Notes, 877.

Silence until the improvement is made and bonds sold does not estop one when the improvement was not on his land and he could not prevent it by any steps he could take: *Columbus v. Agler*, 44 O. S. 485, IV Longsdorf's Notes, 225 [for opinion of Circuit Court, see *Tone v. Columbus*, 1 O. C. C. 305, 1 O. C. D. 168]. See also **ASSESSMENTS**.

Deepening and widening is not authorized by a petition to clean out a township ditch, and a party assessed is not estopped to object after the work is done: *Deuyer v. Shonert*, 1 O. C. C. 73, 1 O. C. D. 44.

Personal knowledge of the pendency of the proceedings and seeing the ditch constructed and being benefited thereby do not create any estoppel to seek a reversal, it not being averred that the ditch was located through plaintiff's land: *Rice v. Wellman*, 5 O. C. C. 334, 3 O. C. D. 165.

The persons entitled to personal notice because "affected," (R. S., § 4457, repealed 91 v. 160), are not merely those to be assessed, but include lower proprietors who may be flooded, and their knowledge is not equivalent to notice where they are not estopped by not objecting to expensive improvements: *Neff v. Sullivan*, 9 Dec. Rep. 765, 17 Bull. 168.

The right to enjoin the collection of an illegal assessment is not barred by delay until the work is completed: *Wright v. Thomas*, 26 O. S. 346, III Longsdorf's Notes, 308. See *Quinland v. Myer*, 29 O. S. 500, III

Longsdorf's Notes, 492; *State, ex rel., v. Mitchell*, 31 O. S. 592, III Longsdorf's Notes, 608.

The right to enjoin ditch assessment may be lost by delay: *Kellogg v. Ely*, 15 O. S. 64, II Longsdorf's Notes, 703.

One who stands by, without objection, and sees a public railroad constructed over his lands, can not after the railroad is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land or enjoin its use by the railroad company: *Goodin v. Canal Co.*, 18 O. S. 169, II Longsdorf's Notes, 874; *Reckner v. Warner*, 22 O. S. 275, III Longsdorf's Notes, 73; *Kellogg v. Ely*, 15 O. S. 64, II Longsdorf's Notes, 703; *Railroad Co. v. Railroad Co.*, 1 O. C. C. 100, 1 O. C. D. 60; *Gunning v. Railway Co.*, 2 O. N. P. (N.S.) 411, 14 O. D. (N.P.) 660.

An abutting owner who consents or submits to the use of the street in front of his premises for telephone purposes by means of poles and wires is not, as a matter of law, entitled to an injunction restraining the company from placing its wires in conduits: *Burns v. Telephone Co.*, 10 O. C. C. (N.S.) 307, 20 O. C. D. 74 [affirming, *Burns v. Telephone Co.*, 3 O. N. P. (N.S.) 257, 17 O. D. (N.P.) 731; affirmed, without opinion, *Burns v. Telephone Co.*, 76 O. S. 589].

After a city has allowed an electric light company to expend a large amount towards performing a contract with the city, no injunction will be granted to the city against the company either on the ground that the contract has been forfeited or that it is *ultra vires*: *Pugh v. Electric Light Co.*, 19 O. C. C. 594, 9 O. C. D. 438.

If the legislature can not authorize a railroad to embark in new enterprises without the consent of all the stockholders, yet a stockholder can not have injunction if, instead of being vigilant, he has waited until the mischief is done, and great public interests created: *Chapman v. Railroad*, 6 O. S. 119, II Longsdorf's Notes, 223 [reversing, *Chapman v. Railroad*, 1 Dec. Rep. 559, 10 W. L. J. 391].

Delay of seven years after allowing one to erect improvements and put in machinery and run it, injuring the habitability of the adjoining house, is sufficient to refuse injunction, and the party will be left to his rights at law: *Goodall v. Crofton*, 33 O. S. 271, III Longsdorf's Notes, 672.

A railroad company having acquiesced for ten years in another road doing a local business on part of the line owned in common can not enjoin on the claim that by written contract it had the exclusive right to such business until it has established its right at law, there being no proof of insolvency or

that the legal redress would not be adequate: *Railroad v. Railroad*, 1 O. C. C. 100, 1 O. C. D. 60.

A person seeing an establishment erected on adjoining land, and stating to its owner that he did not think it would be objectionable, the owner saying it would be managed so as not to be so, is not estopped to seek injunction if the business causes noxious odors, and his statements not appearing to have influenced defendant, and he not knowing it would be a nuisance: *Barkau v. Knecht*, 9 Dec. Rep. 66, 10 Bull. 342.

Noise may become a private nuisance. A roller coaster or gravity railroad in a public resort in a residence neighborhood depriving the residents of ordinary comforts, as sleep at night and quiet on Sunday, is a private nuisance, enjoined without action at law to establish the right. Not objecting to the construction is not an estoppel if they did not know the kind or degree of noise nor the unreasonable hours. The injunction will be limited to nights and Sundays if the noise is not clearly proved to be a nuisance at other hours, and when there is extreme sickness certified to by two reputable physicians. Owners of distinct properties may join in asking such injunction: *Schluter v. Biligheimer*, 9 Dec. Rep. 513, 14 Bull. 224.

A city having contracted with a company for electric lighting for eleven years without a certificate of the auditor that funds were on hand therefor, and the company having, on the faith of the contract, expended over \$300,000 in preparing to carry it out before injunction is asked by a taxpayer, it was held that a city's partly executed contract is void under the law but is not necessarily ground to restrain further execution of it. If both parties desire to carry out a *bona fide* contract, and one has incurred vast expense, and the current revenues will meet the current demands, and the contract is to the financial interest of the public, the further execution will not be stayed by a court of equity, though the contract is void for want of the certificate and because for an illegal duration: *Ampt v. Cincinnati*, 34 Bull. 111 (editorial).

One who sells part of his land to another, to be used for a special purpose, for which street railroad access through his land is indispensable, and promises to assist in getting the right of way over intervening property, thereby gives a general consent to a route through his property, and has no equity to ask injunction against the route selected, or to dictate the route, though there is no technical estoppel. Moreover, if he delays for four months after construction is begun, leading inevitably to his property, he is guilty of laches: *Detweiler v. Railroad*

Co., 6 O. N. P. 485, 8 O. D. (N.P.) 166. See also *STREET RAILWAYS AND INTERURBAN RAILWAYS*.

An action by a municipality or taxpayer on its behalf to enjoin the operation of an ordinance granting an invalid street railway franchise is not prematurely commenced because the franchise was not to go into operation until 1914. The general rule in equity that promptness in asserting a right is to be commended and not censured, applies to such a case: *Horstman v. Railway*, 14 O. D. (N.P.) 545 [reversed, on other grounds, *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988].

L. COURTS IN WHICH RELIEF MAY BE HAD.

1. Injunction by State Courts.

A state court has jurisdiction to enjoin the infringement of a trade mark: *Reeder v. Brodt*, 4 O. N. P. 265, 6 O. D. (N.P.) 248.

A state court is without jurisdiction to temporarily enjoin the putting into effect an increase in freight rates on interstate traffic, pending a determination by the interstate commerce commission of the question of the reasonableness of the proposed rate: *Dairy Co. v. Railway*, 7 O. N. P. (N. S.) 451, 53 Bull. 399.

Where a bridge has been erected by a county over a navigable stream, wholly within such county, and before Congress attempted to confer authority upon the Secretary of War to regulate such matters, the courts of the state have jurisdiction over such matters and will enjoin the county commissioners from removing the old bridge and erecting a new one at the order of the secretary of war: *State, ex rel., v. Commissioners*, 7 O. C. C. (N.S.) 469, 18 O. C. D. 212.

2. Injunction by Federal Courts.

The federal courts will not enjoin foreclosure proceedings where the state court acquired jurisdiction more than four months before the bankruptcy proceedings were begun: *Hofer v. Rohrer*, 8 O. L. R. 94.

Taking depositions is a "proceeding" within R. S. of U. S. § 720, forbidding Federal courts enjoining proceedings in state courts, accordingly, where jurisdiction has attached in the state court, the U. S. court can not enjoin the taking of depositions therein: *Shipbuilding Co. v. Whitney*, 9 O. L. R. 326. See also *COURTS*.

The federal court in bankruptcy has jurisdiction over a lien upon property of the bankrupt, which the holder is seeking to foreclose in a state court in an action brought

subsequent to the institution of the proceeding in bankruptcy, and injunction will lie against further prosecution of the foreclosure proceedings: *In re Donnelly*, 9 O. L. R. 573.

M. BAR.

Injunction by one taxpayer is a bar to others: *Mathers v. City*, 7 Dec. Rep. 496, 3 Bull. 551.

Where a landowner has an easement for access in a township road and at proceedings before the township trustees for its vacation makes no objection and files no claim, and their decision is affirmed by the probate court on appeal, this does not bar enjoining closing up the road, for as the statute does not provide for compensation a demand for it would have been the idle ceremony: *McQuigg v. Cullins*, 56 O. S. 649, IV Longsdorf's Notes, 700. See also *ROADS*.

N. OTHER QUESTIONS.

It is no defense to an action for an injunction that others are contributing or doing like damage: *Dayton v. Railway Co.*, 12 O. D. (N.P.) 258.

Honest belief is not a defense to an action to enjoin the sale of improper and rejected articles as the genuine: *Light Co. v. Tappenhorn*, 2 O. N. P. (N.S.) 553, 15 O. D. (N.P.) 598.

At the November election, 1907, one A was duly elected a justice of the peace for a term of four years commencing January 1, 1908, and ending January 1, 1912. On February 3, 1910, A resigned as such justice of the peace and pursuant to the provisions of G. C., § 1714, the trustees of the township appointed one B justice of the peace to fill the vacancy, until the successor should be elected and qualified, and the governor issued a commission to B authorizing and empowering him to make, execute and discharge all and singular the duties appertaining to such office until his successor was elected and qualified. At the November election, 1911, a successor was elected, who did not qualify, and B continued to act as such justice of the peace after the expiration of the term of A whom he succeeded, until April, 1912, when he rendered the judgment complained of in this case, it was held that in rendering the judgment complained of, B was a "de facto" justice of the peace under color of office; and that the constitutionality of G. C., § 1714, can not be questioned in an action to enjoin the enforcement of such judgment: *Simpson v. Patton*, 1 O. C. C. A. 251.

IV. RIGHTS PROTECTED BY INJUNCTION.

A. PUBLIC OFFICERS, BOARDS AND MUNICIPALITIES.

1. Power to Enjoin.

(a) In Matters of Discretion.

If a board has discretion in awarding a contract, such discretion can not be controlled by the court: *State, ex rel., v. Board*, 81 O. S. 218, IV Longsdorf's Notes, 1056.

Where an officer or board has been entrusted with certain discretionary powers, a court of equity has no jurisdiction to interfere, by way of injunction, so long as such officer or board is acting within the scope of his or their powers, and it is not clearly shown that he is or they are guilty of acting fraudulently or corruptly, or in violation of their duties as public officers: *Alter v. Cincinnati*, 4 O. N. P. 427, 7 O. D. (N.P.) 368.

A court of equity can not enjoin the police department and mayor from acting within their discretion in the enforcement of law: *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623.

Injunction will not lie to enjoin the commissioners from exercise of discretionary powers: *Vornholt v. Gordon*, 4 O. D. (N.P.) 498, 30 Bull. 33.

Injunction will lie against a board of county commissioners to enjoin the awarding of an illegal contract or a gross abuse of their powers. But the courts have no power to set their opinion or discretion against that of the board or any other body of officials acting within the scope of their powers: *Commissioners v. Pargillis*, 10 O. C. C. 376, 6 O. C. D. 717.

A court of equity will not interfere with an executive officer charged with the duty of protecting the public from violations of penal statutes and prosecuting the violators thereof, so long as such officer acts reasonably and in good faith within the executive discretion conferred on him by his office: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

Where the only interference with property rights which can result from a threatened prosecution by the health officer and milk inspectors, is the right to market milk from cows to which distillery waste sold by the plaintiffs has been fed, the interference does not go beyond a reasonable exercise of executive discretion, and injunction against such interference will not lie, but the plaintiffs will be left to set up in a criminal action the question of the constitutionality of the act under which the health department is proceeding, or the correctness of the construction which is being placed upon the

act by that department: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661. See also *MILK*.

A court will not interfere with the determination of an administrative board relative to questions of fact unless such board has abused its authority so that its decision is palpably wrong and will result in injury to another: *Columbus v. Board of Public Service*, 5 O. N. P. (N.S.) 462, 14 O. D. (N.P.) 716.

Injunction will not lie, at the suit of a taxpayer, to prevent the removal and abandonment of a market house by the city where the same is done within the reasonable exercise of the discretionary powers of council: *Gall v. Cincinnati*, 18 O. S. 563, II Longsdorf's Notes, 916.

Under G. C., § 4314, a taxpayer can not control the council of a village upon the question of publishing its ordinances and resolutions. The council has power to select the newspaper in which such ordinances and resolutions shall be published: *Davis v. Davis*, 6 O. N. P. (N.S.) 281, 18 O. D. (N.P.) 313.

Injunction does not lie against the discretionary power of a city council as to the construction of street railways: *Aydelote v. Cincinnati*, 10 O. D. (N.P.) 710.

A newspaper having a circulation of not to exceed one hundred in a city of 500,000 population is not a newspaper of general circulation within the meaning of G. C., §§ 4228 and 4229, and the use of such paper may be enjoined: *Doster v. Cleveland*, 20 O. D. (N.P.) 548.

G. C., §§ 4228 and 4229 requiring publication of municipal ordinances in two newspapers of opposite politics, published and of general circulation in the municipality, vests in the council the discretion of deciding what newspapers having such essentials it will use, but it can not dispense with such requirements, and a court may interfere to prevent the use of papers which do not meet all of such requirements: *Doster v. Cleveland*, 20 O. D. (N.P.) 548.

The discretion of officers and agents of a humane society in determining that the reloading of crippled live stock in transit, which has been unloaded for rest, feed and water, and the loading of such live stock in cars containing the carcasses of dead animals, constitutes cruelty, will not be interfered with by a court of equity upon the complaint of live stock commission men, in the absence of any showing that such discretion was abused: *Meeks v. Humane Society*, 12 O. N. P. (N.S.) 625, 22 O. D. (N.P.) 517.

(b) Other Questions.

A public officer may be enjoined on opening a road, from tearing down fences and from taking a strip of land for road purposes, of greater width than that originally contemplated: *Trustees v. Shauck*, 33 Bull. 251.

An officer failing to give bond, may be enjoined from continuing in office without giving bond: *Brown v. Milford*, 8 O. N. P. 317, 11 O. D. (N.P.) 406.

The fact that a proceeding in *quo warranto* can only be brought by a designated public officer and that if such officer should decline to bring such proceeding, a taxpayer is without remedy, is not sufficient to authorize an action under G. C., §§ 2921 and 2922. Taxpayers are left in many cases without remedy except by the faithful performance of duty by public officers, the law presuming that such officers will properly perform the duties incumbent upon them: *State, ex rel., v. Craig*, 21 O. C. C. 175, 11 O. C. D. 553.

2. Particular Officers.

(a) State Officers.

State officers may be enjoined if they exceed their statutory powers: *Merrill v. Currier*, 2 O. N. P. 52, 3 O. D. (N.P.) 153.

Injunction will not lie against the board of medical examiners to prevent the revocation of the certificate of a physician on the grounds of gross immorality: *Rose v. Baister*, 7 O. N. P. (N.S.) 132, 18 O. D. (N.P.) 658.

Where the level of the waters in a state canal, its reservoirs and feeders, has been raised, a court is without jurisdiction in the absence of consent of the state, to compel the members of the board of public works by mandatory injunction to restore the original level of said waters in order to prevent the overflowing of the lands of the plaintiff: *Ley v. Kirtley*, 5 O. N. P. (N.S.) 529, 18 O. D. (N.P.) 280.

Private individuals can not compel the state to respond in damages for the destruction of water power created by the construction of canals, nor can they maintain injunction proceedings to restrain the state from destroying the same by abandoning the canals: *McBroom v. Watkins*, 11 O. N. P. (N.S.) 337, 21 O. D. (N.P.) 505.

The board of public works is without authority to enter into an agreement or contract to build and forever maintain a dam for the purpose of affording water power to a riparian mill owner, and such agreement or contract would confer no right upon such riparian owner and no obligation upon the state to maintain such dam; nor can the state be prevented from destroying such dam

and thus destroying such water power: *McBroom v. Watkins*, 11 O. N. P. (N.S.) 337, 21 O. D. (N.P.) 505.

A private individual, as such, can not maintain injunction proceedings against, or interfere with, an officer or officers of the state in the performance of his duty, unless it can be shown that such officer acted in bad faith or from corrupt and malicious motives: *McBroom v. Watkins*, 11 O. N. P. (N.S.) 337, 21 O. D. (N.P.) 505.

If the dairy and food commissioner finds a manufacturer's commodity to be in violation of the statute, he may print, publish and circulate such information, and will not be enjoined: *Williams v. McNeal*, 7 O. C. C. 280, 4 O. C. D. 596. See also *FOODS AND DRUGS*.

Where a school building has been closed by the order of the Chief Inspector of Workshops, an injunction will lie at the suit of the board of education where such order is oppressive and arbitrarily made: *Board of Education v. Sawyer*, 7 O. N. P. (N.S.) 401, 19 O. D. (N.P.) 1, 53 Bull. 383.

(b) *County Officers.*

(aa) *Commissioners.*

An individual taxpayer of an unincorporated village having no solicitor can not under G. C., § 4314, bring an action in his own name solely on behalf of the municipality and against the county commissioners to restrain them from proceeding with the improvement of a county ditch lying partly within the limits of the municipality: *McCaslin v. Perrysburg*, 10 O. C. C. (N.S.) 325, 20 O. C. D. 103 [affirming *McCaslin v. Perrysburg*, 6 O. N. P. (N.S.) 48, 18 O. D. (N.P.) 196].

A prosecuting attorney is empowered to bring an action to enjoin a contemplated misappropriation of a county fund, notwithstanding the fund in question is derived in part from taxes levied in other counties: *State, ex rel., v. Sippel*, 11 O. N. P. (N.S.) 555, 21 O. D. (N.P.) 587.

One whose land abuts upon a joint county ditch may enjoin the commissioners of the upper county from enlarging their portion of the ditch and thereby damaging his land: *Redfern v. Commissioners*, 18 O. C. C. 233, 10 O. C. D. 45.

An agreement with the county commissioners, whereby it is attempted to confer authority for the construction of a railway crossing in a mode different from that pointed out by law, is clearly illegal, and an injunction against such construction will lie upon the petition of an abutting property owner: *Ritter v. Railway Co.*, 6 O. N. P. (N.S.) 161, 18 O. D. (N.P.) 846.

Injunction will lie to prevent the recording, of a transcript of the proceedings of the county commissioners in an action for the annexation of territory to a municipality, in the wrong office: *Shipbaugh v. Kimball*, 7 O. N. P. (N.S.) 514, 19 O. D. (N.P.) 33.

The county commissioners exercise a judicial function in acting upon the application for the annexation of territory to a municipality, and where such an application is granted merely because of the passage of an ordinance authorizing the annexation, the commissioners misinterpret and fail to exercise their judicial functions, and an injunction will lie to prevent the recording of the annexation thus affected: *Shipbaugh v. Kimball*, 7 O. N. P. (N.S.) 514, 19 O. D. (N.P.) 33.

A county auditor, after his term of office, can not enjoin commissioners from filling a vacancy therein: *Robbins v. Commissioners*, 2 O. C. C. 23, 1 O. C. D. 340.

County commissioners can not be compelled by mandamus to remove a dam, where, although the petition alleges that the parties who maintained the dam had no legal right to maintain it, the commissioners may have found the fact to be otherwise, since such finding should not be controlled by mandamus; and furthermore, since mandamus will not lie if equity would grant a mandatory injunction for such wrong: *State, ex rel., v. Oviatt*, 83 O. S. 460.

Injunction lies to determine the competency of a newspaper to publish the financial report of the county commissioners, required under G. C., § 2508: *Schloembach v. State, ex rel.*, 53 O. S. 345, IV Longsdorf's Notes, 604; *State, ex rel., v. Commissioners*, 14 O. C. C. (N.S.) 531, 23 O. C. D. 93 [affirmed, without opinion, *State, ex rel., v. Commissioners*, 84 O. S. 447].

Any taxpayer, and perhaps any citizen, can seek injunction against an illegal contract by the county commissioners, no other remedy being provided: *Ruffner v. Commissioners*, 12 Dec. Rep. 571, 1 D. 196 [affirming, *Ruffner v. Commissioners*, 12 Dec. Rep. 473, 1 D. 39].

A county's sale of bonds without advertisement is a contract in contravention of the laws of this state, under G. C., § 2921, which a taxpayer may seek to enjoin on refusal of the prosecuting attorney: *Franklin v. Baird*, 7 O. N. P. 571, 9 O. D. (N.P.) 715.

Where an engineer is made by county commissioners the arbiter of questions, as to whether clay excavated is earth or hard pan, the latter costing twelve times the former, and he makes an estimate grossly unjust to the taxpayers, a taxpayer may obtain an injunction against misapplying public funds:

State v. Commissioners, 6 O. N. P. 405, 9 O. D. (N.P.) 76.

The courts of the state have jurisdiction over a bridge lawfully erected by the county commissioners over a navigable stream wholly within the county, before Congress attempted to confer authority as to such bridges upon the secretary of state, and may enjoin the commissioners, on the petition of a taxpayer, from carrying out an order of the secretary of war, from removing such bridge and tearing it down and building a new and different one in its place, and changing the channel of such stream, and from issuing bonds and levying a tax to pay the expense thereof: *State v. Commissioners*, 7 O. C. C. (N.S.) 469, 18 O. C. D. 212 [dissenting opinion]. *State v. Commissioners*, 8 O. C. C. (N.S.) 169, 18 O. C. D. 232]. See also BRIDGES.

(bb) Auditor.

A county auditor will not be enjoined from issuing his warrants for the payment of salaries or compensation of certain public officers, on the ground that such officers hold their office under an unconstitutional statute: *State, ex rel., v. Craig*, 21 O. C. C. 175, 11 O. C. D. 553.

The omission of the auditor to record one of the duplicates of a petition for the improvement of a public road, constitutes no ground for enjoining the prosecution of the work: *Braden v. Commissioners*, 31 O. S. 386, III Longsdorf's Notes, 592.

Where the claim is for a continuous use of the records, and not merely for a single occasion, the proper remedy is by mandatory injunction and not by mandamus: *Wells v. Lewis*, 12 O. D. (N.P.) 170. See also RECORDS.

When the county auditor has placed an addition to a tax return on the treasurer's duplicate, but not on the original tax list provided for by G. C., § 2583, the levy is not complete and the auditor may be enjoined: *Lumber & Veneer Co. v. Robinson*, 1 O. C. A. 241.

(cc) Treasurer.

An attempted sale of public ground to pay a tax properly charged against it will be enjoined: *Cincinnati v. Hynicka*, 9 O. N. P. (N.S.) 273, 20 O. D. (N.P.) 365.

(dd) Other Officers.

One who has been duly appointed superintendent of a county infirmary has qualified according to law, and has been put in possession of the infirmary by the board of directors at the beginning of his term, may maintain injunction to protect himself in

the possession of the office against an adverse claimant whose term has expired, but who threatens and attempts to interfere with and obstruct him in the discharge of his duties: *Palmer v. Zeigler*, 76 O. S. 210, IV Longsdorf's Notes, 1023 [affirming, *Zeigler v. Palmer*, 10 O. C. C. (N.S.) 545, 20 O. C. D. 292]. See also OFFICE.

The requirement of G. C., §§ 3549, *et seq.*, with reference to filing with the municipal clerk the transcript of the proceedings by the county commissioners upon an application by citizens for the annexation of territory to the municipality, apply under G. C., § 3558, to the annexation of territory upon application of the corporation itself, and injunction will lie to prevent a county recorder to whom such proceedings have been certified, from making a record there.

A taxpayer is not estopped from bringing an action to enjoin an illegal expenditure of public money by reason of the fact that the defendants have been to considerable expense in preparing to execute the contract, where the ground of his action is that the contract is illegal for the reason that the defendants are wholly without authority to execute it, or having executed it to carry it out: *State, ex rel., v. Cass*, 13 O. C. C. (N.S.) 449, 22 O. C. D. 208 [affirmed, without opinion, *State, ex rel., v. Cass*, 84 O. S. 443].

A taxpayer is not guilty of laches in bringing suit to enjoin the illegal expenditure of public money, where within a day or two after the execution of the contract complained of with bond for its faithful performance he served notice through his counsel upon the prosecuting attorney of the county to bring such an action, and three days later, when the refusal of the prosecuting attorney to bring such an action was communicated to him, his own suit was filed: *State, ex rel., v. Cass*, 13 O. C. C. (N.S.) 449, 22 O. C. D. 208 [affirmed, without opinion, *State, ex rel., v. Cass*, 84 O. S. 443].

(c) Township Trustees.

In the absence of a showing of fraud and bad faith or irreparable injury, a court of equity will not interfere by injunction to restrain or control trustees in accepting or rejecting work done by a contractor in constructing a ditch: *McNelly v. Clay Township*, 11 O. N. P. (N.S.) 33.

Petition in error and not an injunction is the appropriate remedy for correction of errors apparent on the record in proceedings by township trustees establishing ditches, etc.: *Haff v. Fuller*, 45 O. S. 495, IV Longsdorf's Notes, 293; *Gease v. Carlisle*, 15 O. D. (N.P.) 435.

Where for the purpose of disposing of the surplus water flowing from an artesian well which has been sunk on a school lot, the township trustees enter into an agreement with the adjoining owner, whereby he lays pipes for carrying off such surplus water to his own land and uses the water there, injunction will lie against turning off the water by subsequent trustees many years later: *Wells v. White*, 17 O. D. (N.P.) 351, 4 O. L. R. 356.

If no steps to assess for a ditch by township trustees have been taken, an injunction suit is premature, unless their answer asserts a right or admits an intention to assess, and a judgment against them for costs is erroneous: *Lutman v. Railway*, 56 O. S. 433, IV Longsdorf's Notes, 694.

(d) *Board of Education.*

(aa) *Injunction Against.*

Quo warranto does not lie to prevent a board of education or the trustees of a school from exercising an excess of power; the remedy against such action is by injunction, and the offending trustees are necessary parties: *State, ex rel., v. Toledo*, 3 O. C. C. (N.S.) 468, 13 O. C. D. 327.

A board of education will be enjoined from expending public funds in erection of new schoolhouse in another place in district when the old one is suitable and located near center of district: *Watkins v. Hall*, 13 O. C. C. 255, 7 O. C. D. 434.

Boards of education are given power to appoint teachers and in the absence of gross abuse of discretion in the exercise of this power, an injunction will not lie: *Youmans v. Board of Education*, 13 O. C. C. 207, 7 O. C. D. 269.

A taxpayer can not proceed under G. C., § 4314, to restrain the board of education from exceeding its authority or expending public funds improperly: *Youmans v. Board of Education*, 13 O. C. C. 207, 7 O. C. D. 269.

Since G. C., § 4314, and the preceding section restrict the right of the taxpayer rather than confer it, a taxpayer may bring an action to restrain the board of education from doing an act not permitted by statute without acting under that section: *Weir v. Day*, 35 O. S. 143, III Longsdorf's Notes, 767; *Youmans v. Board of Education*, 13 O. C. C. 207, 7 O. C. D. 269.

Injunction will lie at the suit of a taxpayer to prevent a change of school books under an order illegally adopted by the board of education: *Lenhart v. Board of Education*, 5 O. N. P. (N.S.) 129, 18 O. D. (N.P.) 825.

A board of education can not enjoin the collection of a tax for a joint sub-school

district established by the probate court: *Board of Education v. Stuck*, 39 O. S. 259, III Longsdorf's Notes, 1025.

Where a board of commissioners appointed under the statute report to the probate court in favor of establishing a sub-district and select a site suitable for a schoolhouse therein, their action in this respect is final and conclusive; and the board of education elected within the sub-district, may be enjoined at the suit of a resident taxpayer, from abandoning the site thus selected and from purchasing another site and erecting a school-house thereon: *Moss v. Board of Education*, 58 O. S. 354, IV Longsdorf's Notes, 741.

Injunction will not lie to restrain a board of education from maintaining separate schools in joint sub-districts after a vote for centralization: *State, ex rel., v. Board of Education*, 1 O. C. C. (N.S.) 486, 15 O. C. D. 424.

Injunction is not the proper remedy to prevent the township board of education from maintaining separate schools in one joint sub-district: *State, ex rel., v. Trustees*, 1 O. C. C. (N.S.) 486, 15 O. C. D. 424.

Where a school board borrowed money in anticipation of taxes in order to build a school house, it can not be enjoined from repaying the loan out of the proceeds of the tax in the treasury on the ground that the building was unauthorized in not having been submitted to vote, and that the bonds for the loan were issued without compliance with statute: *State, ex rel., v. Board of Education*, 11 O. C. C. 41, 5 O. C. D. 447 [affirmed, without opinion, *State, ex rel., v. Board of Education*, 53 O. S. 656].

Although a contract for the employment of counsel is invalid where made by a *de jure* board of education to test the title of the *de facto* board, yet where the city solicitor espoused the cause of the *de facto* board, and the court has upheld the contention of the relators in the *quo warranto* proceeding, the mere invalidity of the employment is so far overcome by equities inuring to the benefit of the public, that a court of equity will not interfere with payment of the moral obligation thus incurred by enjoining its satisfaction out of the public treasury: *Caldwell v. Marvin*, 8 O. N. P. (N.S.) 387, 20 O. D. (N.P.) 715. See also SCHOOLS, PUBLIC.

Where services have been rendered or property obtained for which a valid contract could have been made, and the parties can not be put *in statu quo*, a court of equity will not interfere with the payment of the reasonable value of such services or property. Mere illegality not involving any moral wrong is not sufficient to obtain an injunc-

tion when equitable rights have arisen: *Caldwell v. Marvin*, 8 O. N. P. (N.S.) 387, 20 O. D. (N.P.) 715. See also PUBLIC CONTRACTS.

When a proposition for a bond issue for the erection or equipment of a school house has been submitted by the board of education to the voters of the district three different times, and each time it has been voted down, further submission of the proposition may be enjoined as an abuse of discretion and authority on the part of the board: *McAleander v. Board of Education*, 7 O. N. P. (N.S.) 590, 19 O. D. (N.P.) 89. See also SCHOOLS, PUBLIC.

(bb) Injunction for.

A court of equity ought not to interfere, at the suit of the board of education, to restrain a school teacher from violating a rule of the board or from breaking her contract: *Board of Education v. Paul*, 7 O. N. P. 58, 10 O. D. (N.P.) 17.

(e) Board of Equalization.

Injunction will not lie against the threatened action of a board of equalization so long as they are acting within the scope of the powers conferred upon them by law: *Railway Co. v. Board of Equalization*, 8 O. N. P. 487, 11 O. D. (N.P.) 629.

A petition in an action to restrain the board of revision from adding to the value of certain property, alleging the service of notice of an intention to increase, and complaining of the refusal of the board to allow the property owners to offer any testimony as to the value of such property, sufficiently states that the board is about to place the property on the tax duplicate at an increased valuation, which being conceded by demurrer, entitles plaintiff to relief: *Britton v. Baker*, 12 O. D. (N.P.) 107.

(f) Election Officers.

Officers performing political duties ordinarily belonging to a department of government, can not be enjoined therein. Election officers can not be enjoined from counting certain ballots cast at a primary meeting, and violation of such injunction is not a contempt: *Contempt Proceedings v. Grear*, 6 O. N. P. 312, 9 O. D. (N.P.) 299.

A board of elections will not be enjoined from proceeding in the exercise of its powers on the grounds that such proceedings are irregular or illegal, where it does not appear that they will involve any expenditure of the public funds: *Columbus v. Board of Elections*, 13 O. D. (N.P.) 452.

Where a board of elections adopts rules and issues instructions which are illegal, and injuriously affect the rights of a candidate at an election, such candidate is entitled to a mandatory injunction restraining said board from continuing to enforce such rules and instructions: *Oliver v. Bodie*, 3 O. N. P. 298, 6 O. D. (N.P.) 57.

A court of equity is without authority to restrain the deputy state supervisors of a county from considering contested election certificates and from referring them to the state supervisor on their failure to arrive at a decision thereon: *State, ex rel., v. Thompson*, 71 O. S. 76, IV Longsdorf's Notes, 980.

A petition which alleges that, unless restrained, the canvassing board will count, canvass, tabulate and abstract as "votes upon the question" ballots which did not express any vote, indicates that an inaccurate and untruthful result will be certified by the board, and the return of a certificate based upon such a count will be enjoined: *Brush v. Orgill*, 9 O. N. P. (N.S.) 632, 21 O. D. (N.P.) 794.

Under G. C., § 3568, a certificate from the clerk of the board of deputy state supervisors to the effect that the petition signed by the electors contains twenty-five per cent. or more of the resident electors of the territory to be annexed, is jurisdictional; and if such petition is presented without such certificate or with a certificate which is substantially defective, the subsequent proceedings are invalid; and the county commissioners have no jurisdiction to order an election in case council refuses to act; and the deputy state supervisors will be enjoined from submitting such question of annexation to the voters: *Norwood v. Deputy State Supervisors*, 13 O. C. C. (N.S.) 465 [affirming *Norwood v. Board of Elections*, 22 O. D. (N.P.) 644, 8 O. L. R. 386].

The council of a city is made by statute, the judge of the election and qualifications of its members, and a person elected a member, who is refused recognition as a member by the members who have met to organize, on the ground that he is disqualified, is not in possession of the office or entitled to an injunction to enable him to exercise its functions: *Holbrock v. Smedley*, 79 O. S. 391, IV Longsdorf's Notes, 1047.

(g) Receiver of National Bank.

Temporary injunctions against receiver of national banks are forbidden by R. S. of U. S., § 5242: *Warner v. Armstrong*, 10 Dec. Rep. 426, 21 Bull. 124 [affirmed on other grounds, *Armstrong v. Warner*, 49 O. S. 376]. See also BANKS AND BANKING.

3. Elections.

Courts of equity have no jurisdiction to interfere with public election by injunction: *Lawrence v. Mitchell*, 8 O. N. P. 8, 10 O. D. (N.P.) 265.

Holding an election will not be restrained by temporary injunction: *Lawrence v. Mitchell*, 8 O. N. P. 8, 10 O. D. (N.P.) 265.

An election about to be held to fill the place of a director alleged to be ineligible will not be enjoined, for no irreparable injury will result: *Hooe v. Hall*, 9 O. C. C. 654, 4 O. C. D. 547.

Mandatory injunction is the proper remedy to enforce in case of a petition for a local option election under the Brannock Law: *Krickenberg v. Wilson*, 3 O. N. P. (N.S.) 179, 15 O. D. (N.P.) 779.

4. Exercise of Office.

A claimant to a public office not in possession, can not have injunction against adverse claimant in possession: *Harding v. Eichinger*, 57 O. S. 371, IV Longsdorf's Notes, 719.

Injunction is not the appropriate remedy for determining the title to a public office, and can not be brought by one who is not in possession thereof, such questions being within the jurisdiction of law, and not of equity: *Shaw v. Jones*, 4 O. N. P. 372, 6 O. D. (N.P.) 453.

One who is out of possession of a public office can not maintain a suit for injunction to try his title thereto, the remedy of *quo warranto* at law being the only legal remedy adequate to try title to a public office: *Rienoehl v. Huonker*, 66 O. S. 657, IV Longsdorf's Notes, 920.

Injunction is the proper remedy by a *de facto* officer to prevent his being disturbed in the performance of the duties of the office until the legal title thereto has been determined: *Davies v. State, ex rel.*, 11 O. C. C. (N.S.) 209, 20 O. C. D. 527.

Injunction is ordinarily refused to test or try title to a public office: *Reemelin v. Mosby*, 47 O. S. 570, IV Longsdorf's Notes, 395.

Injunction lies to protect an official who is in office against interference by an adverse claimant until the latter establishes his title: *Harding v. Eichinger*, 57 O. S. 371, IV Longsdorf's Notes, 719; *Reemelin v. Mosby*, 47 O. S. 570, IV Longsdorf's Notes, 395; *Sullivan v. Haacke*, 5 O. N. P. 26, 7 O. D. (N.P.) 113.

The council of a city is made by statute, the judges of the election and qualification of its members, and a person elected a member, who is refused recognition as a member by the members who have met to organize, on the ground that he is disqualified, is not

in possession of the office or entitled to an injunction to enable him to exercise its functions: *Holbrock v. Smedley*, 79 O. S. 391, IV Longsdorf's Notes, 1047.

One who has been duly appointed superintendent of a county infirmary, has qualified according to law, and has been put in possession of the infirmary by the board of directors at the beginning of his term, may maintain injunction to protect himself in the possession of the office against an adverse claimant whose term has expired, but who threatens and attempts to interfere with and obstruct such superintendent in the discharge of his duties: *Palmer v. Zeigler*, 76 O. S. 210, IV Longsdorf's Notes, 1023.

Injunction may be employed by an incumbent of a public office to protect his possession against interference, until the adverse claimant shall have established his title by law: *Slatmyer v. Springborn*, 1 O. N. P. (N.S.) 157 [reversed, *Slatmyer v. Springborn*, 5 O. C. C. (N.S.) 89, 16 O. C. D. 100].

The failure of a policeman to give bond does not *ipso facto* work a forfeiture of the office, nor deprive him of the right to compensation; but a court will enjoin his continuing in office without giving bond: *Brown v. Milford*, 8 O. N. P. 317, 11 O. D. (N.P.) 406. See also MUNICIPAL CORPORATIONS.

A public officer's misconduct, or exercise of powers not conferred, can not be tested by *quo warranto*; injunction is the proper remedy: *State, ex rel., v. Board of Education*, 7 O. C. C. 152, 3 O. C. D. 703. See also QUO WARRANTO; OFFICE.

5. Removal of Officers.

Equity will not undertake to restrain an executive officer from removing an official where power to do so is conferred upon him by law: *Kerr v. Hinkle*, 12 O. D. (N.P.) 365.

Injunction lies at the suit of a taxpayer to restrain the removal of a public officer, as mayor, by the city council: *Dorgan v. Columbus*, 12 O. D. (N.P.) 121.

As *quo warranto* and not injunction is the only remedy to test the right to an office, a city council will not be enjoined from putting officers out and others in: *Shaw v. Jones*, 4 O. N. P. 372, 6 O. D. (N.P.) 453.

A clerk in the police department of a city at the time the new municipal code went into effect, appointed under R. S., §§ 1871, 1879 and 1881 (repealed 96 v. 96), for analogous section see G. C., § 4590, who is not invested with the exercise of any governmental function partaking of the sovereignty of the state, and whose duties are not prescribed by law, and who is under

the control and direction of superiors in the department, is not a "public officer," and can not enjoin the board of public safety from removing him contrary to the provisions of R. S., § 1536-703 (96 v. 75, § 167; repealed, 99 v. 568), nor can he enjoin the appointee of such board from assuming and performing the duties of the employment. Injunction is not the proper remedy: *Bender v. Cushing*, 14 O. D. (N.P.) 65. See also MUNICIPAL CORPORATIONS.

6. Inspection of Public Records.

The right to inspect the public records may be enforced by mandatory injunction: *Wells v. Lewis*, 12 O. D. (N.P.) 170.

Injunction and not mandamus is the proper remedy to secure the right to inspect public records: *Wells v. Lewis*, 12 O. D. (N.P.) 170.

7. Injunction Against Municipality.

(a) In general.

Proceedings in the probate court to fix compensation for the extension of a street railroad may be enjoined until there has been a determination of whether such extension will unnecessarily interfere with the use of the company's track and other property: *Railroad Co. v. Akron*, 6 O. N. P. (N.S.) 81, 18 O. D. (N.P.) 231; *Railway Co. v. Greenville*, 69 O. S. 487, IV Longsdorf's Notes, 963.

The provisions of the statutes authorizing the vacation of streets and alleys by a city council is a summary proceeding having reference to the interests of the general public, and is not binding upon abutting property owners who do not petition or consent. Such proceeding invokes governmental functions, which are not reached by process of injunction on the part of one who is individually affected. Accordingly, where one of two owners, whose properties abut on an alley in the rear, obtain a vacation of such alley by the city council without the consent of the other owner, such petitioning owner can not obstruct the alley at the only means of exit without furnishing some other reasonable means of egress therefrom, although such nonconsenting owner has access to the front of his lot. And the mere failure to appear and protest before the city council will not interfere with his right to an injunction to enjoin the petitioning owner from so obstructing the alley: *Schlemmer Co. v. Furniture Co.*, 2 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 92.

Where a brick sidewalk, which is in good repair and corresponds with the walks as generally laid in other parts of the city,

is ordered taken up and replaced with a more expensive cement walk, the only object of the change being the correction of the grade and slope of the walk, relief by way of injunction will be granted to the property owner in equity: *Detmers v. Columbus*, 2 O. N. P. (N.S.) 657, 15 O. D. (N.P.) 212.

A municipality having torn up a switch, allowed under ordinance, may be enjoined from interfering with the relaying of it, or from again removing it: *Railway Co. v. Cleveland*, 4 O. N. P. 21, 6 O. D. (N.P.) 33.

In a proceeding to enjoin the incorporation or annexation of territory, the injunction can not be allowed except for errors or irregularities in the proceedings, or inaccuracies in the description of the territory sought to be incorporated or annexed: *Hulbert v. Mason*, 29 O. S. 562, III Longsdorf's Notes, 498.

Municipal corporations in Ohio are authorized to construct waterworks and to supply water to their inhabitants, and to collect money for water supplied, and to make such by-laws and regulations as they may deem necessary for the sale, economic and efficient management and protection of the waterworks. Under this power a regulation providing that if any party shall refuse or neglect to pay the water rent when due, the water shall be turned off and not turned on again until all back rent and damages shall be paid and the further sum of one dollar for turning on and off the water, is a reasonable regulation and may be enforced. The determination by the proper city officials of the amount due for water supplied is not final, but the consumer who has good grounds for disputing the correctness of the charge made by the city may apply to the courts to determine the amount due and to restrain the enforcement of the rule pending such determination: *Mansfield v. Manufacturing Co.*, 82 O. S. 216, IV Longsdorf's Notes, 1060.

Mere failure to serve an abutting owner with notice of intention to narrow the sidewalk in front of his property does not entitle him to an injunction against the carrying out of the work: *Anderson v. Columbus*, 1 O. N. P. (N.S.) 541, 14 O. D. (N.P.) 180.

An action under G. C., §§ 4311, 4314, can not be brought to secure private ends nor to serve political purposes, for it is presumed that no one can have an interest adverse to the municipal corporation; or to compel it to do an act in excess of its powers or arising out of the violation of any trust on the part of its officers: *Johnson v. Farley*, 8 O. N. P. 498, 11 O. D. (N.P.) 639.

A grant of the use of a street to a railroad does not prevent the city from repair-

ing crossing of intersecting street, and it will not be enjoined from repairing, etc: *Railway Co. v. Elyria*, 14 O. C. C. 48, 7 O. C. D. 312.

A municipality is without authority to prescribe by ordinance that a commodity acquired by its inhabitants shall not be used for any purpose that is not dangerous or injurious: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

Courts of equity will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened, which must be proved by the petitioner by a preponderance of issuable facts, upon which the court can base its judgment, irrespective of the motives of members of council: *Carpenter v. Traction Co.*, 13 O. N. P. (N.S.) 81.

(b) Appropriation of property.

In a proceeding by the council of a municipal corporation to appropriate property against the will of the owner, for the purpose of extending a street, it is necessary for council to pass the preliminary resolution, and to give notice to the owners of the land as required by statute, but the probate court before which application is made to assess compensation has no jurisdiction to determine whether or not the preliminary resolution so required was passed and the notice given; the only remedy of the land owners in such case is an action to restrain the municipality from proceeding to assess compensation, and from taking possession of the property: *Railroad v. Youngstown*, 5 O. C. C. (N.S.) 332, 16 O. C. D. 679.

A person or corporation can not enjoin a municipal corporation from condemning a right of way for a street through lands. Plaintiff has an adequate remedy at law, for all preliminary questions are to be decided in the condemnation case by the court before going to the jury: *Railroad Co. v. Hyde Park*, 4 O. N. P. 296, 6 O. D. (N.P.) 327.

An injunction will not lie to restrain a municipal corporation from appropriating railroad property for street purposes: *Railroad Co. v. Hyde Park*, 4 O. N. P. 296, 6 O. D. (N.P.) 327.

A court of equity will only interfere to prevent the extension of a street over a railroad in case of unnecessary interference with the use of the tracks: *Railroad Co. v. Akron*, 6 O. N. P. (N.S.) 81, 18 O. D. (N.P.) 231.

In this case it was queried, whether the court of common pleas had jurisdiction to enjoin a proceeding by a city in probate court to appropriate land for street purposes, where the only grounds for the intervention by injunction is, that the city did something in its council proceedings which was in contravention of the law and can not be reached by the probate court: *Railway Co. v. Akron*, 13 O. D. (N.P.) 411 [affirmed, *Railroad Co. v. Akron*, 1 O. C. C. (N.S.) 174, 15 O. C. D. 759].

A municipal corporation which has begun proceedings to condemn land for park purposes, can obtain a temporary injunction against the owner cutting down trees thereon, and the owner can not in his cross-petition seek to enjoin the condemnation suit on any ground that might be set up as a defense thereto: *Put-in-Bay v. Webb*, 18 O. C. C. 780, 7 O. C. D. 478.

(c) Nuisance.

Municipal authorities can not contract in such wise that a nuisance may be maintained in a street, and injunction will lie against the further maintenance of an overhead railroad bridge abutment, which occupies a part of the street and is seriously interfering with the use of the street: *Elyria v. Railway Co.*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482.

Contra in case of a railroad trestle: *Railway v. Railway*, 2 O. N. P. (N.S.) 237, 15 O. D. (N.P.) 112.

An abutting property owner may maintain a suit for an injunction to abate a nuisance in the street, and in case his injury is different from that of the general public it is not necessary that he first make demand upon the city solicitor to bring the action: *Herrick v. Cleveland*, 7 O. C. C. 470, 4 O. C. D. 684.

A building inspector's discretion in issuing a permit (88 v. 90, § 5), will not be interfered with by injunction, though the contemplated use of the building will inevitably be a nuisance and though the owner may be enjoined from constructing it on the proposed plan: *Collins v. Cleveland*, 2 O. D. (N.P.) 380, Clev. L. Reg. 20.

(d) Illegal ordinance.

A court of equity will not interfere to restrain a municipal corporation from enforcing an ordinance on ground of illegality until right of complaint is established at law: *Arnold v. Van Wert*, 3 O. C. C. 545, 2 O. C. D. 314.

Injunction will not lie to restrain the publication of an ordinance establishing a stand for hackney coaches where it does not

clearly appear from the ordinance and the facts alleged that the establishing of such stand will result in a nuisance: *Columbus v. Barr*, 10 O. N. P. (N.S.) 379, 21 O. D. (N.P.) 165.

The publication of an ordinance *ultra vires* the power of a municipal corporation will be restrained at the suit of a taxpayer: *Railway Co. v. Columbus*, 10 O. N. P. (N.S.) 161, 20 O. D. (N.P.) 555.

An injunction *pendente lite* will not be granted in an action to enjoin a city and an electric railway company and the city officials from carrying into effect the provisions of an ordinance granting to such company a new franchise, on the ground that the passage of such ordinance was an abuse and in excess of the corporate powers of the city, where it appears that the provisions of such ordinance were more beneficial to the city and its citizens than was the franchise under which the company was operating before its passage: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

Injunction may be had against the enforcement of an ordinance, the object of which is illegal: *Moore v. Hoffman*, 13 Dec. Rep. 1005, 2 C. S. C. R. 453; *Johnson v. Cincinnati*, 11 Dec. Rep. 383, 26 Bull. 223.

Where an ordinance fixing salaries passed by council was not delivered to the mayor but he was notified of its passage and requested to call and sign it, and subsequently he was absent from the city a few hours during which time it was presented to and signed by the president of council as acting mayor, and subsequently the ordinance was taken possession of by the mayor and returned to council with his reasons for its veto, said ordinance never became a valid law of the city and payment of salaries thereunder should be enjoined: *Pounds v. Elyria*, 9 O. N. P. (N.S.) 625, 20 O. D. (N.P.) 357.

To enjoin the carrying out of municipal legislation as enacted in bad faith, it is not sufficient to aver that the trading of votes and persuasion and threats of one councilman induced the other five to vote as he wished: *Mills v. Norwood*, 11 Dec. Rep. 416, 26 Bull. 348.

A taxpayer may enjoin the auditor and treasurer of a municipal corporation from paying a person for services as superintendent of a city hall to which position such person had been appointed by the city clerk, under an ordinance which authorized him to make such appointment, no statutory authority for such ordinance existing: *Lillard v. Ampt*, 4 O. N. P. 272, 7 O. D. (N.P.) 167.

An action by the city solicitor under G. C., §§ 4311, *et seq.*, will lie notwithstanding the corporation is acting under color of an ordi-

nance, if the provision of the ordinance complained of is in excess of the power of council to grant: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

One who has existing contracts for the removal of slaughter-house and other offal of a sanitary character and possessing value, may enjoin the enforcement of an ordinance for the collection of garbage and offal including slaughter-house offal, in so far as it is in impairment of his contract obligations: *Stadler v. Cleveland*, 12 O. N. P. (N.S.) 321.

(e) *Unauthorized Contracts and Expenditures.*

(aa) *Suit by Taxpayer.*

A taxpayer can not enjoin the action of a municipal corporation on the ground that such acts will break existing contracts. The adversary party to such contract is the only person who can complain in such case: *Cincinnati v. Deater*, 55 O. S. 93, IV Longsdorf's Notes, 654.

The expenditure of public funds for other than public purposes, may be enjoined at the suit of a taxpayer: *Crawford v. Madigan*, 13 O. D. (N.P.) 494.

In an action to enjoin illegal actions of officers of a municipal corporation it is not necessary that it should state in the caption of the petition that plaintiff is a taxpayer: *Ampt v. Cincinnati*, 5 O. N. P. 98, 8 O. D. (N.P.) 475.

G. C., §§ 4311, 4314 authorizing the city solicitor to commence injunction proceedings to restrain the abuse of corporate powers and providing that in the event of his failure to act at the request of any taxpayer, the latter may commence proceedings on behalf of the municipality, apply only to cases where public rights are to be infringed by the council or other authorities and not where an individual is seeking the collection of an account against the city: *State v. Roebuck*, 2 O. N. P. (N.S.) 688, 15 O. D. (N.P.) 400.

Under G. C., § 4314, a taxpayer can not maintain a suit to enjoin one railroad company from transporting the cars of another railroad company across the city streets, if the ground relied upon for enjoining such action is that the contract between the two corporations was *ultra vires*: *Rogers v. Railway*, 12 O. D. (N.P.) 136, 47 Bull. 83.

A taxpayer may, however, sue for an injunction to prevent a private corporation from violating a city ordinance: *Rogers v. Railway*, 12 O. D. (N.P.) 136, 47 Bull. 83.

G. C., § 4314, applies to an application for leave to be made parties to a taxpayer's suit which has been fully argued, considered and determined for the purpose of appealing the same: *Pugh v. Electric Co.*, 19 O. C. C. 594, 10 O. C. D. 573 [reversing *Cincinnati v. Electric Co.*, 9 O. D. (N.P.) 828, 42 Bull. 153].

If a board of police commissioners is put in charge of the police department, as a branch of the police authority of the state, and not as a branch of the municipal corporation, funds raised for its use are not funds of the municipal corporation, and a taxpayer can not sue, under G. C., § 4314, to enjoin the unauthorized conduct of such board: *Fitzpatrick v. Bromwell Co.*, 5 O. N. P. 165; see to the same effect, *Yaple v. Police Commissioners*, 2 O. C. C. 406, 1 O. C. D. 557 [affirmed, without opinion, *Yaple v. Morgan*, 25 Bull. 336, as holding that funds raised for the police department were not funds of the municipal corporation under the statutes then in force].

Whether a taxpayer can on behalf of himself and all other taxpayers bring suit to enjoin an illegal county contract without proceeding under G. C., § 2921, by first applying to the prosecuting attorney, will not be decided, being of little importance, but such suit will be allowed to proceed on the merits: *Commissioners v. Pargillis*, 10 O. C. C. 376, 6 O. C. D. 717 [affirmed, without opinion, *Commissioners v. Pargellis*, 53 O. S. 680].

The fact that remedy in quo warranto may be had by the state does not prevent a general taxpayer from suing under G. C., § 4314: *Elyria v. Railway*, 12 O. D. (N.P.) 609 [same decree on appeal, *Elyria v. Railway*, 13 O. C. D. 482; modified and affirmed in *Railway v. Elyria*, 69 O. S. 414, IV Longsdorf's Notes, 961]; *Horstman v. Railway*, 13 O. D. (N.P.) 670; reversed, *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988.

A taxpayer may maintain a suit to restrain a board of education from doing an illegal act: *Youmans v. Board of Education*, 13 O. C. C. 207, 7 O. C. D. 269.

A lease of a public school house for the purpose of having a private or select school taught therein for a term of weeks, is in violation of the trust, and such use of the school house may be restrained at the suit of a resident taxpayer of the district: *Weir v. Day*, 35 O. S. 143, III Longsdorf's Notes, 767.

(bb) Payment of Public Money.

A municipality may be enjoined from a misapplication of funds. See G. C., §§ 4311 and 4314.

A bond issued for the purpose of raising a fund to be applied for an unauthorized purpose will be restrained by injunction. It is not necessary to wait until the fund has actually been raised and is about to be expended: *Gas Co. v. Elyria*, 57 O. S. 374, IV Longsdorf's Notes, 720.

An injunction will not lie to prevent the expenditure of a fund, which has been raised by a tax levied under an unconstitutional law, if such taxes have been collected, the taxpayers having paid them in without taking advantage of the unconstitutionality of such legislation: *State, ex rel., v. Bader*, 56 O. S. 718, IV Longsdorf's Notes, 701 [affirming *State, ex rel., v. Bader*, 13 O. C. C. 15, 7 O. C. D. 1].

A fund which is set apart for the maintenance of the police force is said not to be a city fund within the meaning of G. C., § 4311, such fund being the police fund of the state, for the territory covered by the boundaries of such municipal corporation: *Yaple v. Police Commissioners*, 2 O. C. C. 406, 1 O. C. D. 557 [affirmed, without opinion, *Yaple v. Morgan*, 25 Bull. 336].

Under G. C., § 4311, the solicitor may enjoin the misapplication of municipal funds in operating a gas plant, which is owned by the municipal corporation: *Findlay v. Parker*, 17 O. C. C. 294, 9 O. C. D. 710 [affirmed, without opinion, *Parker v. Findlay*, 63 O. S. 565].

Injunction will lie to restrain the expenditure of public funds in the exploitation of a particular system of valuing property for taxation, regardless of the merit or demerit of the system: *Crawford v. Madigan*, 13 O. D. (N.P.) 494.

Injunction will not lie against irregular actions of board of elections not involving any expenditure of public funds: *Columbus v. Board of Elections*, 13 O. D. (N.P.) 452.

A taxpayer may enjoin the expenditure of money, or the making of contracts for such expenditures for a municipal corporation under ordinances appropriating sums in excess of estimate for fiscal year: *Ampt v. Cincinnati*, 8 O. N. P. 535, 8 O. D. (N.P.) 475.

Injunction lies to prevent waste or misapplication of a fund which is reserved by a municipality for a specified period as security for a municipal contract, where the further performance of the contract has been rendered impossible by the wrongful acts of the municipality, and an action is already begun to determine the trust and for the balance remaining unpaid: *Trust Co. v. Norwood*, 1 Hosea, 88.

An action to restrain a municipality from paying money to a water company in pursuance of a contract claimed to be illegal

to pay hydrant rentals for fire purposes, is properly brought under G. C., § 4311, by the city solicitor, inasmuch as if the contract is illegal, the payment would be a "misapplication of the funds of the corporation," and also "performance of a contract made on behalf of the corporation in contravention of law": *Defiance v. Council*, 13 O. C. D. 96.

Where a village purchases supplies in an amount in excess of \$500 without advertising for bids or entering into any contract as required by law, the fact that the goods were purchased and delivered in good faith does not render the village liable therefor because of the moral obligation incurred, and upon a suit by a taxpayer an injunction will lie against payment of the bill: *Castner v. Pleasant Ridge*, 7 O. N. P. (N.S.) 174, 18 O. D. (N.P.) 539.

Although a contract for the employment of counsel is invalid, where made by a *de jure* board of education to test the title of a *de facto* board, yet, where the city solicitor espoused the cause of the *de facto* board, and the court upheld the *de jure* board, the mere invalidity of the employment is so far overcome by the equities inuring to the benefit of the public, that a court of equity will not interfere with the payment of the moral obligation thus incurred by enjoining its satisfaction out of the public treasury. But under the foregoing facts if there was no certificate of funds at the time of the adoption of the resolution for the payment of the claim, injunction would lie against such payment: *Caldwell v. Marvin*, 8 O. N. P. (N.S.) 387, 20 O. D. (N.P.) 715.

A suit to enjoin a county treasurer from paying an order given to satisfy an alleged illegal contract made by the county commissioners can be maintained by a taxpayer but only on behalf of the state, provided the prosecuting attorney refuses to bring such suit: *Stolz v. Selz*, 12 O. D. (N.P.) 664.

A taxpayer can not enjoin the payment of a bill arising out of a contract because the bill was approved and ordered paid at an invalid meeting of the county commissioners. His remedy is against the commissioners for misfeasance: *McCaslin v. Perrysburg*, 10 O. C. C. (N.S.) 325, 20 O. C. D. 103 [affirming *McCaslin v. Perrysburg*, 6 O. N. P. (N.S.) 48, 18 O. D. (N.P.) 196].

Injunction is the proper remedy to restrain an unauthorized use of the public moneys, as appropriating funds for entertainments: *Moore v. Hoffman*, 13 Dec. Rep. 1005, 2 C. S. R. 453.

A resident taxpayer, owning property within an incorporated village subject to be taxed for the support of the revenues of the village, in which village there is no solicitor or other legal counsel whose duties require

him, in the name of the corporation, to apply to a court to restrain the illegal use of the funds of the corporation, is not without legal capacity to maintain for himself and on behalf of the village, an action against the municipal authorities to enjoin the unauthorized expenditure of the funds of the village: *Pierce v. Hagans*, 79 O. S. 9, IV Longsdorf's Notes, 1043.

In the absence of a statute specifically authorizing a private individual to sue on behalf of himself and the village for the recovery of funds alleged to belong to the village, he is without capacity to maintain the action, but it must be brought by council or whatever officer is charged with the duty of caring for the public funds or of bringing an action to protect them: *Nicholson v. Maile*, 3 O. N. P. (N.S.) 201, 15 O. D. (N.P.) 682.

In the absence of statutory regulation, a taxpayer may maintain an action, on behalf of himself and other taxpayers, to recover money illegally paid out of the public treasury, and in such action may unite as defendants all against whom any relief is asked and whose right will be affected by the determination of the subject of the action: *Walker v. Dillonvale*, 82 O. S. 137 [reversing *Walker v. Dillonvale*, 11 O. C. C. (N.S.) 385, 20 O. C. D. 623, on the ground that the expenditure therein made was authorized by statute].

A taxpayer may bring suit to restrain a municipal corporation from expending a large sum of money under an invalid resolution: *Stem v. Cincinnati*, 6 O. N. P. 15, 9 O. D. (N.P.) 45.

(cc) Abuse of Corporate Power.

The abuse of corporate powers referred to in G. C., § 4311 includes both the unlawful exercise of powers which the corporation possesses, as well as the unlawful assumption of powers which the corporation does not possess: *Gas Co. v. Flyria*, 57 O. S. 374, IV Longsdorf's Notes, 720.

The act of a city solicitor in bringing a suit to prevent action under a franchise on the theory that the granting of such franchise is an abuse of the corporate power, is to be regarded as the act of a municipal corporation, and the delay thus caused is to be deducted from the period within which work was to begin upon the improvement in question under the terms of such franchise: *State, ex rel., v. Boyce*, 43 O. S. 46, IV Longsdorf's Notes, 145.

Under an illegal contract entered into by police commissioners involving the police funds only, and not the general funds of the municipal corporation, is said not to be

an abuse of the corporate power of the municipal corporation, and, accordingly, not to be within the provisions of G. C., § 4311: *Fitzpatrick v. Bromwell Co.*, 5 O. N. P. 165, 7 O. D. (N.P.) 385.

The unlawful laying of track and the operation of cars caused by the action of the municipal authorities in attempting to grant a franchise unlawfully, and the action of a street railway company under such alleged franchise, is an abuse of corporate power within the meaning of G. C., § 4311, and may be enjoined: *Horstman v. Railway*, 13 O. D. (N.P.) 670 [reversed, on other grounds *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988].

A contract which is made in violation of a statute or ordinance is an abuse of corporate power, although an abuse of corporate power may take place in cases other than the making of contracts: *Shaw v. Jones*, 4 O. N. P. 372, 6 O. D. (N.P.) 453.

Under G. C., § 4311, an injunction to prevent the abuse of corporate powers as well as the exercise or performance of a contract unauthorized by law may be allowed: *Guckenberger v. Dexter*, 5 O. N. P. 429, 8 O. D. (N.P.) 530.

The execution of a contract whereby prisoners sentenced by the police court of a municipal corporation are hired to a corporation by the board of police commissioners, which is a board vested with the police power of the state, is not an exercise of corporate power by the municipal corporation, and is not a violation of G. C., § 4311: *Fitzpatrick v. Wire Co.*, 5 O. N. P. 165, 7 O. D. (N.P.) 216.

If a municipal corporation has no power to allow its streets to be used for laying pneumatic tubes for the purpose of carrying packages by compressed air, a taxpayer may bring suit, under G. C., § 4314, to prevent the municipal corporation from allowing such use of its streets: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805.

Before an injunction can be granted to prevent a change of grade of a street, as an abuse of corporate power, it must be shown that such grade is unreasonable with regard to the use of the street as a public highway: *Corry v. Cincinnati*, 10 Dec. Rep. 601, 22 Bull. 194.

The solicitor may enjoin the construction of supports for a railroad trestle which would amount to a public nuisance in a street: *Alexander v. Railroad*, 2 O. N. P. (N.S.) 59, 14 O. D. (N.P.) 102.

The solicitor may enjoin the erection of a structure, abutment or support in a public way which will necessarily prevent the use by the public of the part thus occupied: *Cincinnati v. Railroad*, 4 O. N. P. (N.S.)

217, 16 O. D. (N.P.) 628 [affirmed in *Railroad v. Cincinnati*, 4 O. N. P. (N.S.) 497, 17 O. D. (N.P.) 689, which was affirmed in *Railroad v. Cincinnati*, 76 O. S. 481, IV Longsdorf's Notes, 1026].

If the council is threatening to proceed to remove the mayor under an invalid ordinance, a taxpayer may enjoin such action, since it is both an abuse of corporate power and a misapplication of corporate funds: *Dorgan v. Columbus*, 12 O. D. (N.P.) 121.

The right of a taxpayer to bring an action to enjoin a threatened abuse of corporate power was not created by the municipal code, nor is it restricted to property owners in cities, but when occasion arises, it is equally available to one owning property in a village: *Smith v. Rockford*, 4 O. N. P. (N.S.) 513, 17 O. D. (N.P.) 649 [affirmed, *Smith v. Rockford*, 9 O. C. C. (N.S.) 465, 19 O. C. D. 478].

(dd) Irregular Contracts.

An ordinance of a municipal corporation appropriating private property for the building of a dike is an ordinance for the expenditure of money and is void if no certificate has been previously filed and recorded with the proper officer; and an injunction will be granted restraining the municipality from proceeding in the probate court to assess compensation to the land owner for the land appropriated: *Hurst v. Belle Valley*, 11 O. C. C. (N.S.) 235, 20 O. C. D. 563.

The execution of certain municipal contracts may be enjoined when there is no fund from which to pay: *Cincinnati v. Board of City Affairs*, 8 O. N. P. 500, 10 O. D. (N.P.) 104.

An action by a citizen against a municipal officer to restrain the execution of a contract as authorized and directed by an ordinance of the city is an action to enforce the trust relationship between such city and its officers in the execution of their trust and the preservation of the rights of the municipality as against the wrongful acts of its agents or officers: *Johnson v. Farley*, 8 O. N. P. 498, 11 O. D. (N.P.) 639; *Brown v. Toledo*, 10 O. C. C. 642, 5 O. C. D. 115; *Gallagher v. Johnson*, 1 O. D. (N.P.) 264, 31 Bull. 24; *Hensly v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114; *Adam v. Miller*, 5 O. C. C. 609, 3 O. C. D. 297.

A contract by a municipality bartering away administrative powers is void, and injunction will not lie to prevent a breach of such contract: *Trust Co. v. Norwood*, 12 O. D. (N.P.) 198 [affirmed, *Trust Co. v. Norwood*, 12 O. D. (N.P.) 623].

A court of equity will not enjoin a street improvement merely because the contract

therefor was let before the money to pay for it was in the treasury, where the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury: *Emmert v. Elyria*, 74 O. S. 185, IV Longsdorf's Notes, 1008.

Injunction will not lie to prevent a municipality from proceeding under an alleged *ultra vires* contract where the city had in good faith terminated the contract prior to the commencement of the action; nor will the fact that the municipality might at some future time reconsider its action in terminating the contract, and undertake to carry out its terms, warrant the issuing of an injunction where there is no present threatened danger of its doing so: *Tritter v. Bohl*, 2 O. N. P. (N.S.) 365, 14 O. D. (N.P.) 710.

Under G. C., § 4314, a taxpayer may enjoin a municipal corporation from entering into a contract involving the expenditure of money if no certificate has been filed showing that the money for such purpose is in the treasury: *Pullen v. Smith*, 5 O. C. C. (N.S.) 1, 16 O. C. D. 549 [reversed in *Smith v. Evans*, 74 O. S. 17, IV Longsdorf's Notes, 1005, on the ground that the transaction in question did not involve the expenditure of money]. (An acceptance of a proposition to purchase a site for a library and to maintain such library in consideration of a donation of a specified amount for the erection of a library building.)

The council of a municipal corporation has power to select the newspapers of opposite politics and of general circulation in which ordinances and resolutions requiring publication shall be published under G. C., §§ 4228 and 4229; but it has no power to designate newspapers which are not of opposite politics and of general circulation; and equity will enjoin a municipal corporation from making contracts with newspapers which was not of general circulation: *Doster v. Cleveland*, 20 O. D. (N.P.) 548.

G. C., § 4311, providing that suits shall be brought by the solicitor in the name of the city to enjoin the execution or performance of any contract made in behalf of the corporation in contravention of law, is cumulative and under it a suit may be maintained in the name of the city to enjoin the unlawful use of a public street, part of a county road, although the action might be brought in the name of the state: *Elyria v. Railway Co.*, 12 O. D. (N.P.) 609 [affirmed, *Elyria v. Railway Co.*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482].

A contract will not necessarily be enjoined even if the objections are valid, for, under the duty to make such order as

justice demands, injustice or wrong must be shown to result: *Fergus v. Columbus*, 6 O. N. P. 82, 8 O. D. (N.P.) 290.

A person with whom a city has made an unlawful contract, though fully performed on the city's part, can be enjoined from "the performance" by a taxpayer under G. C., § 4314: *Haskins v. Railroad*, 7 Dec. Rep. 713, 4 Bull. 1126.

The court's power under G. C., § 4314, to make such order as justice demands does not give power in enjoining an illegal award of public work to affix a condition of payment of work done under the contract before it was declared illegal: *Hertenstein v. Herrman*, 6 O. N. P. 93, 9 O. D. (N.P.) 205.

A lease of piers in front of a park entered into between the city and navigation companies pursuant to the act of 1910 (101 v. 236), before the city had completed its title thereto by appropriation of the underlying rights of property, pursuant to the act of 1906 (98 v. 164, G. C., § 3692) will be enjoined at the suit of a taxpayer or one owning said underlying right of property: *White v. Cleveland*, 14 O. C. C. (N.S.) 369, 23 O. C. D. 317 [modifying and affirming *White v. Cleveland*, 12 O. N. P. (N.S.) 225, 21 O. D. (N.P.) 311 and affirmed, without opinion, *Cleveland v. White*, 87 O. S. 483].

Council can not delegate to the mayor power to buy and maintain water-fountains. But if he has already obtained them, and they have been paid for pending this suit to enjoin, but before any restraining order had been applied for, the application is too late and will not be granted as against his proceeding further, which he disclaims doing, the presumption being that the mayor will do his duty on hearing that the ordinance is void: *Ampf v. Cincinnati*, 3 O. N. P. 223, 4 O. D. (N.P.) 176.

A contract between a village and a construction company, whereby the latter agreed to keep a street in repair for five years so far as such repairs become necessary by reason of insufficient work and ordinary wear and tear, will not prevent the village from making a contract with a traction company and a sewer contractor, though in consequence thereof the street will be torn up. The repairs made necessary by such action are not the repairs included in the contract with the construction company. The latter can not, therefore, enjoin the contract with the traction company or the sewer contractor: *Bank v. Norwood*, 12 O. D. (N.P.) 623 [affirming *Bank v. Norwood*, 12 O. D. (N.P.) 198]. See also **ASSESSMENTS**.

Where a village purchases supplies in an amount in excess of \$500 without advertis-

ing for bids or entering into any contract as required by law, the fact that the goods were purchased and delivered in good faith does not render the village liable therefor, because of the moral obligation incurred, and upon suit by a taxpayer an injunction will lie against the payment of the bill: *Castner v. Pleasant Ridge*, 7 O. N. P. (N. S.) 174, 18 O. D. (N.P.) 539. See also MUNICIPAL CORPORATIONS.

(ee) Letting Contracts to Lowest Bidder.

The lowest bidder upon a municipal contract can not as such bring a suit to enjoin the municipal corporation from rejecting all bids: *State, ex rel., v. Board*, 81 O. S. 218, IV Longsdorf's Notes, 1056; *Johnson v. Cincinnati*, 11 Dec. Rep. 383, 26 Bull. 223; *Johnson v. Railway*, 9 Dec. Rep. 71, 10 Bull. 345.

A city council having rejected all bids, can not be compelled by injunction to accept one because it is the lowest: *Johnson v. Railroad*, 9 Dec. Rep. 71, 10 Bull. 345.

Where bids for public work received in response to advertisement are ignored, and the contract is awarded upon conditions not contained in the original specifications and received subsequent to the time designated in the advertisement, the award is wholly unauthorized and illegal, and upon application to a court of competent jurisdiction may be enjoined: *State, ex rel., v. Board of Education*, 6 O. C. C. (N.S.) 345, 17 O. C. D. 832.

The execution of a contract for public improvement will be enjoined, where the specifications were impossible of enforcement and the bidders were not made aware of the construction which would be placed upon the specifications in determining which was the lowest and best bid: *Tuke v. Sundmaker*, 13 O. C. C. (N.S.) 463, 22 O. C. D. 554 [affirming *Tuke v. Sundmaker*, 10 O. N. P. (N.S.) 417, 21 O. D. (N.P.) 615].

Consideration of bids for public work must be based upon the assumption that the materials which the several bidders propose to use conform strictly to the specifications, and the acceptance of a higher bid on the theory that the bidder is proposing to use better material than is called for in the specifications is destructive of the principle of competitive bidding, and without authority of law, and injunction will lie against such an award: *Tuke v. Sundmaker*, 10 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 615 [for subsequent opinion in same case, see *Tuke v. Sundmaker*, 10 O. N. P. (N.S.) 417, 21 O. D. (N.P.) 615, which was affirmed in *Tuke v. Sundmaker*, 13 O. C. C. (N.S.) 463, 22 O. C. D. 554].

If the specifications provided that the oil should be free from carbon, and strict compliance with this provision was impossible; and the construction applied in awarding this contract was that not more than three-fourths of one per cent. of free carbon should be permitted in the oil; and the construction which was adopted by the director of public service was not known to all the bidders in advance, the director would be enjoined from making such contract: *Tuke v. Sundmaker*, 13 O. C. C. (N.S.) 463, 22 O. C. D. 554 [affirming, *Tuke v. Sundmaker*, 10 O. N. P. (N.S.) 417, 21 O. D. (N.P.) 615; for opinion below on demurrer, see *Tuke v. Sundmaker*, 10 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 615].

Although injunction may be the proper remedy for preventing the award of a contract for a public work to another than the lowest bidder, it does not lie where the suit is brought by the lowest bidder, unless he sue in his capacity of a taxpayer, or become the beneficiary of a suit brought by a taxpayer whom he may agree to indemnify against costs and expenses: *Carmichael v. McCourt*, 6 O. C. C. (N.S.) 561, 17 O. C. D. 775.

That a taxpayer who is himself a competitor and is interested adversely to the municipal corporation, can not bring suit to enjoin a municipal corporation from awarding a municipal contract to one who is not the lowest bidder, even if the solicitor refuses to bring such suit: *Mathers v. Cincinnati*, 7 Dec. Rep. 521, 3 Bull. 709.

That the lowest bidder may enjoin the municipal corporation from rejecting his bid, if the right to reject bids has not been reserved either by statute or by the terms of the bid: *Lake Shore Foundry v. Cleveland*, 8 O. C. C. 671, 4 O. C. D. 230.

The only remedy by which a person making a bid alleged to be the lowest responsible bid, can prevent officials from awarding the contract to another, is an injunction to restrain officials from making such contract. Mandamus will not lie to compel officials to award the contract to the plaintiff: *Akron v. France*, 4 O. C. C. (N.S.) 496, 14 O. C. D. 63.

If a municipal corporation is about to award a contract to one who is not the lowest bidder, and the statute requires the contract thus to be awarded, a taxpayer may enjoin such action: *Pease v. Ryan*, 7 O. C. C. 44, 3 O. C. D. 654; *Tucker v. Newark*, 19 O. C. C. 1, 10 O. C. D. 437.

Where at the time of the injunction proceeding the work under the contract, awarded to a person other than the lowest bidder, is already commenced, the only remedy is to enjoin such party from proceeding fur-

ther with the work, set aside the contract, and refer the matter back for further proceedings in accordance with the statute: *Akron v. France*, 4 O. C. C. (N.S.) 496, 14 O. C. D. 63.

G. C., §§ 4311, *et seq.*, are to be liberally construed and cover every abuse of the city's pecuniary interests. An injury need not be shown, but a threatened illegal act is sufficient. But mere error of judgment in contracting is not restrained, nor can the remedy be granted to further private interest, help a disappointed competitor or gratify caprice or spite: *Fergus v. Columbus*, 6 O. N. P. 82, 8 O. D. (N.P.) 290.

If the award of a contract is protested against when made and suit to enjoin is filed within a week, there is no estoppel by delay to assert the invalidity of the award by reason of not moving for a temporary restraining order, which involves the risk of a bond, or from not applying for immediate hearing: *Hertenstein v. Herrman*, 6 O. N. P. 93, 8 O. D. (N.P.) 205.

Where a *bona fide* bidder for public work in good faith submits a bid which is based on a mistake in measurements which would involve him in serious financial loss were he to do the work for the amount named, the minds of the parties have not met, and he can not be compelled to execute the proposed contract, notwithstanding the terms upon which the bid was submitted provided that it should not be withdrawn; and injunction will lie on the petition of the bidder to restrain the board having charge of the contract from accepting the bid and insisting that he execute the contract or subject himself to an action for damages: *Concrete Co. v. Board of Education*, 11 O. N. P. (N.S.) 86, 21 O. D. (N.P.) 463.

(ff) Contracts in Contravention of Law or Procured by Fraud.

An invalid grant of a street railway franchise made by a municipal corporation may be enjoined both as an abuse of corporate power and as a contract made in behalf of a municipal corporation in contravention of law: *Horstman v. Railway*, 14 O. D. (N.P.) 545. For the holding of the supreme court as to the validity of such franchise, see *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988.

G. C., § 4314, is cumulative, and under it suit may be maintained in the name of a municipal corporation to enjoin the unlawful use of a public street, which is part of a county road, in pursuance of a contract which is made in contravention of law, although such action might also be brought in the name of the state: *Elyria v. Railway*, 12 O.

D. (N.P.) 609 [same decree on appeal, *Elyria v. Railway*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482; modified and affirmed, *Elyria v. Railway*, 69 O. S. 414, IV Longsdorf's Notes, 961].

In an action to enjoin a railway company from constructing a road upon streets, the use of which the municipal corporation has granted, the municipal corporation can not show that the necessary number of consents has not been procured, if fraud or collusion is not charged: *Hamilton v. Railway*, 5 O. N. P. 457, 8 O. D. (N.P.) 174.

A suit may be brought by a taxpayer to declare invalid a resolution of the council of a municipal corporation, extending the grant of a right of a street railway company where it is claimed that the statute which confers the power to make such extension is unconstitutional: *Horstman v. Railway*, 13 O. D. (N.P.) 378 [reversed, *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988].

(gg) Issuance of Bonds.

In a suit by a taxpayer against the board of county commissioners and the party to whom the bonds of the county are delivered without authority of law, to enjoin the delivery of the bonds, the court may render a money judgment against such party for money had and received, or for a conversion of the bonds, when it appears from the facts disclosed on hearing, but not known to the plaintiff when he brought his suit, that the bonds had already been issued and delivered and had been transferred to a *bona fide* holder: *Commissioners v. State*, 78 O. S. 287, IV Longsdorf's Notes, 1041.

A taxpayer suing in his individual capacity can not maintain a suit to enjoin the issue of bonds by a municipality for building and equipping of electric light plant. Such suit must be brought on behalf of the corporation: *Hallock v. Columbus*, 1 O. N. P. (N.S.) 205, 13 O. D. (N.P.) 488.

Where a proposition for a bond issue for the erection or equipment of a school house has been submitted by the board of education to the voters of the district three different times and each time it has been voted down, further submission of the proposition may be enjoined as an abuse of discretion and authority on the part of the board: *McAleander v. School District*, 7 O. N. P. (N.S.) 590, 19 O. D. (N.P.) 89.

Under G. C., § 4314, a taxpayer may enjoin the issue of unauthorized bonds: *Newton v. Toledo*, 18 O. C. C. 756, 8 O. C. D. 607 [affirmed, without opinion, *Toledo v. Newton*, 52 O. S. 649].

Under G. C., § 4314, a taxpayer may sue to enjoin the sale of bonds where the statutes which authorize such sale have not been

complied with: *Fenner v. Cincinnati*, 8 O. N. P. 340, 11 O. D. (N.P.) 58 [reversed, *Cincinnati v. Fenner*, 8 O. N. P. 342, 11 O. D. (N.P.) 288; affirmed, without opinion, *Fenner v. Cincinnati*, 65 O. S. 567].

The entire absence of any power in a municipality, either express or implied, to reissue a negotiable bond to take the place of one which is still outstanding and a continuing primary obligation, disqualifies a court of chancery from entertaining an application for a mandatory injunction to compel the issue of such a bond to take the place of one which has been lost: *Bank v. Cincinnati*, 8 O. N. P. (N.S.) 393, 19 O. D. (N.P.) 685. See also BONDS, NEGOTIABLE.

(hh) Public Improvement on Private Property.

The county commissioners will be enjoined from expending money on the improvement of a county road, until the right of way is legally obtained: *State v. Commissioners*, 39 O. S. 58, III Longsdorf's Notes, 1007.

The construction of a sewer may be enjoined until the land is condemned: *City v. English*, 6 Dec. Rep. 972, 9 Am. L. Rec. 310, 5 Bull. 789.

The statute authorizing contracts with railroads for the use of streets did not intend to surrender the street to the railroad, and deprive the public of the same further than necessary. Streets are held in trust for the public, and if they can be used both by the railroad and the city, the city can grant only a use in common with the public, and a grant of such use as the railroad should deem necessary means such use as is actually necessary, 'with due regard to public convenience, and the city will not be enjoined from repairing a crossing of an intersecting street: *Railway Co. v. Elyria*, 14 O. C. C. 48, 7 O. C. D. 312. See also RAILROADS.

(ii) Grant and Misuser of Franchise.

Under G. C., § 4314, a taxpayer can not sue to prevent a street railway from exercising a franchise, unless the defects in granting such franchise are jurisdictional in character, or are of such a nature that the equity and justice of the case demand the interference of the court: *Sloane v. Railway*, 7 O. C. C. 84, 3 O. C. D. 675.

A taxpayer may sue to enjoin the municipal corporation from granting a franchise for the purpose of laying pneumatic tubes in streets in order to carry packages by compressed air, and to supply compressed air: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805.

A taxpayer can not enjoin a grant of a franchise to a street railway company on the

ground that the abutting property owners have not given their consents, since in such case the only persons who have a right to object are such abutting property owners, and not the general taxpayers: *Simmons v. Toledo*, 5 O. C. C. 124, 3 O. C. D. 64 [affirmed, without opinion, *Simmons v. Toledo*, 30 Bull. 392]; *Sommers v. Cincinnati*, 6 Dec. Rep. 887, 8 Am. L. Rec. 612; *Harrison v. Railway*, 9 Dec. Rep. 805, 17 Bull. 265; *Glidden v. Cincinnati*, 11 Dec. Rep. 853, 30 Bull. 213; *Hamilton v. Railroad*, 5 O. N. P. 457, 8 O. D. (N.P.) 174.

An abutting property owner may maintain an injunction suit for want of a sufficient number of consents for the street on which his property abuts; but not for want of a sufficient number of consents on other streets: *Mathers v. Cincinnati*, 7 Dec. Rep. 521, 3 Bull. 709; *Glidden v. Cincinnati*, 11 Dec. Rep. 853, 30 Bull. 213; *Barney v. Railway*, 11 Dec. Rep. 880, 30 Bull. 286.

A city solicitor can not maintain an injunction suit on behalf of such municipal corporation for want of a sufficient number of consents of property owners: *Lima v. Cramer*, 5 O. N. P. (N.S.) 113, 17 O. D. (N.P.) 245.

If an abutting property owner is entitled to maintain an injunction suit upon the facts, his motive is immaterial even if he is really suing for the benefit of a competing corporation: *Traction Co. v. Parish*, 67 O. S. 181, IV Longsdorf's Notes, 927; *Isom v. Railway*, 10 O. C. C. (N.S.) 89, 19 O. C. D. 583 [affirmed, without opinion, *Railway v. Isom*, 77 O. S. 638].

Within the meaning of G. C., §§ 4311 to 4314, a grant of a franchise to a street railway company is a contract made in behalf of the municipal corporation: *Railway v. Smith*, 29 O. S. 291, III Longsdorf's Notes, 467.

A municipal corporation may bring an action against an interurban railway company, which has entered the municipal corporation in compliance with G. C., § 9120, if such company has not complied with the conditions which were imposed upon the grant of a franchise to the street railway company, whose tracks such interurban railway company has leased: *Cincinnati v. Railway*, 3 O. N. P. (N.S.) 489, 16 O. D. (N.P.) 220 [reversed in *Railway v. Cincinnati*, 75 O. S. 196, IV Longsdorf's Notes, 1015, on the ground that the interurban railway company was not bound to agree to an exchange of transfers, in the absence of an ordinance requiring street railways in the municipal corporation generally to exchange transfers].

The solicitor of a municipal corporation may bring an action for the forfeiture of franchises, which have been granted to a gas company, if the gas company fails to

comply with material provisions thereof: *Columbus v. Gas & Fuel Co.*, 14 O. D. (N.P.) 261 [affirmed, without opinion, *Columbus v. Gas Co.*, 72 O. S. 632].

For the question of the right of abutting owners or taxpayers to sue for an injunction against the granting or the misuse of a franchise, see VI, PARTIES, herein.

(jj) Vacation of Streets.

The statute authorizing the vacation of streets and alleys by a city council is a summary proceeding having reference to the interests of the general public, and is not binding upon an abutting property owner who does not petition or consent. Such proceeding invokes governmental functions, which can not be reached by process of injunction on the part of one who is individually affected: *Schlemmer v. Furniture Co.*, 2 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 92.

The fact that a city abandons a narrow street with sharp grades in exchange for a wide, well graded street, improving the appearance of that part of the city, and more accessible to the increasing population thereof, and without any practical expense therefor, notwithstanding in crossing a railroad more tracks would be crossed, is not an abuse of discretion on its part, for which an injunction will lie to restrain the city from proceedings in appropriation in the probate court to secure a crossing over the railway property: *Railway Co. v. Akron*, 13 O. D. (N.P.) 411. See also **STREETS**.

(kk) Use and Improvement of Streets.

The owner of abutting property can not sue to enjoin the laying of natural gas pipes in the street, on the ground that the question of granting such franchise has not been submitted to the popular vote, in accordance with statute: *Webb v. Gas Co.*, 9 Dec. Rep. 662, 16 Bull. 121.

G. C., § 4311, is cumulative, and under it suit may be maintained in the name of a municipal corporation to enjoin the unlawful use of a public street, which is part of a county road, in pursuance of a contract which is made in contravention of law, although such action might also be brought in the name of the state: *Elyria v. Railway*, 12 O. D. (N.P.) 609 [same decree on appeal, *Elyria v. Railway*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482; modified and affirmed, *Elyria v. Railway*, 69 O. S. 414, IV Longsdorf's Notes, 961].

G. C., § 4314, does not apply to cases in which the owner of the property assessed is resisting an assessment on the ground that the contractor has not performed the contract properly, the statute providing that a

substantial defect in the improvement shall be a defense: *Stone v. Viele*, 38 O. S. 314, III Longsdorf's Notes, 970.

The owner of abutting property can not in that capacity bring suit to enjoin a contract for a public improvement for which an assessment is ultimately to be levied upon the abutting property, on the ground of defects in the legal steps leading up thereto, as long as no assessment has been levied upon his property nor work has been done under the contract. The provision in G. C. § 4314, authorizing a suit by a taxpayer does not apply to the case of a local assessment: *Wood v. Pleasant Ridge*, 12 O. C. C. 177, 5 O. C. D. 516.

G. C., § 4314, does not apply to an action by an abutting property owner to enjoin an improper use of the street in front of his property: *Herrick v. Cleveland*, 7 O. C. C. 470, 4 O. C. D. 684.

G. C., § 4314, does not apply to an action by the owner of property which has been assessed for an improvement to enjoin the collection of such assessment, by the sale of the property assessed, on the ground that the improvement ordinance is unreasonable and invalid, since the abutting property owner may bring an action to enjoin the levy or collection of an illegal assessment without applying to the solicitor in the first instance: *Mills v. Norwood*, 6 O. C. C. 305, 3 O. C. D. 465.

(ll) Criminal Proceedings.

The well-established rule that injunction will not lie against criminal proceedings is applicable to proceedings brought before the mayor of a village against violators of the local option law in a neighboring city, and defendants in such actions must have resort to their remedy at law: *Powell v. Ashville*, 11 O. N. P. (N.S.) 369, 21 O. D. (N.P.) 434.

B. ACTS OF PRIVATE CORPORATIONS.

1. Management.

(a) Acts of Officers.

The director's discretion in management can not be controlled by court unless abuse is shown: *Kuhn v. Woolson Spice Co.*, 13 O. C. C. 547, 7 O. C. D. 289.

Directors can not be enjoined from reducing the price of goods below cost at suit of stockholders who are moving as owners of a competing company: *Kuhn v. Woolson Spice Co.*, 13 O. C. C. 547, 7 O. C. D. 289.

An injunction will not be granted, on the application of stockholders of a corporation, to restrain or interfere with the control of the board in their management of the affairs

of the corporation, when they are not exceeding their legal powers and are acting within the scope of their authority, in the absence of a showing of fraud or breach of trust: *De Lecroix v. Concrete Steel Co.*, 8 O. N. P. (N.S.) 489, 19 O. D. (N.P.) 767.

When the president of a corporation is its active manager, by virtue of the corporation by-laws, and he is the only person connected with its affairs having a practical knowledge of its business, and a majority of the directors were present but declined to perform their duties as such; injunction will not lie to prevent the president of such corporation from entering into contracts in the name of the corporation: *De Lecroix v. Concrete Steel Co.*, 8 O. N. P. (N.S.) 489, 19 O. D. (N.P.) 767, 54 Bull. 321.

Injunction is the proper remedy to prevent a board of trustees, under an original grant from the donor to an educational institution, from exercising an excess of power, and in such a case the offending trustees are necessary parties: *State, ex rel., v. Toledo*, 3 O. C. C. (N.S.) 468, 13 O. C. D. 327.

Quo warranto is a legal remedy and will not lie to oust the trustees of an educational institution, limited by the donor's deed and its articles of incorporation to certain instruction, because they exceed their powers and extend the course of instruction beyond that originally intended. Injunction to restrain the pursuit of such studies is the only remedy: *State, ex rel., v. Toledo*, 3 O. C. C. (N.S.) 468, 13 O. C. D. 327. See also EDUCATIONAL INSTITUTIONS.

Illegal or fraudulent acts by directors of a corporation will not entitle a shareholder or creditor to an injunction where no repetition of such acts is threatened: *Savings Co. v. Rehn*, 6 O. N. P. 185, 8 O. D. (N.P.) 594 [reversing *Rehn v. Savings Co.*, 5 O. N. P. 314, 7 O. D. (N.P.) 398].

If acts requiring judgment and skill are confided to the discretion of officers of a corporation, their exercise of that discretion will not be lightly disturbed—as in selecting a route for a railroad: *Walker v. Railroad*, 8 O. 38, 1 Longsdorf's Notes, 410.

A corporator can enjoin acts beyond the corporate powers only when the violation of his rights are clear. The discretion left to the judgment and skill of officers will not be disturbed unless gross abuse or want of power is shown: *Baldwin v. Railroad*, 1 Dec. Rep. 532, 10 W. L. J. 337.

A minority stockholder may enjoin the unlawful retirement of stock, or an increase of stock for an illegal purpose, or the voting of a majority of the stock where it is owned by a railroad corporation contrary to law, or action by the directors which would commit the road to an unlawful scheme or con-

spiracy in restraint of trade which would subject the corporation to loss of its charter at suit by the state: *Manington v. Railway Co.*, 9 O. N. P. (N.S.) 641, 20 O. D. (N.P.) 468.

An action by a stockholder against a corporation will be entertained in a court of equity to enjoin the corporation from selling its products at such prices as will entail a loss upon its shareholders or deprive them of the dividends to which they would otherwise be justly entitled, or at less than the fair value thereof in the open market, and from conducting its business in any manner other than the equal *pro rata* benefit of the owners of its capital stock; and from conducting business in the interest of persons or corporations, other than its shareholders, or for the purpose of injuring such shareholders: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

Participating policyholders in a life insurance company may maintain a class suit in equity, although they are not stockholders, and the right is contractual to compel the company to preserve a surplus fund accumulated for their benefit from earnings of participating policies, for it is not possible to estimate their money damages: *Bell v. Insurance Co.*, 14 O. C. C. (N.S.) 385, 33 O. C. D. 69 [reversed, without opinion, *Insurance Co. v. Bell*, 87 O. S. 475]. See also INSURANCE.

Where the trustees of a religious corporation have attempted to convey away its property without legal authority, a suit to enjoin, brought in the name of the corporation by some of the loyal members, will be sustained and so though a majority of the trustees ask dismissal of the suit: *Sunday School Association v. Espy*, 17 O. C. C. 524, 9 O. C. D. 695. See also CORPORATIONS.

Interest payable out of net earnings is cumulative, and the deficiency of one year is to be made up out of future surplus net earnings. This right is enforceable by injunction against diversion of the surplus, and some bondholders may sue for all: *Railroad Co. v. Shoemaker*, 3 O. C. C. 473, 2 O. C. D. 270 [affirming *Shoemaker v. Railroad Co.*, 10 Dec. Rep. 12, 18 Bull. 43]. See also BONDS, NEGOTIABLE.

(b) *Transfer of Stock.*

The transfer of stock on the books of the company may be compelled by mandatory injunction: *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

The proper procedure for compelling a transfer of stock is by petition asking for a mandatory injunction; and in such a case it is not necessary that the transfer agent

be made a party: *Burch v. Trust Co.*, 12 O. N. P. (N.S.) 86, 22 O. D. (N.P.) 6 [affirmed, *Burch v. Trust Co.*, 14 O. C. C. (N.S.) 346, 23 O. C. D. 358].

(c) *Inspection of Books.*

In the absence of a statute providing that a stockholder in a foreign corporation resident here may demand an opportunity for inspection of its books and records, injunction will not lie to restrain a foreign corporation from denying such a privilege to a resident stockholder: *Riggs v. Engraving Co.*, 7 O. L. R. 446.

Injunction is the proper remedy to enforce the right of a stockholder in a private corporation, given by G. C., § 8673, to inspect the books and records of the corporation: *Volksblatt Co. v. Hoffmeister*, 62 O. S. 189, IV Longsdorf's Notes, 829; *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

A court of equity will entertain an action by a stockholder of a corporation to enjoin the corporation from refusing to transfer to plaintiffs upon the books of said company, shares of stock owned by plaintiff: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726. See also CORPORATIONS.

Trust company and not beneficiaries is the proper party defendant in an action to enforce inspection of books by stockholders: *Kennon v. Trust Co.*, 16 O. D. (N.P.) 733, 4 O. L. R. 352.

(d) *Expulsion.*

Injunction and not mandamus is the proper remedy of a member of a corporation not for profit, who has been illegally expelled: *Cheney v. Ketcham*, 5 O. N. P. 139, 7 O. D. (N.P.) 183.

Members of a masonic lodge can not obtain an injunction against a trial to be had with a view to their expulsion on the charge of joining a Cerneau body, though it be averred that an illegal, unfair trial is intended. Moreover, they can not join as plaintiffs in one suit: *Hershiser v. Williams*, 6 O. C. C. 147, 3 O. C. D. 389 [affirming *Hershiser v. Williams*, 11 Dec. Rep. 76, 24 Bull. 314; affirmed, without opinion, *Hershiser v. Williams*, 53 O. S. 663].

Suspension of a member until he submits to a public reprimand, is not an irreparable injury, and injunction will be refused. If he had a defense he should have made it at the trial: *Bishop v. Chamber of Commerce*, 5 O. N. P. 365, 5 O. D. (N.P.) 356. See also CORPORATIONS.

The courts have jurisdiction to hear an injunction against a masonic lodge from ex-

cluding members for membership in a Cerneau lodge: *In re Forest City Lodge*, 11 Dec. Rep. 854, 30 Bull. 225. See also CORPORATIONS.

(e) *Election of Officers.*

An election about to be held to fill the place of a director, alleged to be ineligible because not a stockholder, which is denied, will not be enjoined, for no irreparable injury will result: *Hooe v. Hall*, 9 O. C. C. 654, 4 O. C. D. 547.

A court of equity has jurisdiction to determine the rights of parties to an action for injunction, where the plaintiffs claim to be legally elected trustees of an incorporated church, and ask that the defendants, who also claim to be trustees and one of them to be the pastor of the church, be restrained from interfering with their control of the church property or other use of it for purposes of worship: *Munsel v. Boyd*, 10 O. C. C. (N.S.) 121, 20 O. C. D. 182. See also RELIGIOUS SOCIETIES.

(f) *Retirement and Voting of Stock.*

A minority stockholder may enjoin the unlawful retirement of stock or an increase of stock for an illegal purpose, or the voting of a majority of the stock where it is owned by a railroad corporation contrary to law, or action by the directors which would commit the road to an unlawful scheme or conspiracy in restraint of trade which would subject the corporation to loss of its charter at suit by the state: *Manington v. Railway*, 9 O. N. P. (N.S.) 641, 20 O. D. (N.P.) 468.

The fact that a proposed plan for retiring preferred stock is a part of a general scheme or conspiracy to oppress the plaintiffs, does not warrant interference by injunction with the retirement of such stock, where the plaintiffs have no interest in it and its retirement is to be effected in accordance with the law of the state and a resolution of the board of directors: *Gould v. Railway*, 10 O. N. P. (N.S.) 129, 21 O. D. (N.P.) 733.

Where it appears that through stock control of a character forbidden in this state, competing railroad lines are to be operated as a single double track road, the court may restrain the voting of stock in pursuance of such plan, and thus preserve the *status quo* until a full hearing can be had: *Gould v. Railway*, 10 O. N. P. (N.S.) 313, 21 O. D. (N.P.) 733.

A temporary restraining order will be granted to prevent the voting of stock of a railway in pursuance of a plan to operate three parallel and competing railways as a single line, notwithstanding the right to carry out such a scheme would be vested in

the board of directors, and the proper time for issue of an injunction would be when the directors attempt to put such design into effect, and not against the voting by stockholders for directors who may contemplate carrying out such a scheme: *Gould v. Railway*, 10 O. N. P. (N.S.) 313, 21 O. D. (N.P.) 737.

2. Protection of Property-rights Against Corporation.

(a) Abutting Owners.

(aa) Where Act Done Without Consent or Compensation.

A railway company may be enjoined from laying additional tracks in a public street until the right to do so is acquired by appropriation, or other suitable proceedings: *Varwig v. Railroad Co.*, 54 O. S. 455, IV Longsdorf's Notes, 643.

An abutting property owner is entitled to an injunction to restrain the construction of a street railroad in a country road until his rights in such road have been fully compensated: *Schaaff v. Electric Railway Co.*, 16 O. C. C. 252, 8 O. C. D. 688; *Diets v. Traction Co.*, 4 O. N. P. 399, 6 O. D. (N.P.) 513.

Injunction will lie at the suit of an abutting owner to restrain the construction of a switch by an interurban railroad, his consent thereto not having been obtained and no compensation paid: *Chambers v. Traction Co.*, 5 O. C. C. (N.S.) 298, 17 O. C. D. 193.

Abutting property owners are entitled to an injunction to prevent the construction and operation of an interurban railroad entirely on one side of a public highway next the abutting improved farms owned and occupied by the plaintiffs, and also the construction and operation of an electric light and power plant in connection with such road, until compensation and damages shall be assessed in a proper proceeding, and paid or secured to be paid to them: *Schaaf v. Railway Co.*, 66 O. S. 215, IV Longsdorf's Notes, 903.

Injunction lies at the suit of an abutting property owner to restrain the construction of a railroad track in the street until his consent is obtained thereto or he is compensated: *Root v. Railroad Co.*, 7 O. N. P. 337, 5 O. D. (N.P.) 315.

Where the construction of a railroad in a street will work material injury to the abutting property, such construction may be enjoined, until the right to construct such road in the street shall first be acquired: *Railway Co. v. Lawrence*, 38 O. S. 41, III Longsdorf's Notes, 951.

A natural gas company may be enjoined from laying their pipes in a city street, where

they have acquired a franchise for that purpose from the city but have failed to get the consent of the abutting owners: *Webb v. Gas & Fuel Co.*, 9 Dec. Rep. 662, 16 Bull. 121; *Light & Power Co. v. Light Co.*, 69 O. S. 259, IV Longsdorf's Notes, 957.

The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric cables and wires for the purpose of furnishing light and energy to private takers is an abuse of property rights and when done without the owner's consent gives him the right to an injunction: *Callen v. Light Co.*, 66 O. S. 166, IV Longsdorf's Notes, 901.

Telegraph and telephone poles may be removed by order of a court of equity, where they were erected pending an action to enjoin their erection and without the complainant's consent: *Denver v. Telephone Co.*, 8 O. N. P. 666, 10 O. D. (N.P.) 273; *Smith v. Telegraph Co.*, 2 O. C. C. 250, 1 O. C. D. 475.

A new and inconsistent use of a street is not necessarily a taking of private property within the meaning of the constitution. It must be such a use as palpably and injuriously affects the adjacent property, and to plead or prove merely the invasion of a private right does not stir the conscience of a court of equity: *Burns v. Telephone Co.*, 10 O. C. C. (N.S.) 307, 20 O. C. D. 74 [affirming *Burns v. Telephone Co.*, 3 O. N. P. (N.S.) 257, 17 O. D. (N.P.) 731; affirmed, without opinion, *Burns v. Telephone Co.*, 76 O. S. 589]. See also **STREETS**.

An abutting owner who consents or submits to the use of the street in front of his premises for telephone purposes, by means of poles and wires is not, as matter of law, entitled to an injunction against the telephone company engaged in putting its wires in a conduit in a street of a city as an invasion of his private rights: *Burns v. Telephone Co.*, 10 O. C. C. (N.S.) 307, 20 O. C. D. 74 [affirming *Burns v. Telephone Co.*, 3 O. N. P. (N.S.) 257, 17 O. D. (N.P.) 731; affirmed, without opinion, *Burns v. Telephone Co.*, 76 O. S. 589]. See also **TELEPHONES AND TELEPHONE COMPANIES**.

Injunction will lie at the suit of a non-consenting abutting property owner to restrain the laying of gas pipes longitudinally with and under the side walk for the conveyance of natural gas to private consumers, notwithstanding the laying of such pipe is under and by virtue of a city ordinance: *Federal Gas Co. v. Townsend*, 1 O. N. P. (N.S.) 289, 14 O. D. (N.P.) 5.

A lot owner may enjoin the construction of a street railroad in front of his premises, where the consent of the owners of property on the street was not obtained as required by

law: *Roberts v. Easton*, 19 O. S. 78, II Longsdorf's Notes, 927.

Where a railroad company acting under a city ordinance granting it the right to lay its tracks in a city street, proceeds to tear up such street to construct its road, without first getting the consent of the abutting owners, an injunction will be granted at the suit of an abutting owner whose property has been damaged, ordering the railroad company to restore the street to its former condition in front of the property of such abutting owner: *Bending Co. v. Railway Co.*, 2 O. N. P. 317, 3 O. D. (N.P.) 430.

An injunction against the relaying of a spur railroad track across a turnpike, will not be granted when the track was originally laid with the consent of the turnpike company, and five years later the turnpike people tore up the track, claiming that it was laid without consent or right: *Bridge Co. v. Railroad*, 12 O. C. D. 723 [affirmed, without opinion, *Bridge Co. v. Railroad*, 62 O. S. 635].

A railroad company may be enjoined from increasing its right of way after its railroad has been located and completed: *Warner v. Railroad Co.*, 39 O. S. 70, III Longsdorf's Notes, 1008.

Where the placing of railway tracks across that part of a street which is a *cul-de-sac* impressed with the easement of ingress and egress, will materially impair the easement, the construction thereof will be enjoined until compensation is made to the land owner: *Furnace Co. v. Railway Co.*, 9 O. N. P. (N.S.) 426, 20 O. D. (N.P.) 188. See also **STREETS**.

Injunction lies against constructing a railroad track in a street on behalf of an abutter materially injured thereby until the right is acquired by appropriation of his interest: *Root v. Pennsylvania Co.*, 7 O. N. P. 337, 5 O. D. (N.P.) 315. See also **RAILROADS**.

(bb) Interference with Ingress and Egress.

Injunction will lie at the suit of an abutting property owner to enjoin the construction of a railway along the side of the traveled part of the highway without conforming to the grade of the highway and without filling in between the rails, and from so constructing the road in front of plaintiff's property as to interfere with the free ingress and egress to and from all parts of it: *McMaken v. Street Railway Co.*, 5 O. N. P. 367, 5 O. D. (N.P.) 358.

A spur track not materially interfering with the abutting owner's rights will not be enjoined: *Gunning v. Railway*, 2 O. N. P. (N.S.) 411, 14 O. D. (N.P.) 660.

Where lands abut upon a *cul-de-sac*, the appendant easement of ingress and egress extends to all that part of the street lying between such lands and the first connecting thoroughfare and where the placing of railway tracks across that part of the street so impressed with the easement will materially impair the easement, the construction thereof will be enjoined until compensation is made to the landowner: *Furnace Co. v. Railway Co.*, 9 O. N. P. (N.S.) 426, 20 O. D. (N.P.) 188.

Injunction will lie at the suit of a manufacturing company to enjoin the construction of railroad tracks in the street in front of their factory and so near to its entrance as to materially interfere with the loading and unloading of wagons: *Burial Case Co. v. Railway Co.*, 4 O. C. C. (N.S.) 365, 14 O. C. D. 107.

Injunction will not lie to restrain the laying of a spur track in a public street where the plaintiff's property is one hundred and sixty feet beyond the end of the track: *Herzog v. Railway Co.*, 6 O. C. C. (N.S.) 527, 15 O. C. D. 702.

Injunction will not lie to enjoin the laying of a double track in the street by a street car company, on ground that it will interfere with a public market in the street in front of plaintiff's property: *Sells v. Railway Co.*, 11 Dec. Rep. 643, 28 Bull. 172.

Injunction will not lie to prevent the carrying forward of a public work as the changing of grade crossings of a steam railroad, where no danger exists of substantial loss to an abutting owner, and the mode open to him for recovering compensation alone is involved: *Banking & Trust Co. v. Cleveland*, 1 O. N. P. (N.S.) 493, 14 O. D. (N.P.) 33.

An injunction will not lie on the petition of a property owner against the connecting of buildings on opposite sides of the street by a bridge twenty feet above the pavement, where the ingress and egress of the plaintiff is in nowise impaired, and the injury which he will sustain, if any, is not different in kind from that suffered by the public at large: *Offutt v. Packing Co.*, 11 O. C. C. (N.S.) 357, 21 O. C. D. 58. See also **STREETS**.

Where the evidence is conflicting as to the extent of the injury to an abutting property owner caused by laying a railway track across a street so as to obstruct its only outlet, and some of the evidence is to the effect that the laying of the proposed track will, owing to the peculiar conditions, enhance the value of the plaintiff's property, and the neighborhood is a lumber district where there is much smoke and noise, the damages which may be sustained are evidently such as can be compensated in a suit at law, and the petition for an injunction against the laying

of the track will be dismissed: *Lumber Co. v. Railway*, 11 O. N. P. (N.S.) 289.

Encroachment upon the sidewalk by the laying of street railway tracks so near there-to at a street corner that in turning into the other street the body of a car extends slightly over the sidewalk, is not a material interference with the ingress and egress of the abutting owner, but is interference of a character that is common to him and the public at large, and injunction will not lie on his petition for a removal of the tracks at that point: *Powell v. Railway*, 10 O. N. P. (N.S.) 266, 20 O. D. (N.P.) 313.

Where the construction of railroad tracks in or across a street that affords the only reasonable means of access to property abutting thereon, will materially impair and interfere with the owner's right of access to and egress from such property, or will materially depreciate the value thereof, the owner may enjoin the construction until the right is acquired under proceedings instituted against such owner for the appropriation of private property, or otherwise, although his property does not immediately abut upon that portion of the street over which the railroad tracks are proposed to be located: *Hall v. Railway*, 85 O. S. 148 [modifying and affirming *Hall v. Railway*, 11 O. C. C. (N.S.) 97, 20 O. C. D. 718].

If the construction of railroad tracks in a street which gives the only reasonable means of access to property which abuts thereon will interfere materially with the owner's ingress to such property and egress therefrom, the owner of such property suffers an injury which is different in kind and not merely in degree from the injury which is suffered by the general public: *Hall v. Railway*, 85 O. S. 148 [modifying and affirming *Hall v. Railway*, 11 O. C. C. (N.S.) 97, 20 O. C. D. 718].

(cc) Where Owner has Right to Sue for Damages.

An abutting owner's right to an injunction against the construction of telegraph and telephone lines on the highway, is not defeated by right of action in such an abutting owner to sue for the amount claimed as damages: *Denver v. Telephone Co.*, 8 O. N. P. 666, 10 O. D. (N.P.) 273.

A railway company which has agreed for a valuable consideration not to locate a track in a certain manner on its right-of-way, and subsequently finds it necessary to disregard this agreement in order to properly discharge its duty to the public, will not be enjoined against a breach of its agreement, but the owner of the land will be remanded to a suit for the damages growing out of

the breach: *Miller v. Railway Co.*, 12 O. N. P. (N.S.) 683, 22 O. D. (N.P.) 638.

The plaintiff sued to enjoin the building of a trestle longitudinally in Garrard avenue, a dedicated but unimproved and impassable street, lying with its abutting property far below the established grade, subject to overflow, and not capable of use unless filled to a height of twenty-five or thirty feet, permission to build the trestle having been granted by the city, and a right of way having been granted by plaintiff for a trestle over its tracks, connecting with this one on Garrard avenue. It was held that in view of its permit granted by the city, and its agreement with the plaintiff, and the plaintiff being unable to show any material injury to its property rights, and having an adequate remedy at law, injunction will not lie: *Railway Co. v. Railway Co.*, 2 O. N. P. (N.S.) 237, 15 O. D. (N.P.) 112 [affirmed, without opinion, *Railway Co. v. Railroad*, 72 O. S. 598]. See also RAILROADS.

(b) Act Illegal or Unauthorized.

G. C., § 8761, does not authorize a city or village council to agree with a railroad company for the permanent and exclusive occupation of a public street with abutments to support an overhead crossing of the railroad; nor can such occupation be rightly gained by means of appropriation; and if the company so occupying the street refuses to restore it to its former condition of usefulness to the public, it may be compelled to do so by mandatory injunction, without a right to compensation for the expense of removal: *Railway Company v. Elyria*, 69 O. S. 414, IV Longsdorf's Notes, 961.

Where a railroad company, having a line of telegraph, grants the use of its poles to a telegraph company on certain conditions and stipulations in favor of the grantor, which are *ultra vires*, an injunction will not be granted whereby the grantor will be required to perform other stipulations made in consideration of such void stipulations: *Railroad Co. v. Telegraph Co.*, 38 O. S. 24, III Longsdorf's Notes, 950.

Injunction will not lie at the suit of a stockholder, where it appears that the purpose is to protect a monopoly in connection with another company: *Kuhn v. Woolson Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292.

Where a gas company has a right to lay gas pipes in the streets of a city, a court of equity will not enjoin it from doing so, because it has not obtained a permit from the proper city officials as required by an ordinance or police regulation of the city:

Hamilton v. Gas Light & Coke Co., 8 O. N. P. 319, 11 O. D. (N.P.) 513.

Injunction lies to prevent a private corporation from violating a municipal ordinance: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136.

Injunction will lie to enjoin the operation of a street railway under an invalid street railway franchise: *Horstman v. Railway*, 14 O. D. (N.P.) 545 [reversed, *Railway v. Horstman*, 72 O. S. 93, IV Longsdorf's Notes, 988].

Where the act of incorporation does not authorize a railroad to relocate its road, after completing it upon the first location, a court of equity will enjoin the condemnation of lands for the purpose of such relocation: *Moorhead v. Railroad Co.*, 17 O. 340, I Longsdorf's Notes, 811.

Where the grant permitting the laying of a spur track across the land of the grantor contains certain conditions and limitations, an injunction will lie to restrain a violation of the grant: *Collins v. Craig Shipbuilding Co.*, 7 O. C. C. (N.S.) 350, 17 O. C. D. 802.

An agreement with the county commissioners, whereby it is attempted to confer authority for the construction of a railway crossing in a mode different from that pointed out by law, is clearly illegal, and an injunction against such construction will lie upon the petition of an abutting property owner: *Ritter v. Railway Co.*, 6 O. N. P. (N.S.) 161, 18 O. D. (N.P.) 846.

(c) Act Legal and Authorized.

Interurban railway operating under an ordinance allowing it to put in all necessary switches, can not be prevented by force by municipal authorities from putting in a switch, on the ground that it is not necessary, etc.: *Railroad Co. v. Bedford*, 6 O. N. P. 276, 8 O. D. (N.P.) 142.

An injunction will lie to restrain an abutting owner from removing poles of a trolley company lawfully occupying the street: *Railway Co. v. Winslow*, 3 O. C. C. 425, 2 O. C. D. 240 [reversing *Railway Co. v. Winslow*, 10 Dec. Rep. 358, 20 Bull. 420].

If a municipal corporation by an ordinance duly passed authorizes a gas company to supply natural gas, and in case of its inability through no fault of its own to supply natural gas in sufficient quantities, it is authorized to supply artificial gas at a higher rate, but before charging such higher rate it must first establish to the satisfaction of the board of public service or its successors that it is unable to supply such gas or to purchase it, the finding of such board is conclusive until such board makes a different finding or the original finding is set aside as not made in good faith or for some other valid

reason; and a property owner can not enjoin such company from turning off gas from his house if after such finding is made he refuses to pay such higher rate: *Fekter v. Electric Co.*, 19 O. D. (N.P.) 658.

Under the decree of court permitting the East Ohio Gas Company to collect from consumers in the city of Akron the full amount claimed to be due from them, provided that one-third of the amount so collected should be deposited in bank pending a determination of the amount which could be legally charged and a settlement with the consumers on that basis, injunction will not lie to prevent the withdrawal by the gas company of the amount thus impounded, where it appears that the supreme court has held that the company can not be compelled to furnish gas at the rate demanded and is at liberty to discontinue its service and withdraw from the city: *Akron v. Gas Co.*, 7 O. N. P. (N.S.) 553, 9 O. N. P. (N.S.) 526, 19 O. D. (N.P.) 218 [reversed, *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055].

(d) To Restrain Discrimination.

A court of equity will not assume to dictate the policy or business management of a common carrier, aside from its clear duty under its charter or the statutes, but where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight, it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all: *Mining Co. v. Railroad*, 1 O. N. P. (N.S.) 385, 14 O. D. (N.P.) 209; *Scofield v. Railway Co.*, 43 O. S. 571, IV Longsdorf's Notes, 183.

Though a consolidated road extends through several states, its injurious discriminations here or along the line may be enjoined in our courts: *Scofield v. Railway Co.*, 43 O. S. 571, IV Longsdorf's Notes, 183. See also CARRIERS.

Where a railway company whose tracks are contiguous to a manufacturing establishment and connected with the tracks of another company, refuses, on request, without valid excuse, to switch cars arriving by the later company to such contiguous tracks as provided by G. C., §§ 8997 to 9001, the duty so to do may be enforced by mandatory injunction: *Wagon Works Co. v. Railway Co.*, 3 O. N. P. (N.S.) 412, 16 O. D. (N.P.) 111 [affirmed, without opinion, *Railway Co. v. Wagon Works Co.*, 72 O. S. 612].

A court of equity will not intervene in favor of a consignee who is denied switching facilities from tracks of another company to

tracks contiguous to its factory under G. C., §§ 8997 to 9001, because of refusal to comply with reasonable rule for the collection of "demurrage" charges, where such consignee was responsible for the detention of the cars: *Wagon Works Co. v. Railway Co.*, 3 O. N. P. (N.S.) 412, 16 O. D. (N.P.) 111 [affirmed, without opinion, *Railway Co. v. Wagon Works Co.*, 72 O. S. 612]. See also CARRIERS.

A railway company which has extended side tracks from its line to coal mines as a part of its regular method of transporting coal in a given region will be compelled by mandatory injunction to extend a side track a distance of a few hundred feet to another coal mine at the expense of the owner of such coal mine, if he asks for such extensions: *Coal Co. v. Railway*, 22 O. C. D. 700 [following *Mining Co. v. Railway*, 10 O. N. P. (N.S.) 385, 14 O. D. (N.P.) 209].

Where in a case of discrimination the nature of a complaining coal company's business consists in mining coal which necessitates long continued and indeterminate series of shipments, a remedy by damages in an action at law would lead to such a multiplicity of suits and involve such uncertainty in the measure of damages, that the remedy of damages would be inadequate and resort may be had to a court of equity: *Mining Co. v. Railroad Co.*, 1 O. N. P. (N.S.) 385, 14 O. D. (N.P.) 209. See also CARRIERS.

For injuries to trade, see also TO PREVENT INJURY TO TRADE OR BUSINESS, IV, E, herein.

3. Acts for Protection of the Public.

Injunction lies to compel a railroad to pay the expense of lowering a turnpike instead of constructing a bridge over it: *Turnpike Co. v. Railroad Co.*, 15 O. C. C. 268, 8 O. C. D. 269.

A railroad company may be compelled by injunction to construct a bridge over a public street and this although the street is not in prime condition for public travel: *Toledo v. Railway Co.*, 17 O. C. C. 265, 9 O. C. D. 135.

A street railway company will not be enjoined from crossing a steam railway at grade, for the rule as to enjoining grade crossings of railroads, does not apply to street railroads in absence of statutory prohibition: *Railway v. Railway*, 5 O. C. C. (N.S.) 583, 16 O. C. D. 180 [affirmed, without opinion, *Railway v. Railway*, 73 O. S. 364].

An electric railway may be enjoined at the suit of a municipality from operating its system in such a manner as to result in electrolysis of water pipes: *Dayton v. Railway Co.*, 6 O. C. C. (N.S.) 41, 16 O. C. D.

736 [affirming *Dayton v. Railway*, 12 O. D. (N.P.) 258].

Erection of electric light poles and the stringing wires thereon near telephone poles may be enjoined: *Telegraph Co. v. Light Co.*, 9 Dec. Rep. 540, 14 Bull. 327.

A municipal corporation can not restrain a gas company from laying pipes in its streets for the conveyance of gas to the patrons of the company on the ground that the city owns a gas plant which will be injured by the competition of the gas company: *Hamilton v. Gas Light & Coke Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513.

A corporation adopting the name of private person as part of its corporate name can enjoin another corporation of which such person is a member from using his name as part of its corporate name, or otherwise in such a way as to mislead: *Manufacturing Co. v. Thayer Co.*, 6 O. N. P. 300, 9 O. D. (N.P.) 288.

Injunction against carrying into effect the provisions of a natural gas franchise as being *ultra vires* will not lie when the company, under the direction of the city, has made large expenditures of money, and no objection has been made by the city or any one on its behalf: *Darby v. Norwood*, 17 O. D. (N.P.) 253, 4 O. L. R. 536. See also GAS COMPANIES.

Although the court was of the opinion that a double street railway fare, one on the track of an interurban road, and a second fare on the track of the Cincinnati Street Railway Company, can not be legally collected for a single continuous journey in the same general direction within the corporate limits of the city of Cincinnati; yet since it is a matter that is in some doubt, the court declines to grant an injunction against the collection of such double fares, but leaves the status as it is until the law can be fully determined: *Cincinnati v. Railroad*, 13 O. N. P. (N.S.) 265.

A municipal ordinance imposing a duty upon a street railway company to "run cars as often as public convenience and business of the road will justify," can not be enforced by specific performance, as the operation of cars would have to be adjusted from time to time as the public demand increased or diminished; the frequency of such changes would be left to conjecture and is, therefore, necessarily uncertain: *Matthews v. Traction Co.*, 5 O. C. C. (N.S.) 179, 15 O. C. D. 652 [affirmed, without opinion, *Matthews v. Traction Co.*, 70 O. S. 436]. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

4. To Compel Performance of Conditions of Franchise.

Where it is the duty of a gas company to furnish gas to a city at the rates fixed by an ordinance of the city council, it may, if it refuse, be compelled by a mandatory injunction so to do, so long as it continues to exercise and enjoy its franchise as a gas company: *Gas Light Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356.

This principle applies also to a gas company not organized to light a single city, but organized to supply natural gas to any contracting city: *Toledo v. Gas Co.*, 5 O. C. C. 557, 3 O. C. D. 273.

A court of chancery may by mandatory injunction require performance of the conditions under which a corporation exercises its franchise: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

Equity can not be resorted to, to work an ouster or to forfeit a franchise: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271. See also FRANCHISES.

Although a court should be slow to enforce, by mandatory injunction or specific performance, the performance of the conditions under which a corporation exercises a franchise because of the continuing supervision which the enforcement of such an order or decree would entail upon the court, nevertheless this is not a conclusive obstacle, and when public rights are involved, a court of chancery will not shrink from the maintenance, through its duly appointed officer, of such continuing supervision as is necessary to preserve the rights of the public: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271. See also FRANCHISES.

Where the tracks of a railway company lie contiguous to a manufacturing establishment, and are also connected with the tracks of another railroad, it is the duty of the first company, on request, to switch the cars arriving by the said other company, consigned to such manufacturing establishment, to such contiguous tracks of its own, and where such company without valid excuse, refuses so to do, the performance of such duty may be enforced by mandatory injunction: *Wagon Works v. Railway Co.*, 3 O. N. P. (N.S.) 412, 16 O. D. (N.P.) 111.

A provision in the ordinance embodying a grant to a natural gas company, that gas shall not be furnished for illuminating purposes, but only for heating and power, is void, and the company may be compelled to either furnish gas for illuminating purposes or to abandon its rights in the streets: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, with-

out opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

The acceptance from a municipality of an electric franchise carried with it an obligation to furnish electric light and power agreeably to the provisions of the ordinance and the law, and specific performance of the obligation thus incurred may be enforced by the municipality through the medium of a mandatory injunction, or at least an injunction may be obtained against violation of the obligations thus assumed: *Gaslight Co. v. Zanesville*, 47 O. S. 35, IV Longsdorf's Notes, 356; *Van Wert v. Public Service Co.*, 11 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 526.

Where an allegation is made in a petition to declare a forfeiture of franchises, that the defendant was about to sell its property and franchises to some person unknown, in violation of the conditions thereof, and counsel desire to bring an action to test the validity and effect of such condition, a temporary injunction against such sale will be granted: *Columbus v. Gas Co.*, 2 O. N. P. (N.S.) 277, 14 O. D. (N.P.) 261. See also FRANCHISES.

Conditions in a street railroad grant may be enforced by a city by injunction. It need not resort to specific performance: *Cincinnati v. Railroad*, 7 Dec. Rep. 249, 2 Bull. 17.

That donations have been made to a benevolent institution with certain conditions of reverter, which would be violated by the consolidation of the said institution with another, is not ground for equitable interference with a proposed consolidation of benevolent institutions: *Dunham v. Kauffman*, 10 O. N. P. (N.S.) 49, 20 O. D. (N.P.) 274.

C. AGAINST INTERFERENCE WITH FRANCHISES.

Equity will interfere to prevent invasion of statutory or corporate franchise conferred upon an individual or corporation against a party attempting to usurp the right or exercise the franchise: *Bank v. Debolt*, 1 O. S. 591, I Longsdorf's Notes, 1009.

Injunction will lie to protect the franchise of a street railroad from an invasion or a disturbance: *Railway Co. v. St. Bernard*, 8 O. N. P. 288, 11 O. D. (N.P.) 454.

An artificial gas company whose contract with the municipal authorities of a city or village for the furnishing of gas for illuminating purposes to the corporation and its inhabitants has expired by the lapse of time, is not entitled to an injunction against a natural gas company furnishing natural gas to said corporation and its inhabitants for the same purpose: *Light and Power Co. v. Light Co.*, 69 O. S. 259, IV Longsdorf's Notes, 957. See also GAS COMPANIES.

Where a gas and light company has been granted a franchise to do business and for this purpose occupy the streets and public grounds within a city, and the municipal authorities later under an invalid ordinance grant a franchise to another competing company, injunction will not lie against the latter company at the suit of the former, on the grounds that the ordinance authorizing it to do business was illegal, it not being shown that any right of the complaining company was being violated: *Light and Power Co. v. Gas Light Co.*, 1 O. C. C. (N.S.) 526, 14 O. C. D. 684.

A city will be estopped from enjoining the exercise of a natural gas franchise after the company has expended large sums of money without objection and under the direction of the city: *Darby v. Norwood*, 17 O. D. (N.P.) 253, 4 O. L. R. 536.

An injunction *pendente lite* will not be granted in an action to enjoin a city and an electric light company and the city officials from carrying into effect the provisions of an ordinance granting to such company a new franchise on the ground that the passage of such ordinance was an abuse and in excess of the corporate powers of the city, where it appeared that its provisions were more beneficial to the city than was the franchise under which the company was operating before its passage: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

While a company continues to exercise its franchise, the state has a right to compel it to perform the condition upon which the franchise was granted, by a petition invoking the equity powers of the court, prosecuted by the attorney general in the name of the state: *State v. Railroad*, 36 O. S. 434, III Longsdorf's Notes, 866.

While equity never decrees an ouster or forfeiture a court of chancery may by mandatory injunction require performance of the conditions under which a corporation exercises its franchise: *Milford v. Traction Co.*, 4 O. C. C. (N.S.) 191, 16 O. C. D. 271.

An ordinance which provides that "for the purpose of dispensing with as many poles in the streets as possible, all existing poles therein are authorized to be used for electric street railway purposes upon reasonable compensation being made for the use thereof to the persons or company owning the same. Providing that only one set of wires and poles shall be erected upon any one street," does not give to the company which first succeeded in erecting its poles and stringing its wires the exclusive right to operate with electricity lines of street railways upon the streets thus occupied; and it does not prevent another company from erecting a second set of poles and wires, if the city subse-

quently gives authority so to do; and a taxpayer suing on behalf of the city can not prevent such second company, acting under such franchise, from erecting its poles and stringing its wires: *Mulhenney v. Railway*, 20 O. C. D. 686.

D. CONTRACTS..

1. Relief against Contract.

Relief will be afforded, in a court of equity, against the payment of notes given for a void patent right: *Darst v. Brockway*, 11 O. 462, I Longsdorf's Notes, 583.

An injunction may lie in a proper case to enjoin the payment of a check, unless the bank has accepted or certified it; or otherwise become committed to its payment; but if relief is sought on the ground that the check is given for gambling, equity will not interfere: *Kahn v. Walton*, 46 O. S. 195, IV Longsdorf's Notes, 318.

Equity will enjoin the sale of real estate that would confer no title: *Deutsch v. Stone*, 11 Dec. Rep. 436, 27 Bull. 20.

State officers may be enjoined from proceeding under the color of an unconstitutional law to violate a contract with an individual to his irreparable injury: *Forging & Tool Co. v. Griffith*, 5 O. N. P. (N.S.) 566, 18 O. D. (N.P.) 261.

The mere fact that a city, which has entered into a water contract for a greater period than that permitted by statute, has passed ordinances and resolutions to carry out such contract and has made payments thereon, does not estop the city from maintaining an action by the city solicitor to enjoin further performance of such contract: *Defiance v. Water Co.*, 13 O. C. D. 96.

Where a *bona fide* bidder for public work in good faith submits a bid which is based on a mistake in measurements which would involve him in serious financial loss were he to do the work for the amount named, the minds of the parties have not met, and he can not be compelled to execute the proposed contract, notwithstanding the terms upon which the bid was submitted provided that it should not be withdrawn; and injunction will lie on the petition of the bidder to restrain the board having charge of the contract from accepting the bid and insisting that he execute the contract or subject himself to an action for damages: *Construction Co. v. Board of Education*, 11 O. N. P. (N.S.) 86, 21 O. D. (N.P.) 463.

Injunction lies at the suit of one who claims to be the owner or have an interest in a certificate of deposit, where such certificate of deposit was to be held as security for a certain lighting contract which a municipal

corporation had formally rejected and now seeks to enforce without the consent of the party making the original offer: *Light Co. v. Cincinnati*, 11 Dec. Rep. 581, 28 Bull. 29.

A court of equity, in a suit to enjoin further operations and to quiet the title of the lessor to premises under an expired oil and gas lease and extension thereof, will grant the relief sought; but where the lessees have made an effort to complete a first well within the term, and have met with delay but not of an excusable character which would extend the lease, equity will permit the completion of the well for the purpose of ascertaining the results of the work, and will apportion the cost between the parties: *Hollister v. Vandergrift*, 12 O. C. C. (N.S.) 586, 20 O. C. D. 759.

A mandatory preliminary injunction will not be granted for the payment of money only: *Sampsell v. Esher*, 11 Dec. Rep. 351, 26 Bull. 156.

2. Breach.

(a) In General.

Injunction may be allowed at the suit of the city to restrain threatened violations of the conditions of a street railroad grant: *Cincinnati v. Street Railway*, 7 Dec. Rep. 249, 2 Bull. 17.

An electric light company, which has contracted with a municipality to "furnish light" at specified rates, will be enjoined from making additional charges for lamps furnished as the term "furnish light" will be held to include lamps as well as current: *Newark v. Light Co.*, 16 O. D. (N.P.) 669, 4 O. L. R. 351, 3 O. L. R. 644.

A mandatory injunction lies to compel a company to agree under an ordinance with common council to furnish gas to city upon reasonable terms: *Vondron v. Trustees*, 6 O. N. P. 531, 8 O. D. (N.P.) 227.

A railroad company having sold tickets with return coupons to a large number of persons who desired to attend a convention, the tickets by their terms being non-transferable and the purchasers being required on returning to show their identity as the original purchasers, the contract resting upon a substantial reduction in the price of carriage, is entitled to an injunction against persons acquiring the return portion of such tickets from the original purchasers and selling them to others to be used in violation of such contract, and a denial of that relief is not justified because the plaintiff had agreed with the other carriers with respect to the reduction of rates and the conditions of tickets for such occasions: *Kinner v. Railway*, 69 O. S. 339, IV Longsdorf's Notes,

958 [affirming *Kinner v. Railroad*, 3 O. C. C. (N.S.) 401, 13 O. C. D. 294].

On petition by a gas company against S, averring that S had agreed to light his store only with gas for ten years, and not introduce electric lights, the company agreeing to furnish it at a reduced price, and S agreeing to use not less than three-quarters of his present consumption, and averring that S had put in electric lights and refused to light with gas, and asking injunction, it was held that it does not appear but that the remedy at law is full and adequate, for here is a final breach, and full damages can be assessed at once; hence injunction can not be granted: *Steinau v. Gas Co.*, 48 O. S. 324, IV Longsdorf's Notes, 417 [reversing *Gas Co. v. Steinau*, 2 O. C. C. 236, 1 O. C. D. 490].

Where under a contract between plaintiffs and defendants for the furnishing of a certain amount of horse power, plaintiffs claim that defendants have interfered with certain machinery and destroyed its capacity to furnish such power and refuse, or threaten to refuse, to allow plaintiffs to replace or repair it, the remedy of plaintiffs is by an action for damages, and not injunction: *Sipe v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 226.

Under a contract between plaintiffs and defendants whereby the latter were to furnish the former with a certain amount of horse power, which was furnished by means of two pulleys and two belts, an injunction will not be granted to restrain defendants from interfering with plaintiffs in the use of one of such pulleys and belts, if at all, unless it appears that the pulley and belt remaining in service was not furnishing the amount of power contracted for: *Sipe v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 226.

Under the act of 1891 to improve the Edwards road at a certain grade, a railroad illegally being located in the road about three feet above such grade, thus making the required improvement impossible, a contract by the county commissioners to permit the railroad to remain where it is will not be enjoined because it is void, and hence no obstacle. Mandamus is the proper remedy to compel the commissioners to improve the road properly: *Dyer v. Railway*, 7 O. C. C. 255, 4 O. C. D. 584.

Injunction is an appropriate remedy to restrain certain specific acts threatened to be committed in violation of a contract between a local and long distance telephone company for the exclusive interchange of business: *Telephone Co. v. Telephone Co.*, 13 O. C. C. (N.S.) 337, 22 O. C. D. 17 [affirming *Telephone Co. v. Telephone Co.*, 7 O. N. P. (N.S.) 425, 19 O. D. (N.P.) 202].

A contract between a telephone company engaged in operating a local exchange and

another company engaged in long distance service for the physical connection of lines and interchange of business for a period of ninety-nine years, where partly performed and of material benefit to the parties seeking its avoidance, is binding where the other party upon faith of and in performance of said contract has made large expenditures: *Telephone Co. v. Telephone Co.*, 13 O. C. C. (N.S.) 337, 22 O. C. D. 17 [affirming *Telephone Co. v. Telephone Co.*, 7 O. N. P. (N.S.) 425, 19 O. D. (N.P.) 202].

When removing "tickers" in breach of contract can not be enjoined, see *Griffin & Co. v. Telegraph Co.*, 8 Dec. Rep. 572, 9 Bull. 22; *Bradley v. Telegraph Co.*, 8 Dec. Rep. 707, 9 Bull. 223.

Where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land therein embraced to be used as a perpetual easement for the benefit of the abutting lands of each, and the common benefit of all, and, in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter use the way so agreed upon as a private way, the agreement may be enforced in equity, at the suit of a purchaser of one of such proprietors, against a purchaser with notice from another. Injunction preventing the permanent obstruction of, or interference with such way, is a proper mode of enforcing the agreement: *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346.

An injunction will lie to enforce the performance of its contract or agreement to carry passengers to the grounds of a private corporation, owning and operating a resort. An action in damages in such a case does not afford an adequate remedy: *Humphrey Co. v. Railway*, 9 O. N. P. (N.S.) 609, 20 O. D. (N.P.) 510.

The lessee of premises leased on condition that only beer manufactured by the lessor shall be sold on the premises, may be enjoined from a repudiation of his agreement not to sell other beer: *Brewing Co. v. Konst*, 12 O. C. C. (N.S.) 577, 20 O. C. D. 782 [affirmed, without opinion, *Konst v. Brewing Co.*, 79 O. S. 469].

A person with whom an agent has negotiated for the property and to whom he has paid a part of the purchase price is a proper party to an action by the principal for a completion of the contract and a recognition of his rights therein; and upon tender of the amount remaining due under the contract he is entitled to an injunction against transfer of the property to the agent and decree for its transfer to him: *Topper Bros.*

v. Bohn, 12 O. N. P. (N.S.) 177, 22 O. D. (N.P.) 537.

A decree declaring a contract null is a finality and no injunction is necessary: *Waymire v. Jetmore*, 22 O. S. 271, III Longsdorf's Notes, 73.

It being agreed that a railroad company could build its road on land and pay for the land within sixty days after estimate of its value, and on default of payment all interest in the land and all fixtures put on it were to become the property of the owner, payment was not made and injunction against the use of the land for a railroad is asked. It was held that extraordinary remedies can not be secured by agreement to enforce a contract by which use of property is voluntarily permitted. The stipulation is in the nature of a forfeiture. The party will be left to his legal remedies: *Coe v. Railroad*, 10 O. S. 372, II Longsdorf's Notes, 442.

The acceptance from a municipality of an electric franchise carries with it an obligation to furnish electric light and power agreeably to the provisions of the ordinance and the law, and specific performance of the obligation thus incurred may be enforced by the municipality through the medium of a mandatory injunction, or at least an injunction may be obtained against violation of the obligations thus assumed: *Van Wert v. Service Co.*, 11 O. N. P. (N.S.) 91, 21 O. D. (N.P.) 526. See also MUNICIPAL CORPORATIONS.

Mandatory injunction will lie to restrain a telephone company from violating its contract with another company by routing its business over lines belonging to a third company: *Telephone Co. v. Telephone Co.*, 7 O. N. P. (N.S.) 425, 19 O. D. (N.P.) 202 [affirmed, *Telephone Co. v. Telephone Co.*, 13 O. C. C. (N.S.) 337, 22 O. C. D. 18; affirmed, without opinion, *Telephone Co. v. Telephone Co.*, 86 O. S. 319]. See also TELEPHONES AND TELEPHONE COMPANIES.

Failure by a contractor to comply with the conditions of a contract entered into by him with a village, which conditions were waived by council, is not in the absence of fraud or misconduct on their part a cause for injunction against performance of the contract, especially where such failure does not result in prejudice to the community: *Moore v. Elmore*, 13 O. N. P. (N.S.) 651, 23 O. D. (N.P.) 50.

An injunction will not be granted against such teacher's violation of contract, for public policy requires that the board must take the responsibility and either dismiss the teacher or rescind the rule: *Board of Education v. Paul*, 7 O. N. P. 58, 10 O. D. (N.P.) 17. See also SCHOOLS, PUBLIC.

(b) *Inconsistent Contract.*

An action to restrain the defendant from entering into a contract with another party which is in violation of an existing contract of the plaintiff with defendant, is an action in the nature of one for specific performance and governed by the same rules: *Hepburn v. Voute*, 7 O. N. P. 290, 5 O. D. (N.P.) 311.

When the defendant refused to comply with the terms of a contract by which he as lessee was to furnish a theater for a certain time and plaintiff was to perform there, plaintiff was refused an injunction restraining defendant from allowing any other performance there during the same time: *Hill v. Anderson*, 6 O. N. P. 111, 10 O. D. (N.P.) 432.

A theater contract, for a theater, attendants, orchestra, etc., for a week can not be enforced by the actor by mandatory injunction, for the court can not supervise services. But injunction against use of the theater during the week for any other play will be granted if the contract is plain and threatened breach undisputed. There is no adequate remedy at law, for the profits can not be fixed: *Lacy v. Heuck*, 9 Dec. Rep. 347, 12 Bull. 209.

(c) *Particular Covenants.*(aa) *Negative Covenants.*

An injunction lies to enjoin the breach of a negative covenant in a contract: *Stines v. Dorman*, 25 O. S. 580, III Longsdorf's Notes, 265; *Railroad Co. v. Railroad Co.*, 13 O. S. 544, II Longsdorf's Notes, 624; *Rogers v. Railway*, 12 O. D. (N.P.) 136.

Where the purpose of a restrictive covenant is to preserve to a municipality a parkway of uniform width and symmetry, a violation of such restriction by the erection of a stone wall, which will diminish the width for a portion of the distance and render the whole irregular in outline, presents a sufficient cause for the granting of an injunction upon the petition of the city: *Cleveland v. Painter*, 6 O. N. P. (N.S.) 129, 18 O. D. (N.P.) 815.

Restrictions as to use are binding on a public service corporation having the power of eminent domain, as well as on an individual; and before the railroad company can use a lot charged with such restrictions for a purpose prohibited by the restriction, it must obtain, by purchase or condemnation, the title of all owners of any interest therein: *Kuebler v. Railway Co.*, 10 O. N. P. (N.S.) 385, 20 O. D. (N.P.) 525 [reversed for laches, without opinion, *Railway Co. v. Duncan*, 84 O. S. 463].

Owners of realty who have acquired title by deeds which contain covenants restricting such realty to use for residence purposes, can not enjoin a railway company from constructing its track across such realty where such injunction suit was delayed for three years after the railway had acquired its right of way, and until such railway had constructed its track at a cost of several million dollars up to such realty. If such owners of realty have any remedy it is in law and not in equity: *Railway Co. v. Duncan*, 84 O. S. 463.

A court of equity will not enforce the performance of the negative covenants of a contract where full performance can not be enforced, unless substantial justice would be done thereby: *Breweries Co. v. Zernik*, 4 O. N. P. (N.S.) 193, 16 O. D. (N.P.) 493.

A provision in a mortgage against the sale on the premises of other than mortgagee's beers, etc., will be enforced by injunction: *Brewing Co. v. Demko*, 9 O. C. C. (N.S.) 130, 19 O. C. D. 102.

The provision in a mortgage covenanting to erect a saloon to sell mortgagee's beer exclusively for a period of ten years, this restriction to run with the land, and making unpaid Dow tax and accounts for beer furnished a lien on the premises is unreasonable and oppressive and lacking in mutuality, and injunction against the sale of beer of other manufacture will not lie: *Breweries Co. v. Zernik*, 4 O. N. P. (N.S.) 193, 16 O. D. (N.P.) 493. See also MORTGAGES.

Covenants against the sale of intoxicating liquors on the premises are binding upon the heirs and assigns, and are enforceable against a grantee by an injunction: *Johnson Co. v. Kaszas*, 8 O. N. P. 678, 11 O. D. (N.P.) 480.

A contract by one who sells a business, not to compete with the vendee will be enforced by injunction if in reasonable restraint of trade: *Morgan v. Perhamus*, 36 O. S. 517, III Longsdorf's Notes, 873.

Injunction lies to enforce a contract not to enter into the same business within four squares: *Peterson v. Schmidt*, 13 O. C. C. 205, 7 O. C. D. 202.

Where the contract contains no negative covenants, injunction will not lie for the purpose of indirectly compelling its specific performance: *Hill v. Anderson*, 6 O. N. P. 111, 10 O. D. (N.P.) 432.

If it is not shown that adequate relief in damages can be had in an action at law, for breach of contract, injunction will be refused: *Rosenstiel v. Electrical Co.*, 20 O. C. C. 705, 6 O. C. D. 27.

An agreement that a party will not do certain specified acts may be enforced in a negative manner by enjoining the commis-

sion of such acts, especially where the acts prohibited relate to or interfere with property rights or business, and damages therefor, being speculative, conjectural or uncertain, would be inadequate: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136. See also INJUNCTION.

A covenant qualifying the use of land—as in a perpetual lease forbidding use for a blacksmith shop—the lease showing an intent to annex it thereto runs with the land without the word assigns, both in favor of a grantee of the fee and against an assignee of the lease, and injunction lies to enforce it. Making horseshoes and shoeing horses is occupying as a blacksmith shop, for a farrier is a blacksmith: *Wright v. Heidorn*, 4 O. N. P. 124, 6 O. D. (N.P.) 151 [affirmed, *Heidorn v. Wright*, 4 O. N. P. 235, 6 O. D. (N.P.) 315, and affirmed, without opinion, *Heidorn v. Wright*, 60 O. S. 609]. See also LANDLORD AND TENANT.

A railway company which has agreed for a valuable consideration not to locate a track in a certain manner on its right-of-way, and subsequently finds it necessary to disregard this agreement in order to properly discharge its duty to the public, will not be enjoined against a breach of its agreement, but the owner of the land will be remanded to a suit for the damages growing out of the breach: *Miller v. Railway Co.*, 12 O. N. P. (N.S.) 683, 22 O. D. (N.P.) 638.

A negative contract, binding one accepting employment with a public accountant not to take business on his own account from regular clients of his employer, is enforceable by injunction where the rights of innocent third parties are not involved: *Langdon v. Houck*, 14 O. N. P. (N.S.) 510.

(bb) Covenants in a Lease.

Where a breach of the covenants in a lease would result in an irreparable injury, injunction is the proper remedy: *Park Co. v. Van Dusen*, 63 O. S. 183, IV Longsdorf's Notes, 852.

If the assignee has knowledge of the restrictions in his lease, he will be enjoined from violating its stipulations, regardless of the fact whether the covenants run with the land or not: *Heidorn v. Wright*, 4 O. N. P. 235, 6 O. D. (N.P.) 315.

Violation of a covenant not to carry on certain trades on the premises being continuous may be enjoined, although the lease provides a remedy by re-entry, unless it appears that plaintiff can not possibly suffer damage thereby. Acceptance of rent after violation of the covenant does not estop to seek injunction: *Wright v. Heidorn*, 4 O. N. P. 124, 6 O. D. (N.P.) 151 [affirmed, *Heidorn*

v. Wright, 4 O. N. P. 235, 6 O. D. (N.P.) 315; affirmed, without opinion, *Heidorn v. Wright*, 60 O. S. 609]. See also LANDLORD AND TENANT.

A lessee may be enjoined from increasing risk of insurance company: *Lodge v. White*, 13 Dec. Rep. 734, 2 C. S. C. R. 6.

The lessee of premises, leased on condition that only beer manufactured by the lessor should be sold on the premises, may be enjoined from a repudiation of his agreement not to sell other beer: *Brewing Co. v. Konst*, 12 O. C. C. (N.S.) 577, 20 O. C. D. 782 [affirmed, without opinion, *Konst v. Brewing Co.*, 79 O. S. 469].

Upon the breach of a covenant in a lease, restricting the use of the property leased to that of residence purposes only, injunction is the proper remedy: *Park Co. v. Van Dusen*, 63 O. S. 183, IV Longsdorf's Notes, 852; *Heidorn v. Wright*, 4 O. N. P. 235, 6 O. D. (N.P.) 315 [affirmed, without opinion, *Heidorn v. Wright*, 60 O. S. 609].

Injunction will lie to restrain the lessors of premises from declaring the forfeiture of a lease containing a covenant against underletting, where past violations of this covenant had been made with the knowledge of the lessors and without objection from them; but such an injunction will not operate to prevent lessors from insisting upon an observance of the covenant against underletting in the future, after notice of their intention to thereafter stand on the covenant: *Beckenbaugh v. Harlow*, 12 O. C. C. (N.S.) 570, 21 O. C. D. 496.

Where a gas and oil lease provides that one well shall be completed within a year, and the lessees make a cash payment of fifteen hundred dollars on the date the contract was executed and expend as much as twenty-two hundred dollars within the year in drilling a well, which yielded oil but not in paying quantities, they are entitled to an extension of time within which to make further search for gas and oil; and upon refusal of the lessees to pay rental demanded on the theory that "no well had been completed" injunction will not lie against them, within five months of the completion of the well that was drilled, to restrain them from entering upon the premises and operating for gas and oil: *Diehl v. Oil Co.*, 12 O. C. C. (N.S.) 539, 20 O. C. D. 750.

An injunction will not lie to restrain a tenant in possession of a permanent leasehold from the commission of waste, where there is no showing that the lease provides against waste, or averment or proof that the security will be impaired or that the tenant under the lease is insolvent: *Fowler v. Children's Home*, 10 O. N. P. (N.S.) 557.

(cc) Building Restrictions.

Where adjoining property owners are bound by covenants in a deed, under which they both hold, not to erect buildings within a prescribed distance from the street upon which their properties abut, either is entitled to an injunction to enforce the observance of the covenant by the other: *McGuire v. Caskey*, 62 O. S. 419, IV Longsdorf's Notes, 838; *Russell v. Harpel*, 20 O. C. C. 127, 10 O. C. D. 732; *Isham v. Matchett*, 18 O. C. C. 338, 10 O. C. D. 267; *Sachs v. Cordes*, 60 O. S. 609 [reversing, without opinion, *Sachs v. Cordes*, 11 O. C. C. 145, 5 O. C. D. 67]; *Wright v. Heidorn*, 4 O. N. P. 124, 6 O. D. (N.P.) 151; *Stines v. Dorman*, 25 O. S. 580, III Longsdorf's Notes, 265.

A covenant in a deed of conveyance, whereby the grantor, in part of the consideration for said conveyance, stipulates and agrees for himself, his heirs and assigns, touching and concerning an adjacent lot which he owns, "that the only building put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purpose than that of a family residence, and shall cost not less than \$5000 for the residence alone" is a covenant binding upon the grantor and all persons claiming under him with notice of the same, and its observance may, in equity, be enforced by injunction: *Brown v. Huber*, 80 O. S. 183, IV Longsdorf's Notes, 1051.

When there are restrictions put upon the grantee in a deed as to the use of the ground, a court of equity will, in behalf of the grantor, restrain any violation of the restrictions which are threatened by the grantee: *Burton v. Stapely*, 4 O. N. P. (N.S.) 65, 17 O. D. (N.P.) 1 [reversed *Burton v. Stapely*, 4 O. N. P. (N.S.) 73, affirmed, without opinion, *Burton v. Stapely*, 74 O. S. 461]. See also DEEDS.

An injunction will lie against the construction of a "house" in violation of a general building restriction, when the enjoyment of neighboring property is substantially affected as to view, light and air, although encroachments upon remote portions of the street and not affecting plaintiff's enjoyment have been submitted to: *Bader v. Walther*, 5 O. N. P. (N.S.) 497, 18 O. D. (N.P.) 299. See also DEEDS.

Restrictive covenants providing that lands shall be used for residence purposes only, create equitable easements which constitute private property, and under Art. I, § 19, of the constitution, a railroad company purchasing such lots must first make compensation to the lot owners before it can use them for other than residence purposes, and until such compensation is made, the plaintiffs are

entitled to an injunction to prevent the violation of such restrictions: *Kuebler v. Railway*, 10 O. N. P. (N.S.) 385, 20 O. D. (N.P.) 525.

(d) Illegal and Unconscionable Contracts.

A contract of employment whereby the employe is bound for two years and the employer for one week, and which gives the employe no redress against discharge at any time without cause, but prohibits him from entering the same line of business for eighteen months thereafter, whether the employer continues in the same business or not, is so harsh and unconscionable that it will not be enforced by a court of equity at the suit of the employer who seeks to enjoin the employe from engaging in the same line of business after his discharge without cause: *Jennings v. Bethel*, 6 O. C. C. (N.S.) 245, 17 O. C. D. 239.

Injunction will not lie to enforce an oppressive and unconscionable contract, as not to enter the service of a rival within a year after leaving employment: *Oil Co. v. Familton*, 5 O. N. P. 23, 5 O. D. (N.P.) 219.

Injunction will not lie to enforce an illegal contract: *Dyer v. Railway*, 7 O. C. C. 255, 4 O. C. D. 584.

If a contract is in partial restraint of trade, it can not be enforced unless it appears from the pleadings and the evidence to be founded upon a valuable consideration and to be reasonable and not oppressive: *Breweries v. Zevnik*, 4 O. N. P. (N.S.) 193, 16 O. D. (N.P.) 493.

Injunction will lie to prevent a local telephone company, which has agreed to give to a long distance telephone company a monopoly of its business, from breaking such agreement and giving long distance telephone business to a competing company, if such contract is valid and is not monopolistic: *Telephone Co. v. Telephone Co.*, 19 O. D. (N.P.) 193.

(e) Personal Services.

A contract for personal services will not be specifically enforced: *Hayman v. Campbell*, 2 O. N. P. (N.S.) 213, 15 O. D. (N.P.) 220; *Sipe v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 228; *Hill v. Anderson*, 6 O. N. P. 111, 10 O. D. (N.P.) 432; *Baseball Club v. Lafoie*, 13 O. D. (N.P.) 504; *Delavan v. Macarte*, 1 Dec. Rep. 228, 4 W. L. J. 555; *Lacy v. Heuck*, 9 Dec. Rep. 347, 12 Bull. 209; *Baseball Club v. Reiley*, 11 Dec. Rep. 272, 25 Bull. 385.

A contract for personal services will not be enforced by injunction. Thus, a celebrated equestrian, having contracted to perform in plaintiff's circus, will not be enjoined from

performing elsewhere; a person's regular business will not be stopped: *Delavan v. Macarte*, 1 Dec. Rep. 226, 4 W. L. J. 555.

An Ohio court can not lend its aid to enforce an order of a Pennsylvania court enjoining the breach of the negative provisions in a contract for personal service: *Baseball Co. v. Lajoie*, 13 O. D. (N.P.) 504.

A contract for personal services, as a baseball player, will not be enforced by enjoining the defendant from playing for any other club unless he is shown to be a player so skillful that his place could not be reasonably filled, and irreparable injury would result: *Baseball Club v. Reiley*, 11 Dec. Rep. 272, 25 Bull. 385.

A contract of employment whereby the employe is bound for two years and the employer for one week, and which gives the employe no redress against discharge at any time without cause, but prohibits him from entering the same line of business for eighteen months thereafter, whether the employer continues in the same business or not, is so harsh and unconscionable that it will not be enforced by a court of equity at the suit of the employer who seeks to enjoin the employe from engaging in the same line of business after his discharge without cause: *Jennings v. Bethel*, 6 O. C. C. (N.S.) 245, 17 O. C. D. 239.

A contract for services can not be enforced by injunction: *Sipe v. Bartlett*, 22 O. C. C. 230, 12 O. C. D. 226.

An injunction will be denied where it is sought thereby to enforce a contract involving skill, personal labor or cultivated judgment: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N.P.) 309.

A contract for personal services containing a negative covenant against doing what would defeat it, may sometimes be enforced to the extent of enjoining breach of the negative covenant: *Railroad v. Railroad*, 13 O. S. 544, 11 Longsdorf's Notes, 624.

Defendant agreed that plaintiff should "manage and negotiate the sale of his patents or certain interests in them or use his best efforts to organize a company," payment to be in part of the stock and proceeds. Plaintiff proceeded to organize the company and seeks to enjoin a sale of the patents elsewhere or the organization of other companies. It was held (1) the contract gives no exclusive rights. (2) There being a doubt whether the threatened acts will deprive plaintiff of the benefit of his contract injunction will be refused. A contract for services is not thus enforceable if it and the proposed breach are doubtful: *Bryan v. Chyne*, 10 Dec. Rep. 599, 22 Bull. 165.

(f) *Building Contracts.*

A building contract will not be specifically enforced if it involves skill, etc., and hence a violation of it will not be enjoined: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N. P.) 309.

A mandatory injunction will not lie to compel the erection of a structure of a specific character: *Rauch v. Brewing Co.*, 7 O. C. C. (N.S.) 460, 18 O. C. D. 546.

A contract to erect a house for a tenant, not specifying size, cost, material or dimensions, can not be enforced: *Van Tyne v. Short*, 7 Dec. Rep. 720, 4 Bull. 1149.

The remedy of a contractor having a valid contract with the township board of education for an impairment of his contract rights by reason of a change made in good faith in the centralization of the township schools, is an action at law: *State v. Board of Education*, 1 O. C. C. (N.S.) 486, 15 O. C. D. 424. See also SCHOOLS, PUBLIC.

3. *Against Wrongful Interference with Contract.*

Unless a contract is itself unlawful and against public policy, a court of equity will grant relief by way of injunction to restrain one who is not a party to the contract, but who is seeking to induce others to violate it, and to accomplish that end must do a wrong offensive to a court of equity, and which amounts to crime: *Kinner v. Railway*, 69 O. S. 339, IV Longsdorf's Notes, 958 [affirming *Kinner v. Railroad*, 3 O. C. C. (N.S.) 401, 13 O. C. D. 294].

Peacefully enticing employees to leave their employment, when not under contract to remain, and giving them railroad tickets and money for traveling expenses to go to another city with their families, is not unlawful persuasion and in contempt of a previous order of court enjoining unlawful persuasion: *Iron Molders' Union v. Greenwald Co.*, 4 O. N. P. (N.S.) 161, 16 O. D. (N.P.) 678; *Greenwald Co. v. Iron Molders' Union*, 1 Hosea, 242 [affirmed, without opinion, *Greenwald Co. v. Iron Molders' Union*, 77 O. S. 618].

To induce a man by argument and by giving him money to quit his work when he can do so without breaking a contract, there being no compulsion of any sort, no false charges and no ill feeling against his employer, is not unlawful persuasion: *Greenwald Co. v. Iron Molders' Union*, 1 Hosea, 242 [affirmed, without opinion, *Greenwald Co. v. Iron Molders' Union*, 77 O. S. 618].

While organizations of workmen have the right to persuade other workmen to join the union and to refuse to work except for established wages, they have no right to

attempt to ruin a man's business by bringing to bear upon his customers and employees intimidating and coercive means, and a court of equity will enjoin mere persuasion when it has for its object a malicious or unlawful end or persuading third parties to break a contract, or otherwise to act in violation of the legal rights of the complainant: *Manufacturing Co. v. Metal Polishers', etc., Union*, 8 O. N. P. 574, 11 O. D. (N.P.) 643; *Slatmyer v. Springborn*, 1 O. N. P. (N.S.) 157 [overruled on other grounds, *Slatmyer v. Springborn*, 5 O. C. C. (N.S.) 89, 16 O. C. D. 100].

One who has existing contracts for the removal of slaughter-house and other offal of a sanitary character and possessing value, may enjoin the enforcement of an ordinance for the collection of garbage and offal including slaughter-house offal, in so far as it is in impairment of his contract obligations: *Stadler v. Cleveland*, 12 O. N. P. (N.S.) 321.

E. TO PREVENT INJURY TO TRADE OR BUSINESS.

1. Unlawful Business.

Equity will not lend its aid to one monopoly as against another permitting one party to drive another out of business by underselling him: *Kuhn v. Spice Co.*, 13 O. C. C. 547, 7 O. C. D. 289; *Kuhn v. Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 202.

Property rights of partners in an illegal business will not be protected by injunction: *Backenstoe v. Backenstoe*, 14 O. D. (N.P.) 353.

Since G. C., § 8623 forbids a corporation to be formed for carrying on professional business, a corporation which is formed for the purpose of practicing dentistry can not enjoin persons who are also practicing dentistry from making use of a name so like the name of such corporation as to mislead the public and to amount to unfair competition: *Dentists Co. v. Mullens*, 19 O. D. (N.P.) 136, 6 O. L. R. 475.

2. Trade Secrets.

A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and such employees as it is necessary to confide it, in order to apply it to the uses for which it was intended; when discovered in an honest manner, the person making the discovery has the right of use: *Tube Co. v. Tube Co.*, 3 O. C. C. (N.S.) 459, 13 O. C. D. 468 [affirmed, without opinion, *Tube Co. v. Tube Co.*, 69 O. S. 560]; *Rosenbloom Co. v. Gray*, 1 Hosea, 95.

An employee will not be enjoined from using information obtained in his employment

unless it is something of the secret workings of the employer's business which he could not and would not have learned but for his employment, and unless he has either expressly or impliedly bound himself not to disclose or make use of these secrets: *Steam Laundry Co. v. Smith*, 8 O. N. P. (N.S.) 402, 19 O. D. (N.P.) 460. See also **TRADE SECRETS**.

Where patterns, castings, etc., used in connection with a secret process of manufacture, are wrongfully abstracted from the mill to which they belong for use in another mill, equity will enjoin such use: *Tube Co. v. Tube Co.*, 3 O. C. C. (N.S.) 459, 13 O. C. D. 468 [affirmed, without opinion, *Tube Co. v. Tube Co.*, 69 O. S. 560].

An injunction will lie to prevent persons whose knowledge has come directly from their confidential employment or indirectly from those whose knowledge is the result of such confidential employment from disclosing a secret formula belonging to plaintiff or represented to belong to plaintiff: *Stock Remedy Co. v. Chemical Co.*, 17 O. D. (N.P.) 207.

A secret formula for the compounding of a drug whether patentable or not, and whether the product or package be protected by trade mark or not, is a species of property in the enjoyment of which its owner will be protected by injunction: *Stock Remedy Co. v. Chemical Co.*, 17 O. D. (N.P.) 207.

An injunction will not lie to restrain a defendant from using a secret formula for a drug belonging to plaintiff or representing that he is using such formula, where it is shown by the evidence, that the appearance of the two compounds is similar but that the packages in which they are sold have no resemblance to each other, the ingredients are different and no purchaser using ordinary care has been or is likely to be deceived into purchasing the one for the other, and where defendant does not claim or intend to use plaintiff's formula: *Stock Remedy Co. v. Chemical Co.*, 17 O. D. (N.P.) 207.

An employee who is under either an express contract, or a contract implied from the confidential relations existing between him and his employer, not to disclose trade secrets, has no right, after leaving the employment, to disclose or use the same for his own benefit, or to the injury of his former employer. Injunction will lie to restrain such disclosure or use: *Seifried v. Mayo*, 14 O. D. (N.P.) 536. See also **TRADE SECRETS**.

An employee may, after leaving his employer's service, lawfully engage in the same line of business as, and in competition with the latter, and to this end may avail himself of the general knowledge and practice he

has acquired while engaged in his former employer's service, which includes the right to canvass for the latter's customers, the names of whom he has learned *bona fide* in the ordinary course of experience in the business; no property rights of the employer are thereby infringed. But names of customers collected by the employer, or by such employe for him, by special effort and at great expense, which is not such mere information as is supplied by, or can be obtained from sources open to the public and which are guarded by the employer from competition as far as possible, all of which such employe necessarily obtained by reason of his employment, can not be used by such employe for his own benefit, or to the disadvantage of his former employer. Such special information is the property of the employer; and while he can not be protected even with respect to these customers as against the ordinary competition of such employe, yet when the latter becomes possessed of his knowledge by virtue of his confidential relations to his employer, and, after leaving his employ, makes use thereof for his own benefit to the injury of his former employer, he is guilty of unfair and unconscionable competition which equity will enjoin. Hence where it appears that an employe of a gold and silver refiner was, during his eight or nine years of employment, sent by his employer on extended trips throughout the country to see manufacturing jewelers, jobbers, pawnbrokers, bookbinders, etc., to ascertain their needs as to new supplies, and their custom as to disposing of their refuse product of gold, on the basis of which knowledge so obtained his subsequent trips were so timed as to fit the respective customs in this regard; that these facts were, in some instances, already known to the employer, but in others were ascertained by the employe as part of his duty to his employer; that the information so obtained was such that it could not be ascertained from directories or similar sources of public information; that he did not, in all cases, report the names thus ascertained to the employer, but that the names reported were entered on the employer's books; in such case, equity will perpetually enjoin such employe from using the names of customers so obtained for his own benefit, or to the disadvantage of his former employer. Whether the information was carried away in memory, or written down, is immaterial: *Seifried v. Maycox*, 14 O. D. (N.P.) 536.

Injunction will lie to protect an inventor by preventing the disclosure or unauthorized use of a secret process by one who has obtained a knowledge of it in confidence: *Foun-*

dry Co. v. Dodds, 10 Dec. Rep. 154, 10 Bull. 84.

Injunction will lie against the disclosure or the using of confidential information or trade secrets or the combining with others for the purpose of injuring an established business: *Cash Register Co. v. Heyne*, 10 O. N. P. (N.S.) 465.

State courts have jurisdiction to enjoin one who had agreed to construct plaintiff's device for which a patent had been applied, and to preserve the secret and not construct for any one else, although a patent having been issued he would have a remedy in the U. S. courts for infringement: *Gordon v. Deckebach*, 9 Dec. Rep. 324, 12 Bull. 169. See also PATENT.

3. Trade Name.

It is manifestly unfair competition to adopt a name almost identical with that of an established competitor, and manufacture and sell the same line of goods, in the same city and almost the same locality, with an appropriation of the marks the plaintiff uses upon his goods, and the practical copying of his advertising: *Ironsides Co. v. Chemical Co.*, 1 O. N. P. (N.S.) 346, 14 O. D. (N.P.) 193.

The name Cincinnati Vici Shoe Co. is not identical with Cincinnati Shoe Co., nor enjoinable as an unfair competition: *Shoe Co. v. Shoe Co.*, 7 O. N. P. 135, 9 O. D. (N.P.) 579.

Even though a trade name can not be sustained as a trade-mark it may still be protected by injunction from unfair competition: *Shoe Co. v. Shoe Co.*, 7 O. N. P. 135, 9 O. D. (N.P.) 579; *Ironsides Co. v. Chemical Co.*, 1 O. N. P. (N.S.) 346, 14 O. D. (N.P.) 193.

One who does not live in the locality may be enjoined from using a geographical name as a trade name where another person, living in the locality, has already adopted it as a trade name, and the defendant's use of the name is for the purpose of fraud and deception: *Harvey v. Lamourcaux*, 5 O. N. P. 473, 7 O. D. (N.P.) 455.

If a petition to enjoin a name as too similar does not aver an intent to deceive, or notice to defendant that its use is misleading, it is doubtful if a cause of action is stated: *Shoe Co. v. Shoe Co.*, 7 O. N. P. 135, 9 O. D. (N.P.) 579.

The advertisement of articles in imitation of plaintiff's may be enjoined where plaintiff can prove actual injury: *Rothchild's Sons v. Collender Co.*, 12 O. C. C. 741, 4 O. C. D. 105.

Injunction is the proper remedy to prevent an incorporating company from assum-

ing the name of an existing corporation, or a name so similar to that of an existing corporation as to mislead the public: *Shoe Co. v. Shoe Co.*, 7 O. N. P. 135, 9 O. D. (N. P.) 579.

One who is granted a right to sell a particular brand of flour within a certain territory will be enjoined from selling an inferior article under the name of the brand in question either within or without the prescribed territory: *Milling Co. v. Stites*, 17 O. D. (N.P.) 328, 4 O. L. R. 506.

The use of the partnership name may be enjoined on the application of a retiring partner where on his retirement he transferred all the real and personal property of the firm to the continuing partners, but no mention was made of the good will: *McGowan v. McGowan*, 22 O. S. 370, III Longsdorf's Notes, 82.

Sale by an outgoing partner to continuing partners of all his interest in the firm carries his interest in the good will, of which the firm name is a part, and if he uses the firm name thereafter in a similar business, injunction will be granted: *Iron Works Co. v. Payne*, 50 O. S. 115, IV Longsdorf's Notes, 487. See also GOOD-WILL.

Solicitation of old customers to buy and of employees to leave and use of the trade name will be enjoined as a breach of a sale of the good will made by a receiver on sale thereof on dissolution of a firm: *Richardson v. Westjohn*, 6 Dec. Rep. 1043, 9 Am. L. Rec. 723, 6 Bull. 233.

Where a family named French has carried on a dairy and milk business for a great number of years under their own name, and more recently have built up in connection therewith an extensive business in ice cream, injunction will lie against the use of the word "French" in connection with an ice cream business carried on by a competitor who is not a Frenchman and whose manifest purpose is to attract trade by creating a false impression as to his own identity: *Dairy Co. v. Giacin*, 12 O. C. C. (N.S.) 134, 21 O. C. D. 395 [affirming *Dairy Co. v. Giacin*, 8 O. N. P. (N.S.) 549, 20 O. D. (N.P.) 638; affirmed, without opinion, *Giacin v. Dairy Co.*, 84 O. S. 483]. See also UNFAIR COMPETITION.

If the name of a corporation is made up out of the name of a natural person, such natural person will not be enjoined from permitting his name to be used in connection with the competing business as an official thereof; but the owner of such business will be enjoined from making such proper name more conspicuous than the rest of the name under which business is done: *Pflueger Co. v. Manufacturing Co.*, 85 O. S. 450.

Where a person has established a business and reputation for the manufacture and sale of an article of traffic, under a particular name and style of label, whether the words and devices adopted by him constitute a trade-mark or not, another person, whether it be his own name or not, can not lawfully assume the same name and label, or the same with slight alterations, so as to induce the belief that the imitation is the original, and such use of such name and label will be enjoined on the ground of fraud: *Drake Medicine Co. v. Glessner*, 68 O. S. 338, IV Longsdorf's Notes, 945. See also TRADE-MARKS AND TRADE NAMES.

4. Trade-marks.

A state court has jurisdiction to enjoin the infringement of a trade-mark: *Reeder v. Brodt*, 4 O. N. P. 265, 6 O. D. (N. P.) 248.

If the imitation would be likely to deceive ordinary buyers it is enjoined, though it does not infringe the whole trade-mark and though it contains the defendant's name, or though he sells the goods as his own: *Reeder v. Brodt*, 4 O. N. P. 265, 6 O. D. (N.P.) 248.

False misrepresentations in advertising a valid trade-mark, though outside the trade-mark itself, will deprive the owner of legal protection against infringement: *Feder v. Brundo*, 5 O. N. P. 275, 8 O. D. (N.P.) 179.

B's sale to T of his plow factory and patents, with an agreement that T might use any new improvement B might invent, B agreeing not to engage in making plows thereafter, will not authorize T to use a trade-mark thereafter adopted by B to designate his new improvements. B is entitled to an injunction to protect his trade-mark, although he may be violating the agreement not to manufacture: *Burch v. Plow Co.*, 15 O. C. C. 482, 8 O. C. D. 201.

5. Misleading Device, etc.,

The burden of proof is upon plaintiff in an action to enjoin a competitor from using the same terms in his business to establish the fact that it originated the use of such terms in the connection with which they are used: *Ironsides Co. v. Chemical Co.*, 1 O. N. P. (N.S.) 346, 14 O. D. (N.P.) 193.

A cigar label which may mislead an ordinary purchaser is an infringement, though by reading it through he would be deceived: *Union v. Burkhardt*, 6 O. N. P. 342, 9 O. D. (N.P.) 459.

Cigar label "Carmencita," with cut of dancing girl in scanty costume, is not infringed by a label "La Camerita," with a cut of a girl in winter costume, with a photograph camera: *Brown Bros. v. Bucher*, 6 O. N. P. 379, 9 O. D. (N.P.) 362.

Labor union labels may be protected by enjoining unauthorized use of them: *Union v. Linder*, 2 O. N. P. 114, 3 O. D. (N.P.) 244.

Where a person has established a business and reputation for the manufacture and sale of an article, under a particular name and style of label, whether the words or devices adopted by him constitute a trade-mark or not, another person, whether it be his own name or not, can not lawfully assume the same name and label, or the same with slight alterations, so as to induce the belief that the imitation is the original, and such use of such name and label will be enjoined on the ground of fraud: *Medicine Co. v. Glessner*, 68 O. S. 337, IV Longsdorf's Notes, 945.

Where a label or style of package is imitated, it is necessary to show by evidence an intent to deceive the public and to steal the plaintiff's market. This intent may be shown by proof of actual deception, but it may be inferred from examination of the respective labels. Positive proof of fraudulent intent is not required, if the simulation is clearly shown. If the infringing device be such that persons exercising ordinary caution are liable to be misled into purchasing the article bearing the objectionable device, when they intend to purchase the other one, an injunction will be allowed: *Medicine Co. v. Glessner*, 68 O. S. 337.

A petition in an action to enjoin defendants from using plaintiff's trade design or device must allege a present or threatened injury and it is not sufficient to merely allege that the defendants have been using the design or device: *United Hatters v. Loeb*, 22 O. C. C. 339, 12 O. C. D. 272.

Competition consisting in so arranging an adjoining house as to seem to be part of plaintiff's, and falsely stating such to be the fact, and by signs, decorations and other devices, deluding people into defendant's store, as if it were plaintiff's, is "unfair competition," and will be enjoined: *Lippman v. Martin*, 5 O. N. P. 120, 8 O. D. (N.P.) 485.

A retailer whose clerk on receiving a request for a particular article, delivers an article which is not the genuine, is responsible for the clerk's acts and will be enjoined: *Light Co. v. Tappehorn*, 2 O. N. P. (N.S.) 553, 15 O. D. (N.P.) 598.

6. Agreement not to Compete.

A covenant upon the sale of a millinery and dressmaking business not to engage in such business in the future in such town or at any place within such distance of said town as will interfere with said business is valid and will be enforced by injunction:

Morgan v. Perhamus, 36 O. S. 517, III Longsdorf's Notes, 873.

An agreement upon the sale of a business not to enter into the same business within four squares is valid. To open a like business in wife's name within that business and working for her is a violation of the agreement and enjoined: *Peterson v. Schmidt*, 13 O. C. C. 205, 7 O. C. D. 202.

Where one in selling his business to another agrees, for the consideration received, not to engage again in the same line of business within a specified territory of reasonable extent, either for himself or on behalf of any other person, so long as the purchaser is engaged in that line in that locality, and further agrees to pay the purchaser the sum of \$500 as liquidated damages, should the seller violate any part of the conditions of his contract, a court of equity has jurisdiction to enforce the restrictive covenants, notwithstanding the stipulation as to liquidated damages: *Ewing v. Davis*, 2 O. C. C. (N.S.) 90, 15 O. C. D. 203.

Injunction lies restraining co-partners from engaging, during the term of the partnership contract, in competing business: *Halladay v. Faurot*, 8 Dec. Rep. 633, 9 Bull. 92.

An agreement on sale of a business not to engage "directly or indirectly" in the same business for five years in such city is broken by acting as manager or employe in a competing business in the same city or in other places where the articles made are designed for sale in such city: *Empson v. Bissinger*, 8 Dec. Rep. 629, 9 Bull. 86.

If his wife carries on the business, employing him on a salary or giving him support in lieu of salary, this is a mere evasion; and he will be enjoined from assisting her and she from employing him or selling goods made by him elsewhere: *Empson v. Bissinger*, 8 Dec. Rep. 629, 9 Bull. 86.

7. Interference with Mail.

Injunction is the proper remedy for the continuing partner, where the retiring partner interferes with the enjoyment and possession of mail addressed to the old firm, by claiming an interest therein and notifying the postal authorities to withhold it from delivery: *Pedretti v. Pedretti*, 6 O. N. P. (N.S.) 113, 18 O. D. (N.P.) 224.

Injunction will not lie to prevent the delivering mail to a party, though addressed to a name under which he formerly did business, but which now belongs to another, when it is shown that such mail was intended for him: *Carriage Co. v. Smith-Eggers Co.*, 1 O. N. P. 391, 3 O. D. (N.P.) 77.

8. Unlawful Competition.

Injunction will not lie to prevent the practice of medicine by one having no legal certificate therefor, where the only ground urged for such relief is, the diminution of profits to one lawfully engaged in such practice by reason of the unlawful competition: *Merz v. Murchison*, 11 O. C. C. (N.S.) 458, 20 O. C. D. 646.

One may acquire, at least against his own servants, a property right in a route (bread route) a list of customers and enjoin a conspiracy by them to start a new concern and take the trade with them: *Smith v. Kernan*, 8 Dec. Rep. 32, 5 Bull. 145.

An employe driving over a milk route or hiring himself to a rival and attempting to run the latter's wagon over the same route will be enjoined. So where the owner of a newspaper route, temporarily sick, employs one to carry, and the latter seeks to appropriate the customers: *Smith v. Kernan*, 8 Dec. Rep. 32, 5 Bull. 145.

Equity will not entertain a bill by stockholders in a corporation asking for the appointment of a receiver to wind up the business of such corporation, or grant relief by injunction or otherwise, on the ground that those controlling the corporation were mismanaging it, or destroying its profits where it appears that plaintiffs, controlling the coffee business, prepared also to engage in the sugar refining business, whereupon defendants, having a monopoly of the latter business, purchased a controlling interest in the corporation in question, which was a competitor of plaintiffs in the coffee business, and proceeded to reduce the price of coffee, with the intention of wrecking plaintiff's coffee business unless they gave up the sugar refining business, as equity will not lend its aid to one monopoly as against another or interfere with the laws of trade, permitting one party to drive another party out of business by underselling him: *Kuhn v. Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292. See also CORPORATIONS.

If a board of trade in another state be a corporation exercising such public functions that a discrimination by it in refusing market reports to a telegraph company which permits tickers in brokers' offices would be enjoined, yet the telegraph company is not responsible for the acts of the sender of messages and such discrimination can not be prevented by enjoining it from removing the ticker and discontinuing such messages: *Cain v. Telegraph Co.*, 10 Dec. Rep. 72, 18 Bull. 267.

Removal of tickers from a bucket shop by reason of the board of trade of another state, with power to exclude persons, forbidding a

telegraph company to impart market reports obtained therefrom to persons carrying on business forbidden by our statute on penalty of exclusion will not be enjoined, for the company can not be compelled to do what it is unable to do, and as it owns the ticker which becomes of no use to the plaintiff. That plaintiff carries on other business also, or may be willing to deliver the commodity instead of settling differences, will not entitle him to the aid of a court of equity: *Griffin v. Telegraph Co.*, 8 Dec. Rep. 572, 9 Bull. 22. See also TELEGRAMS AND TELEGRAPH COMPANIES.

To obtain an injunction for unfair competition in trade in the selling of an improper and rejected article as the genuine, it is not necessary to prove an intention to mislead: *Block Light Co. v. Tappehorn*, 2 O. N. P. (N.S.) 553, 15 O. D. (N.P.) 598.

A case of unfair competition in trade is established and ought to be enjoined where it appears that imperfect, rejected mantles for incandescent lights have found their way into the hands of the defendants, who have been warned not to sell them as the genuine and proper mantle, the defendant not heeding such warning: *Block Light Co. v. Tappehorn*, 2 O. N. P. (N.S.) 553, 15 O. D. (N.P.) 598.

For discrimination, see TO RESTRAIN DISCRIMINATION, IV, B, 2, d, herein.

9. Acts of Labor-unions.

Combination of operatives to obtain higher wages, or prevent reduction of wages by strike, is not illegal if it does not involve coercion or intimidation: *Perkins v. Rogg*, 11 Dec. Rep. 585, 28 Bull. 32.

Strikers interfering with use of streets may be enjoined: *Brunsmann v. Atherton*, 12 O. D. (N.P.) 547; *Wire Co. v. Union*, 41 Bull. 25.

Soliciting workmen to join a union with intent to injure or coerce an employer may be enjoined: *Hillenbrand v. Trades Council*, 14 O. D. (N.P.) 628, 1 Hosea, 327.

Where a labor organization attempts by acts of intimidation or violence to impose a course of conduct or rules, adopted by themselves, upon another against his will, such acts amount to a conspiracy and will be enjoined: *Manufacturing Co. v. Local Union*, 12 O. D. (N.P.) 753; *Mulholland v. Waiters' Union*, 13 O. D. (N.P.) 342.

Boycotting of one who refuses to accede to the demands of the union is unlawful and where it results in an attempt to ruin complainant's business by bringing to bear upon his customers and employes intimidating and coercive means, it will be enjoined: *Manu-*

facturing Co. v. Union, 8 O. N. P. 574, 11 O. D. (N.P.) 643.

"Strikers" will not be enjoined from committing riot or violating the personal or property rights of their late employer, or of non-union men who have taken their places nor will they be enjoined from using or threatening to use obscene language towards non-union men. All such acts are criminal offenses in Ohio, and adequate provision has been made for the arrest, restraint and punishment of offenders no matter how numerous they may be: *Boiler & Engine Co. v. Benner*, 14 O. D. (N.P.) 357.

Nonparticipating members of a labor union are subject to an injunction against boycott, picketing, etc.: *Manufacturing Co. v. Union*, 8 O. N. P. 574, 11 O. D. (N.P.) 643.

An injunction will lie to protect property against unlawful acts of "strikers": *Perkins, Campbell & Co. v. Rogg*, 11 Dec. Rep. 585, 28 Bull. 32.

The maintenance of a patrol by a labor union of persons who pass up and down in front of a place of business distributing cards containing printed matter tending to damage such business, is an improper and illegal use of the streets and may be enjoined: *Mulholland v. Union*, 13 O. D. (N.P.) 342.

Picketing will not be enjoined when the purpose thereof is to meet and talk with the nonunion men who have taken the place of the strikers, to persuade them to quit their employment: *Boiler & Engine Co. v. Benner*, 14 O. D. (N.P.) 357.

Mer persuasion, by striking employees, may be enjoined where it has for its object a malicious or unlawful end or the persuasion of third parties to break a contract: *Manufacturing Co. v. Union*, 8 O. N. P. 574, 11 O. D. (N.P.) 643.

Injunction will lie to restrain striking employees from using force and violence and from intimidating employees going to or from their work: *Engineering Co. v. Nichols*, 13 O. D. (N.P.) 614.

Injunction will not lie to restrain striking employees from peaceably attempting to persuade or induce employees not under contract for a definite period of time to quit their work or from persuading others not to enter such employment: *Engineering Co. v. Nichols*, 13 O. D. (N.P.) 614.

Acts of strikers not sufficient to justify interference with, see *Hunter v. Condron*, 12 O. D. (N.P.) 577.

Injunction lies to prevent trespassing on premises and interfering with business: *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305; *Railroad Co. v. Wenger*, 9 Dec. Rep. 815, 17 Bull. 306.

Where a labor organization splits into two hostile factions, injunction will lie upon petition of one of the factions to restrain the other from threatening to strike or quit in a body employment where the plaintiffs are employed or are promised employment: *Graves v. McNulty*, 13 O. N. P. (N.S.) 110, 22 O. D. (N.P.) 425.

Injunction lies against enforcement of an order for a lockout, where under the rules of the organization of employers making the order its members are liable to fine or expulsion for disobedience thereof: *Journeymen v. Master Horseshoers*, 13 O. N. P. (N.S.) 297, 23 O. D. (N.P.) 342.

A court of equity, in carrying out its recognized duty of refusing to permit either employer or employe to terrorize the other, must also refuse to permit that it be itself made a scarecrow by issuing an injunction for the purpose of frightening either side; from which it follows that a blanket injunction will not be issued against a labor union for the purpose of restraining its unnamed members from committing offenses, nor against individual members of a union except upon hearing; or if the circumstances are such as to require the issuance of such an order without notice, the reason therefor must be of sufficient force to require that it be set forth in an entry: *Morton v. Brotherhood of Painters, etc.*, 13 O. N. P. (N.S.) 311, 23 O. D. (N.P.) 222.

Injunction will lie to restrain combination of persons from attempting to ruin plaintiff's business by bringing to bear upon his customers and employees intimidation, threats and coercive means: *Manufacturing Co. v. Union*, 8 O. N. P. 574, 11 O. D. (N.P.) 643.

Injunction will lie to restrain coercive measures by labor unions in the maintenance of a boycott against a hotel claimed to be "unfair to labor." Whether or not such claim is well founded is immaterial: *McCormick v. Local Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165.

Peaceable persuasion and argument, oral, printed or written, by members and officers of labor unions to divert patronage from a hotel claimed by them to be "unfair to labor" will not be enjoined as an unlawful boycott: *McCormick v. Local Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165.

The distribution by pickets in a labor union boycott, of cards warning patrons of a hotel and saloon not to patronize the place as unfair, and threatening to publish the names of any who do so, may be enjoined: *McCormick v. Local Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165.

Coercive measures to enforce a boycott may consist of violence or any form of intima-

tion such as threats, oral, printed or written. The restraint of such unlawful acts by a court of equity does not violate any right of trial by jury or any constitutional provisions as to the freedom of speech or the press: *McCormick v. Local Union*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165; *Moore v. Bricklayers' Union*, 10 Dec. Rep. 665, 23 Bull. 48 [affirmed, without opinion, *Bricklayers' Union v. Moore & Co.*, 51 O. S. 605].

In a contest between two factions of a labor union one faction can not enjoin the other from threatening to strike if members of the plaintiff faction are employed on jobs on which members of the defendant faction are employed: *Graves v. McNulty*, 13 O. N. P. (N.S.) 110, 22 O. D. (N.P.) 425.

A strike discontinues the contract of employment which is not for a specified time, and it is then a trespass for the strikers to go on the premises and interfere with the business, and those combining to do so are responsible for the acts of each. Injunction will lie to prevent such trespasses because the remedy at law is not adequate: *Railroad Co. v. Wenger*, 9 Dec. Rep. 815, 17 Bull. 306. See also MASTER AND SERVANT.

10. Against Public Officers.

Injunction will not lie against the food commissioners on the grounds that they are maliciously conspiring to injure complainant's business: *Food Co. v. McNeal*, 1 O. N. P. 266, 4 O. D. (N.P.) 356.

The board of public works is without authority to enter into an agreement or contract to build and forever maintain a dam for the purpose of affording water power to a riparian mill owner, and such agreement or contract would confer no right upon such riparian owner and no obligation upon the state to maintain such dam; nor can the state be prevented from destroying such dam and thus destroying such water power: *McBroom v. Watkins*, 11 O. N. P. (N.S.) 337, 21 O. D. (N.P.) 505.

The order directed by this commission to the Baltimore and Ohio Railway Company, notifying it to cease and desist from requiring shippers of milk and cream over its road between points within the state of Ohio to load the same into baggage cars, is not an interference with interstate commerce, but is within the power of the commission, and injunction will not lie against its enforcement: *Railroad v. Railroad Commission*, 10 O. N. P. (N.S.) 665, 21 O. D. (N.P.) 468.

F. AGAINST EXECUTION, LEVY AND SALE.

1. In General.

An injunction can not be issued by the court of common pleas to restrain an execu-

tion issued by the supreme court: *Sample v. Ross*, 16 O. 419, I Longsdorf's Notes, 772.

In the absence of a showing of a lack of jurisdiction to enter the judgment complained of, injunction will not lie to prevent the levy of an execution on a foreign judgment: *Howard v. Kinney*, 8 O. C. C. (N.S.) 568, 19 O. C. D. 186.

The fact that an agreement is offered to the sheriff by the assignee that in consideration of the delivery of the goods to him to be sold the lien of the judgment shall attach to the proceeds as to the original goods, and the proceeds be applied on the execution, and that such goods are of greater value than the amount due on the execution, and can be sold to better advantage by the assignee, is not sufficient for enjoining the judgment creditor and sheriff from selling the goods: *Mack v. Steinau*, 10 O. D. (N.P.) 701.

Injunction will lie against levy by a county treasurer, for unpaid Dow tax, on a boat belonging to a citizen of another state, which has been brought without his consent into the water of this state, and intoxicating liquors sold therefrom within the limits of a county which has been voted "dry" under the Rose county local option law: *Haas v. Remick*, 13 O. C. C. (N.S.) 1, 21 O. C. D. 591 [affirmed, without opinion, *Remick v. Haas*, 85 O. S. 466; for later opinion in same case, see *Haas v. Remick*, 13 O. C. C. (N.S.) 395, *sub nomine Haas v. Thayer*, 22 O. C. D. 89].

If the judgment debtor of a guardian pays the debt, after the ward's death, to her administrator, he may enjoin the guardian from enforcing the judgment, but must make the administrator party to the bill: *Harper v. Seely*, W. 390, I Longsdorf's Notes, 32.

2. To Restrain Sales.

A sheriff may be enjoined from selling goods levied under a void judgment: *Wood v. Stanberry*, 21 O. S. 142, III Longsdorf's Notes, 15.

A court of equity may enjoin a sale on execution, where in law no title would pass, and it would merely be a cloud upon the title: *Bank v. Schultz*, 2 O. 471, I Longsdorf's Notes, 138; *Norton v. Beaver*, 5 O. 178, I Longsdorf's Notes, 259; *Riddle v. Bryan*, 5 O. 48, I Longsdorf's Notes, 246; *Deutsch v. Stone*, 11 Dec. Rep. 436, 27 Bull. 20.

Equity may enjoin a sale of real estate even under a legal claim, until its legality is established, if by reason of the uncertainty the parties could not know if a title would pass and thus the value would be partly destroyed: *Burnet v. Cincinnati*, 3 O. 73, I Longsdorf's Notes, 150.

Where a husband and wife have secured the wife's separate property to her by an ante-nuptial contract, an injunction will lie at the suit of the wife to enjoin her husband's creditors from levying upon and selling her separate property on execution: *Scheferling v. Huffman*, 4 O. S. 241, II Longsdorf's Notes, 90; *McLeary v. Snider*, 2 Dec. Rep. 59, 1 W. L. M. 270.

One holding an equitable lien on real estate can not enjoin the sheriff from proceeding to sell the property upon a judgment and execution obtained against the owner of the fee, the judgment creditor not being made a party to such proceedings: *Schubert v. Taylor*, 8 O. N. P. 100, 10 O. D. (N.P.) 585.

The more appropriate remedy, where an execution has been erroneously issued, is by application to the court from which it issues to set it aside. Yet, where it has been sent to another county, and suit has been brought to enjoin its enforcement, to which suit the execution creditor appears and answers to the merits, making no objection to the jurisdiction or mode of proceeding, relief will be granted by injunction: *Miller v. Longacre*, 26 O. S. 291, III Longsdorf's Notes, 305.

An execution in the hands of a constable, against one of two partners, for his individual debt, may be levied upon partnership goods. After such levy is made a court of chancery may interfere by injunction, and restrain the sale thereunder: *Sutcliffe v. Dohrman*, 18 O. 181, I Longsdorf's Notes, 841; *Place v. Sweetzer*, 16 O. 142, I Longsdorf's Notes, 756.

Where a sheriff has in his possession goods and chattels by virtue of a levy under an execution issued upon a void judgment, and afterwards levies, subject to his former levy, an order of attachment in favor of other creditors of the judgment debtor, upon the same property, and proceeds or threatens to proceed, under the direction of the plaintiff in execution, to sell the same, for the purpose of applying the proceeds upon the execution, the plaintiffs in attachment may restrain the sale by injunction: *Wood v. Stanberry*, 21 O. S. 142, III Longsdorf's Notes, 15.

After re-delivery to defendants, under G. C., § 12059, plaintiff may file a supplemental petition asking for an injunction against a threatened sale of the property by the defendants, which would deprive plaintiff of the right to elect to take the goods if they got judgment: *Marshall Field & Co. v. Esch*, 18 O. C. C. 749, 4 O. C. D. 162.

Injunction lies to enjoin the removal and sale on execution of portions of the mortgaged property of a railroad company, when

the whole of the property mortgaged is admitted to be inadequate security for the payment of the mortgage debt: *Lane v. Baughman*, 17 O. S. 642, II Longsdorf's Notes, 858; *Coe v. Bank*, 10 O. S. 412, II Longsdorf's Notes, 447; *Winslow v. Iron and Nail Factory*, 12 Dec. Rep. 591, 1 D. 229; *Ludlow v. Hurd*, 12 Dec. Rep. 791, 1 D. 552.

Injunction will lie against a mortgagee who has reduced his debt to a judgment and now seeks to levy upon the mortgaged property and sell the same upon levy and execution: *Maloney v. Kinney*, 5 O. N. P. 197, 7 O. D. (N.P.) 420.

If a deed is taken by mistake to the agent instead of to the buyer, and left so to save the trouble of a new deed, it is not in fraud of creditors for the agent afterwards, when embarrassed, to convey to the principal without consideration, and injunction against levy and sale as a cloud will lie: *Tear v. Mathews*, W. 371, I Longsdorf's Notes, 30.

Execution on equipments of a railroad can not be enjoined by a mortgagee on the ground that the terms of the mortgage secured possession of the road to the company in order to earn money to pay the debt and interest, there being no default, where there is no averment that the property left would be insufficient to pay the debt, for it does not show injury to the security: *Coe v. Bank*, 10 O. S. 412, II Longsdorf's Notes, 447.

While a Kentucky railway and all its property was mortgaged to a trustee to secure bondholders, the driving-wheels were detached from a locomotive and sent to Cincinnati for repairs and were attached there, and the trustee seeks injunction against the attachment. It was held that, as the mortgagor the railway company could not remove its property from the trust, so its creditors can not, and the trustee is entitled to protection: *Winslow v. Iron and Nail Factory*, 12 Dec. Rep. 591, 1 D. 229.

Sale under an execution issued out of the court rendering the judgment can not be enjoined by another court for irregularity, or because it is for an excessive amount or because nothing remains unpaid, for the remedy in the other court on motion is ample: *Sample v. Ross*, 16 O. 419, I Longsdorf's Notes, 772.

A levy about to be made on chattels as the property of another may be enjoined by the owner: *Hillyer v. Richards*, 13 O. 135, I Longsdorf's Notes, 629.

An execution sale on a justice's judgment will be enjoined where the plaintiff should have proceeded by foreclosure instead of by personal judgment and execution. Equity may interfere with proceedings at law by a mortgagee: *Maloney v. Kinney*, 5 O. N. P. 197, 7 O. D. (N.P.) 420.

A debtor having got property on credit and sold it to H. S. & Co. at for less than its value in order to avoid an attachment about to be issued, confessed judgments and the constable got money on them, and also put collections in the hands of W to collect and cheat creditors. Injunction against the constable paying over on the confessed judgments will be sustained. But the remedy against H. S. & Co. is by creditor's bill after judgment: *Bromley v. Cohen*, 3 Dec. Rep. 296, 1 Gaz. 126.

The fact that an agreement is offered to the sheriff by the assignee that in consideration of the delivery of such goods to him to be sold, the lien of the judgment shall attach to the proceeds as to the original goods, and the proceeds be applied on the execution, and that such goods are of greater value than the amount due on the execution, and can be sold to better advantage by the assignee, is not sufficient for enjoining the judgment creditor and sheriff from selling the goods: *Mack v. Steinau*, 10 O. D. (N.P.) 701.

The sheriff is not a proper party to enjoin execution or sale. An injunction on the parties operates through them on all officers of the law: *Olin v. Hungerford*, 10 O. 268, I Longsdorf's Notes, 510; *Allen v. Medill*, 14 O. 445, I Longsdorf's Notes, 680.

A petition to enjoin an execution issued from another county on a fraudulent judgment should not make the sheriff a party. G. C., § 11264, does not apply; hence, if the judgment creditor resides in the latter county he can not be served on such petition by summons issued to his county: *Howard v. Levering*, 8 O. C. C. 614, 4 O. C. D. 236; *Adams v. Boynton*, 4 Dec. Rep. 348, 1 Clev. L. Rep. 352.

The sheriff is not a proper party to a suit to enjoin replevin, and ought to be dismissed: *Corbin v. Bouve*, 13 Dec. Rep. 537, 1 C. S. C. R. 259.

But if there is a fraudulent combination between the sheriff and the creditor, he may be made a party: *Olin v. Hungerford*, 10 O. 268, I Longsdorf's Notes, 510.

Where the sheriff, made special master to collect notes, promises the debtor to allow a set-off, and thus induces him to omit to plead it, the sheriff is a proper defendant to the injunction. The beneficiaries of the collection of the notes are not necessary parties: *Allen v. Medill*, 14 O. 445, I Longsdorf's Notes, 680.

When personal property held by a sheriff upon an execution in his hands, is taken from him by a writ of replevin, but is afterwards returned to him upon his executing an undertaking as provided in G. C., § 12059, and conditioned as therein required, it is the

duty of such sheriff to retain said property in his possession until the determination of the replevin suit. And where after such redelivery to him and before the determination of the replevin suit, he advertises and offers said property for sale under the execution in his hands, such sale by him may be restrained by injunction: *Uphaus v. Roof*, 68 O. S. 401, IV Longsdorf's Notes, 945. See also REPLEVIN.

G. TO RESTRAIN THE DISPOSITION OR REMOVAL OF PROPERTY.

Prior to the adoption of the civil code an injunction would not be granted, in aid of an action at law, to prevent a debtor from disposing of his property pending such action: *Bank v. Williams*, 2 Dec. Rep. 142, 1 W. L. M. 571.

Under the act of 1848 (46 v. 96) an injunction may be granted restraining the defendant in a suit at law, from any disposition of property in his possession: *Anonymous*, 1 Dec. Rep. 254, 5 W. L. J. 467.

In an action to recover specific personal property, injunction lies to prevent defendant's disposal of the property: *Atkins v. Veach*, 7 Dec. Rep. 176, 1 Bull. 234.

Where a husband separates from his wife without providing for her support, and conveys his property to his son to prevent her from obtaining alimony on a bill pending for that purpose, chancery will enjoin them from further charging the property, and appoint a receiver to secure the income to satisfy the alimony: *Questel v. Questel*, W. 492, I Longsdorf's Notes, 39.

The mortgagor is entitled to an injunction against a threatened replevin of the mortgaged property where the chattel mortgage was without consideration, and was procured by duress, and the debt is not yet due: *Totten v. Lawton*, 8 O. C. C. 377, 4 O. C. D. 518.

There is jurisdiction in a court of equity, to determine the rights of a rival board of trustees when an injunction against interference with the control of the property is sought: *Munsel v. Boyd*, 10 O. C. C. (N.S.) 121, 20 O. C. D. 182.

H. TO PROTECT EASEMENTS.

1. In General.

A court of equity has power to enforce the conditions in the grant of an easement, even after the way provided for in the easement is completed: *Pomeroy v. Salt Co.*, 37 O. S. 520, III Longsdorf's Notes, 933.

A court of equity will not enjoin a single trespass to an easement, unless it be shown

that the way so obstructed was the only mode of ingress and egress to and from complainant's premises: *Young v. Spangler*, 2 O. C. C. 540, 1 O. C. D. 636.

A lease by the state board of public works of ground on the water front of a canal reservoir for bathhouse and dock purposes does not include the right to build a pier eighty feet out into the reservoir, and where such a pier has been built the lessees can not by injunction prevent others from landing boats thereat: *Traction Co. v. Malinski*, 10 O. N. P. (N.S.) 374.

The raising of the grade of a public highway which is subject to overflow in times of flood, can not be enjoined by an adjacent property owner on the ground that the road was long ago improved to a definite and fixed grade and no steps have been taken by the county commissioners to appropriate the land which will be damaged thereby or to make compensation to the owner: *Hoshor v. Commissioners*, 14 O. C. C. (N.S.) 198, 22 O. C. D. 415 [affirmed, without opinion on the reasoning of the circuit court, *Hoshor v. Commissioners*, 84 O. S. 503].

The owner of realty which is injured by raising the grade of a public highway to a point above the high water mark, which improvement occupies part of his land and interferes materially with the natural flow of water from his land, has an adequate remedy at law. The injury is complete when the improvement is constructed and the measure of damages is the difference in the value of the land before the improvement was made and the value of the land after such improvement was made. Injunction can not therefore be granted to restrain the making of such an improvement: *Hoshor v. Commissioners*, 14 O. C. C. (N.S.) 198, 22 O. C. D. 415 [affirmed, without opinion on the reasoning of the circuit court, *Hoshor v. Commissioners*, 84 O. S. 503].

Where the placing of railway tracks across that part of such street so impressed with the easement will materially impair the easement, the construction thereof will be enjoined until compensation is made to the land owner: *Furnace Co. v. Railway*, 9 O. N. P. (N.S.) 426, 20 O. D. (N.P.) 188 [affirmed, without opinion, *Furnace Co. v. Railway*, 86 O. S. 354].

Restrictive covenants providing that lands shall be used for residence purposes only, create equitable easements which constitute private property, and under Article I, § 19, of the constitution, a railroad company purchasing such lots must first make compensation to the lot owners before it can use them for other than residence purposes, and until such compensation is made, the plaintiffs are entitled to an injunction to prevent

the violation of such restrictions: *Kuebler v. Railway*, 10 O. N. P. (N.S.) 385, 20 O. D. (N.P.) 525 [modified and affirmed, *Railway v. Duncan*, 84 O. S. 463].

Where a telephone line has been erected along a highway by virtue of an express agreement with the grantor of the present abutting owner, injunction will lie against destruction of the line years afterward by the present owner, because of failure of the company to accede to his demand for a large sum as compensation for the increased burden upon his land arising from the erection of the telephone line: *Telephone Co. v. Hughes*, 14 O. C. C. (N.S.) 468, 23 O. C. D. 406.

The estates represented by ownership of the surface and of underlying mineral rights are mutually dominant and servient, and in a conveyance of the surface there is an implied reservation of right of access to the estate below, and this right may be enforced by injunction: *Oil Co. v. Curtiss*, 14 O. C. C. (N.S.) 593 [affirmed, without opinion, *Curtiss v. Oil Co.*, 88 O. S. —].

A claim of a right-of-way by prescription over the lands of another will not be upheld where it appears that the way was enclosed by gates, and the owner of the land complained when the gates were left open and threatened to shut them up permanently if care was not taken to close them, and the alleged way was not a well defined track, but a number of tracks spread over a width of seventy feet. The use of such a way is by license or permission, and such use may be enjoined by the owner of the lands traversed: *Bounds v. White*, 9 O. N. P. (N.S.) 491, 21 O. D. (N.P.) 785.

Allegations of a right in plaintiff to a way of necessity, of long use of a particular way, of the refusal by the defendant owners of the adjoining property to permit a further use of that way or of any way, and that the denial of this right has cast a cloud upon the title of the plaintiff and is interfering with the sale of his land, constitute facts sufficient in law to form the basis of an action for injunction and other relief: *Wentzel v. Guard*, 8 O. L. R. 520.

Removal of obstructions over a private way may be compelled by mandatory injunction: *Harrison v. Pike*, 7 Dec. Rep. 603, 4 Bull. 156; *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500; 8 Dec. Rep. 35, 5 Bull. 270.

Owners of lands abutting upon that portion of a highway which it is proposed to vacate or change the course of, for the purpose of doing away with a crossing at grade, may enjoin such change where the injury which they will suffer thereby is different from or in excess of that which will

be suffered by the general public: *Grinnell v. Commissioners*, 6 O. C. C. (N.S.) 180, 17 O. C. D. 118. See also RAILROADS.

2. Extent of Abutting Owner's Easement.

A property owner on a street or alley a portion of which, other than the part on which he abuts, is vacated by the city, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access by other streets and alleys, although the distance he may have to travel in some directions may be greater than before the vacation. To entitle a party to any relief in such cases, the inconvenience he suffers must differ in kind from that of the general public, and not only in degree: *Manufacturing Co. v. Beatty*, 65 O. S. 264, IV Longsdorf's Notes, 885 [overruling *Kinnear v. Beatty*, 21 O. C. C. 384, 12 O. C. D. 68].

Injunction will not lie to restrain the laying of a spur track in a public street where the plaintiff's property is one hundred and sixty feet beyond the end of the track: *Herzog v. Railway Co.*, 6 O. C. C. (N.S.) 527, 15 O. C. D. 702 [affirmed, without opinion, *Railway v. Herzog*, 74 O. S. 440].

Side track, on which plaintiff's property does not abut will not be enjoined, where access to all property abutting on the entire street is not affected: *Herzog v. Railway*, 6 O. C. C. (N.S.) 527, 15 O. C. D. 702 [reversing, *Herzog v. Railway*, 2 O. N. P. (N.S.) 17, 14 O. D. (N.P.) 529; affirmed, without opinion, *Railway v. Herzog*, 74 O. S. 440].

An abutting property owner's easement in the street extends only to the center of the street, and not to the opposite property line: *Smedes v. Railroad Co.*, 16 O. D. (N.P.) 743, 4 O. L. R. 44, 1 Hosea, 10 [criticizing *Madden v. Railroad Co.*, 21 O. C. C. 73, 11 O. C. D. 571]; *Madden v. Railway*, 21 O. C. C. 73, 11 O. C. D. 571.

The use by the owner of an abutting lot of an excavation beneath the sidewalk rests upon license or permission, and does not vest in the lot owner such juristic right as will enable him to prevent the placing of such steam pipe in and through such excavation when authorized by the proper municipal authorities: *Stone v. Light Co.*, 9 O. N. P. (N.S.) 545, 20 O. D. (N.P.) 130.

3. What Acts May be Enjoined.

(a) Acts by Individuals.

Injunction lies to restrain the removal of a party wall: *Duhme v. Jones*, 8 Dec. Rep. 757, 9 Bull. 293.

Injunction lies to compel defendant to remove obstructions from a private way or alley: *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500; *Smith v. Pike*, 7 Dec. Rep. 603, 4 Bull. 156; *Harrison v. Craighead*, 8 Dec. Rep. 35, 5 Bull. 270.

Mandatory injunction lies to compel the removal of an encroachment on a private alley by one abutter's building: *Gold v. Franz*, 5 O. N. P. 205, 7 O. D. (N.P.) 334.

A property owner on a street or alley, a portion of which, other than the part on which he abuts is vacated by the city council, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property by other streets and alleys, although the distance he may have to travel in some direction may be greater than before vacation. To entitle a party to any relief in such cases, the inconvenience he suffers must differ in kind from that of the general public, and not only in degree: *Manufacturing Co. v. Beatty*, 65 O. S. 264, IV Longsdorf's Notes, 885 [reversing *Beatty v. Kinnear*, 21 O. C. C. 384, 12 O. C. D. 68]. See also STREETS.

(b) Acts by Corporations.

Where it appears that the acts of an electric lighting company in placing its poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, was done without the consent of an abutting lot owner, and that their maintenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance and an order for removal: *Callem v. Light Co.*, 66 O. S. 166, IV Longsdorf's Notes, 901.

But to entitle an abutting owner to a mandatory injunction to compel the removal of telephone poles and wires, the complainant must show some substantial injury, as, the obstruction of free ingress and egress from his building or premises, or an interference with his right to light and air: *Hays v. Telephone Co.*, 21 O. C. C. 480, 12 O. C. D. 167.

The erection of telegraph and telephone poles within the curb line is not an interference with an abutting owner's easement in the street, provided they do not interfere with abutter's light, air or access: *Tannion v. Telegraph Association*, 13 O. D. (N.P.) 252 [reversed, *Tannion v. Telegraph Association*, 1 O. N. P. (N.S.) 81, 13 O. D. (N.P.) 730].

The erection of telegraph and telephone poles and lines may be enjoined: *Smith v. Telegraph Co.*, 2 O. C. C. 259, 1 O. C. D.

475; *Mantell v. Telephone Co.*, 20 O. C. C. 345, 11 O. C. D. 274; *McLean v. Light Co.*, 8 Dec. Rep. 619, 9 Bull. 65.

A telephone pole with 160 wires having been erected in front of plaintiff's property, and to its substantial injury and without his consent, and there being no laches, he is entitled to a mandatory injunction for its removal regardless of the convenience or necessity of the defendant: *Mantell v. Telephone Co.*, 20 O. C. C. 345, 11 O. C. D. 274.

Contra, reasonable use of streets for poles, wires, etc., of telephone company is not a new burden for which an abutting property owner is entitled to compensation: *Auerbach v. Telephone Co.*, 7 O. N. P. 633; *sub nomine*, *Auerbach v. Telephone Co.*, 9 O. D. (N.P.) 389.

A telephone company has no right to erect its poles in the sidewalk or the curb line of a street without first obtaining the consent of the abutting property owner, or payment to him of the amount of damages which will be caused to his property by the erection of such poles and such abutting owner may enjoin the erection of such poles: *Tannion v. Telegraph Association*, 1 O. N. P. (N.S.) 81, 13 O. D. (N.P.) 730; *Tannion v. Telegraph Association*, 13 O. D. (N.P.) 252 [reversing *Tannion v. Telegraph Association*, 1 O. N. P. (N.S.) 81, 13 O. D. (N.P.) 730].

Injunction is the proper remedy for removal of telegraph and telephone lines from a highway: *Denver v. Telephone Co.*, 8 O. N. P. 666, 10 O. D. (N.P.) 273.

Where a property owner having graded his lot to conform with the established grade of the street, the municipality can not later, by a change of grade, interfere with his ingress and egress, or with his easement in the street, which is as much property as the land itself, and may be protected by injunction: *McGuire v. East Cleveland*, 1 O. C. C. (N.S.) 435, 15 O. C. D. 497.

The construction of a street railroad may be enjoined where it impairs access to the property of an abutting owner: *Burial Case Co. v. Railway*, 4 O. C. C. (N.S.) 365, 14 O. C. D. 107; *Railway v. Smith*, 41 Bull. 212.

Where a railway company under a permit to lay tracks in a street, is tearing up the street without having obtained the consent of an injured abutter, a mandatory injunction to restore the squares in front of him will be granted, but with a reasonable time to enable the railway to comply with the order: *Bending Co. v. Railway*, 2 O. N. P. 317, 3 O. D. (N.P.) 430.

Where the prosecuting attorney declines to take action, owners of abutting lands may petition for an injunction against the abolishing of a grade crossing in the manner

proposed: *Stoner v. Railway*, 9 O. N. P. (N. S.) 337, 20 O. D. (N.P.) 448.

The use of a public road for the purpose of carrying a sewer beyond the limits of a municipality to a suitable point for discharging its contents into a watercourse, can not be interfered with by an adjacent property owner, where the use of the sewer is restricted to surface or storm water, and its construction has been regularly authorized by the city council with the approval of the county commissioners and the state board of health. But if the sewer is used for sewage purposes, even in a slight degree, this would be a use in derogation of the rights of an abutting land owner whose property would be traversed by the stream into which the sewer empties; and unless the right has been acquired by appropriation, such use may be enjoined by a land owner thus situated without waiting until the threatened injury has resulted in a material damage: *Whitney v. Toledo*, 8 O. C. C. (N. S.) 577, 19 O. C. D. 74.

Natural gas pipes in streets are an additional burden and may be enjoined: *Webb v. Gas Co.*, 9 Dec. Rep. 662, 16 Bull. 121.

Mandatory injunction lies to compel the removal of a viaduct in a street when it obstructs light and air from complainant's property and compensation is not made therefor: *Lloyd Booth Co. v. Commissioners*, 12 O. C. D. 706.

An injunction will lie against the construction of a house by an adjoining property owner, when the enjoyment of his neighbor's property is substantially affected thereby as to view, light and air, although his neighbor may have submitted to encroachments upon portions of the street, remote from him and not affecting his enjoyment, in violation of the general restriction: *Brader v. Walther*, 5 O. N. P. (N.S.) 497, 18 O. D. (N.P.) 299.

An order of the township trustees vacating a road does not authorize the closing up or obstructing of the road against the objection of one who has acquired an easement therein, and in such a case, injunction will lie against the trustees and others threatening to obstruct or close up such road: *McQuigg v. Cullins*, 56 O. S. 649, IV Longsdorf's Notes, 700.

But supervisors of a public road can not have an injunction to prevent the obstructing of a public road: *Putnam v. Valentine*, 5 O. 187, I Longsdorf's Notes, 262.

An owner of land abutting upon a street has an easement in the street which is "as much property as the land itself," and if the construction of a proposed track by a railway company will materially interfere with this easement, an injunction will be

allowed to prevent such construction until the rights of the property owner have been obtained by proper appropriation, purchase or other proceedings whereby its property interest in this easement is to be acquired by the railway company: *Burial Case Co. v. Railway Co.*, 4 O. C. C. (N.S.) 365, 14 O. C. D. 107.

The laying of a track in the street within twenty-six feet of the entrance to a factory, where wagons are loaded and unloaded, constitutes such a material interference with the rights of the owner of the factory, and an injunction will lie upon his petition: *Burial Case Co. v. Railway Co.*, 4 O. C. C. (N.S.) 365, 14 O. C. D. 107.

A person owning property abutting upon a street in a municipal corporation is entitled to an injunction to restrain the construction of an electric road in such street, although he has a remedy at law under G. C., § 8764, to compel appropriation of his rights therein. The action above stated is properly brought against the electric railway company and not against the city, notwithstanding the latter has granted such company a franchise in such street: *Weber v. Railway Co.*, 13 O. D. (N.P.) 194. See also RAILROADS.

An additional burden is imposed upon the land owner by the laying of a switch in a highway, and where this is done without compensation being made therefor, or consent first obtained, a constitutional right of the land owner is violated and an injunction will lie: *Chambers v. Traction Co.*, 5 O. C. C. (N.S.) 298, 17 O. C. D. 193 [affirmed, without opinion, *Traction Co. v. Chambers*, 73 O. S. 348]. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

A property owner is entitled to an injunction against the threatened invasion of his property rights by an interurban railroad, and is not required to wait until the threatened injury is done, and then undergo the vexations and expense of a protracted litigation for damages: *Schaaf v. Railway Co.*, 66 O. S. 215, IV Longsdorf's Notes, 903.

The plaintiffs are entitled to an injunction to prevent the construction and operation of an interurban railroad or of an electric plant operated by it to supply heat and power to consumers when the same constitute additional burdens on the highway, until their compensation and damages shall be assessed in appropriation proceedings and paid or secured to be paid: *Schaaf v. Railway Co.*, 66 O. S. 215, IV Longsdorf's Notes, 903. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

Where a street, either by vacation or by obstruction of steam railroads or closing of the street in any other way is cut off near

enough to property abutting on such street, to materially affect its value, then the property owner has a right to be compensated before the street is so obstructed or closed, and he can prevent such obstruction or closing by injunction: *Madden v. Pennsylvania Co.*, 21 O. C. C. 73, 11 O. C. D. 571.

When a city council has, by ordinance, legally granted to one street railway company the right to construct its railway and lay its track on and over a particular part of a designated street within said city, and such company has duly accepted said grant and entered upon and taken possession of the right of way so specifically granted, a subsequent grant by said city council, or its successor in office, the board of control, of the same right of way, or a substantial part thereof, to another street railway company for like purpose will not of itself confer upon the second grantee the right to enter upon and take possession of the route or right of way so granted, where such entry and possession by it will materially and injuriously interfere with, interrupt and abridge the first grantee's use and enjoyment of the said right of way. And where such second grantee threatens, and is about to take possession of said route and right of way under and by virtue of its said grant, without the consent and against the will of said first grantee, and without having appropriated the right so to do, it will be restrained from so doing by injunction: *Traction Co. v. Traction Co.*, 69 O. S. 402, IV Longsdorf's Notes, 961. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

G. C., § 8763, does not authorize a city or village council to agree with a railroad company for the permanent and exclusive occupation of a public street with abutments to support an overhead crossing of the railroad; nor can such occupation be rightly gained by means of appropriation; and if the company so occupying the street refuses to restore it to its former condition of usefulness to the public, it may be compelled to do so by mandatory injunction, without a right to compensation for the expense of removal: *Railway Co. v. Elyria*, 69 O. S. 414, IV Longsdorf's Notes, 961 [affirming *Elyria v. Railway Co.*, 12 O. D. (N.P.) 609; *Elyria v. Railway Co.*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482]. See also RAILROADS.

Where one street railway condemned the right to run over tracks of another, and the tracks were in fact owned by other companies not made parties, but who ran no cars, but allowed the company in possession to use them, the officers and stockholders being the same, the companies not made party have no such real and abiding interest in the tracks as to enjoin their use by the condemning

company until it had also appropriated their interest: *Railway Co. v. Railway Co.*, 9 O. C. C. 664, 6 O. C. D. 733. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

Injunction will not lie to restrain the laying of a railway side track in a public street where it appears that complainant's property will not abut upon the track when completed, but will lie at a distance of fifty and one hundred and sixty feet respectively from the ends thereof, that the ingress and egress to and from all the property abutting on the entire street will not be affected thereby, that no damages different in kind or degree from that suffered by the general public will result to complainant, that the inlet and outlet to other streets will not be obstructed therefrom, and that the rails of the proposed track will be laid even with the surface so as to make no obstruction to vehicles making use of the street: *Herzog v. Railway Co.*, 6 O. C. C. (N.S.) 527, 15 O. C. D. 702 [reversing *Herzog v. Railway Co.*, 2 O. N. P. (N.S.) 17, 14 O. D. (N.P.) 529].

A steam railroad spur track built on a manufacturing street for the sole purpose of setting in and taking out cars for the convenience of shippers, and which is not used for general travel on the company's main line, is not such a material and substantial injury to an abutting property owner as will entitle him to an injunction against its maintenance and operation but is rather in the nature of a proper street use, where it further appears that the track as laid leaves a nine-foot space between the rail and curb, and that vehicles can at all times pass freely along the street; that the street, which was formerly a mere dirt road and at certain seasons muddy and impassable, has been planked and graveled by the railroad company from curb to curb in substantial compliance with the ordinance by virtue of which the track was laid; that the pulling in and out of cars occupies but a few minutes each day so far as the occupancy of the street in front of plaintiff's property is concerned, and at all other times he has the whole width and use thereof, and no special injury to him or his property is shown by reason thereof. Such a use of the street is not a diversion from the purpose of its acquisition. It was queried but not decided whether the use of such track for general purpose is *per se* a diversion: *Gunning v. Railway Co.*, 14 O. D. (N.P.) 660.

If a street railroad is not an additional burden on a lot owner on a country road, whether he owns to its line or its middle, but if it is so located as to appropriate a substantial right of a lot owner on a country road, injunction would be granted until com-

pensation is made; but if it is not clear that the right of access has been substantially invaded the party will be left to his action for damages: *Schaaff v. Railway Co.*, 16 O. C. C. 252, 8 O. C. D. 688.

A turnpike company seeking to enjoin a railroad from constructing over the pike a bridge as being not high enough, but on which much work has been done, the decree will, instead of compelling a higher bridge, require the railroad to pay the expense of lowering the pike if that would be much less costly: *Turnpike Co. v. Railroad Co.*, 15 O. C. C. 268, 8 O. C. D. 269. See also RAILROADS.

Where a grant permitted the laying of a spur-track across the land of the grantor, with the condition and limitation that the track can be used only for special specified business, injunction will lie to prevent the carrying of a greatly increased business over this track without compensation to the owner: *Collins v. Shipbuilding Co.*, 7 O. C. C. (N.S.) 350, 17 O. C. D. 802. See also RAILROADS.

4. *Abutting Owner's Right to use the Street.*

An injunction will not lie on the petition of a property owner against the connection of buildings on opposite sides of the street by a bridge twenty feet above the pavement, where the ingress and egress of the plaintiff is in no wise impaired, and the injury which he will sustain, if any, is not different in kind from that suffered by the public at large: *Offutt v. Packing Co.*, 11 O. C. C. (N.S.) 357, 21 O. C. D. 58.

But a municipality may compel by mandatory injunction, the removal from the sidewalk of so much of a building as encroaches thereon: *Columbus v. Philbrick*, 5 O. N. P. (N.S.) 449, 18 O. D. (N.P.) 145.

The projection of an electric sign ten feet from the front of a building over the sidewalk and at a height of fourteen feet above the sidewalk is not an unreasonable use of the street by an abutting owner, and can not be enjoined: *Reese v. Cleveland*, 5 O. N. P. (N.S.) 193, 18 O. D. (N.P.) 13.

Injunction will not lie at the suit of a gas company to restrain an abutting property owner from interfering with its use of the street, where no compensation has been paid to such owner for the use of the street: *Gas Co. v. Townsend*, 1 O. N. P. (N.S.) 289, 14 O. D. (N.P.) 5.

Injunction will not lie at the suit of a corporation to restrain an abutting owner from interfering with its use of the street where his property would be injured to an appreciable extent: *Gas Co. v. Townsend*, 1 O. N. P. (N.S.) 289, 14 O. D. (N.P.) 5.

Where the poles are erected at the curb of the street without the consent of the abutting owner, the company erecting such poles is not entitled to an injunction to restrain the interference with its poles by abutting owners: *Telegraph Co. v. Lead Co.*, 12 Bull. 104.

The placing of two railway tracks on a street from thirty-six to forty feet in width between the curbs does not amount to a destruction of or an exclusive occupancy of the street, and injunction against such use of the street will not lie upon the petition of abutting property owners, where an action by the railway company to condemn their rights in the street is pending: *Mining Co. v. Railway*, 14 O. C. C. (N.S.) 195, 23 O. C. D. 192 [affirmed, without opinion, *Mining Co. v. Railway*, 86 O. S. 343].

5. Water-rights.

Although from the operation of oil wells conducted with care on lands adjacent to a flowing stream, salt water in sufficient quantities to make the water of the stream unsuitable for the generation of steam may by gravity be carried into the stream, such operation will not be enjoined at the suit of a lower riparian owner who has been accustomed to use the waters of the stream for the generation of steam, if it appears that the plaintiff may obtain water suitable for the purpose from another convenient source, or that the water of the stream may at a reasonable and ascertainable expense be made suitable therefor: *Iron Company v. Hyland*, 74 O. S. 160, IV Longsdorf's Notes, 1008 [affirming *Iron Co. v. Hyland*, 2 O. L. R. 19].

Neither the county commissioners nor an individual have any right to collect water and by turning it into a ditch with an insufficient outlet cause an overflow of the lands of a lower owner, and an injunction will lie against a ditch improvement where the testimony warrants the conclusion that such a result will follow: *Love v. Simon*, 11 O. C. C. (N.S.) 359, 20 O. C. D. 639.

Mandatory injunction is the proper remedy to compel making of dam to restore water taken from subterranean stream destroyed by well: *Trout Club v. Sporting Club*, 8 O. C. C. 194, 8 O. C. D. 693.

A municipal corporation owning levees which would be injured by interference with the natural flow of the water is entitled to an injunction to prevent it: *Dayton v. Robert*, 8 O. C. C. 649, 4 O. C. D. 361.

For the violation of the rights of ownership of the mouth of a river tributary to a lake, the law affords no adequate remedy,

and injunction lies: *Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 545.

A water company will be enjoined from taking water from a stream, making merchandise of it, and selling it to citizens, manufacturers, and railroad companies, where such use of the stream would so diminish the volume of the water as to work an injury to riparian owners: *Manufacturing Co. v. Manufacturing Co.*, 12 O. C. D. 738.

Where a riparian owner of land is about to impede the natural flow of a stream by filling some portion of his land that is covered by the flowing waters of the stream even at flood stage, so as to injure land on the opposite bank of the stream, an injunction is the proper remedy to prevent the wrong: *Simonson v. Richardson*, 2 O. N. P. (N.S.) 170, 15 O. D. (N.P.) 33.

Where for the purpose of disposing of the surplus water flowing from an artesian well which has been sunk on a school lot, the township trustees enter into an agreement with the neighboring lot owner whereby he lays pipes for carrying the water to his own land and uses the water there, injunction will lie against turning off the water by subsequent trustees many years later: *Wells v. White*, 17 O. D. (N.P.) 351, 4 O. L. R. 356.

Where the level of the waters in a state canal, its reservoirs and feeders, has been raised, a court is without jurisdiction, in the absence of consent of the state, to compel the members of the board of public works by mandatory injunction to restore the original level of said waters in order to prevent overflowing the lands of the plaintiff: *Ley v. Kirtley*, 5 O. N. P. (N.S.) 529, 18 O. D. (N.P.) 280. See also CANALS.

Where land on the side of a township road is servient to the land on which the road is and therefore bound to take the natural flow of the water therefrom, the township authorities have no right to turn it on said land in any different way or in different places from the natural flow, and so far are enjoinable. And the owner has no right to insist on their making a ditch or embankment at the side of the road to prevent the natural flow upon his land: *Vermillion v. Myers*, 82 O. S. 414. See also ROADS.

The use of a sewer constructed along a public road beyond the limits of the municipality to a suitable point for discharging its contents into a watercourse, for sewage purposes even in a slight degree, would be in derogation of the rights of an abutting land owner whose property would be traversed by the stream; and unless the right has been acquired, such use may be enjoined by a land owner without waiting until material damage has resulted: *Whitney v. To-*

Iodo, 8 O. C. C. (N.S.) 577, 19 O. C. D. 74
See also **WATERS AND WATERCOURSES**.

I. AGAINST TRESPASS.

Repeated acts of trespass, which in time would ripen into a prescriptive right, will entitle the owner to an injunction: *Pollock v. Shipbuilding Co.*, 56 O. S. 655, IV Longsdorf's Notes, 700.

Numerous acts on land constituting trespass being committed, and their continuance threatened under a claim of right, where the injury from each is trifling as compared with the costs of actions at law, may be subject of injunction and relief in equity: *Lembeck v. Nye*, 47 O. S. 336, IV Longsdorf's Notes, 376.

The use of a right of way by mere license or permission may be enjoined by the owner of the land traversed: *Bounds v. White*, 9 O. N. P. (N.S.) 491, 21 O. D. (N.P.) 785.

Injunction lies for violation of rights of ownership as those of hunting and trapping: *Shooting Club v. Bodi*, 20 O. C. C. 637, 10 O. C. D. 544.

Injunction lies against the closing of a variety show even though the state has taken possession and closed up the plaintiff's place of business: *Ryan v. Jacob*, 8 Dec. Rep. 167, 6 Bull. 139.

Where a plaintiff is in possession of property which the defendant claims by adverse title, and the defendant is threatening acts which will tend to the destruction of the estate, the prayer of the plaintiff for an injunction will be granted until such time as the defendant establishes his title by an action at law: *Harding v. Perin*, 8 O. C. C. (N.S.) 533, 19 O. C. D. 79.

A court of equity has jurisdiction to determine the rights of rival officers, boards, etc., when interference with the control of property is sought to be enjoined: *Munsel v. Boyd*, 10 O. C. C. (N.S.) 121, 20 O. C. D. 182.

Public officers opening a road about to take more of plaintiff's land than is in his portion of the road and tear down his fences may be enjoined: *Trustees v. Shauck*, 33 Bull. 251 [without opinion in supreme court].

But when the sign space, to which several tenants have a right, is for their business purposes properly and reasonably used by some of them to the exclusion of the remainder, the former having the prior possession will not be enjoined from such exclusive use at the suit of the latter: *Lavo v. Haley*, 9 Dec. Rep. 785, 17 Bull. 242.

For the right of the owner of the coal underlying the lands of another to an injunction restraining the sinking of a nat-

ural gas well, see *Iron Co. v. Gill Bros.*, 9 Dec. Rep. 481, 14 Bull. 112.

(The injunction was allowed on the theory that gas is a dangerous substance and to refuse the injunction would be to permit a dangerous substance, over which he had no control, to be brought upon the complainant's premises without his consent.)

The act of the mayor and police in stationing an officer in or at the door of plaintiff's place of business (a loan office), with instructions to interrogate customers in view of ascertaining if the license law was being obeyed, thus injuring the business, is an illegal invasion of plaintiff's rights and a continuous trespass, and injunction lies: *Boring v. Hunt*, 12 O. N. P. (N.S.) 472, 22 O. D. (N.P.) 543.

An injunction will not be granted against a mere act of trespass; hence, on petition by the owner of a freehold estate in coal under the surface against the surface owner, who threatens to bore for natural gas through the coal mines, alleging that the gas was dangerous and explosive, will frighten off the miners and endanger the mines, and enhance the cost, an answer denying these perils is not demurrable, for it eliminates the element of irreparable damages and leaves the petition asking injunction against an ordinary trespass, as if defendant were about to sink a well for water: *Iron Works v. Gill*, 9 Dec. Rep. 481, 14 Bull. 112.

A mere trespass on land will not be enjoined, unless amounting to waste, tending to destroy the estate, and not well capable of pecuniary compensation: *Ross v. Page*, 6 O. 166, I Longsdorf's Notes, 330.

A mere trespass will not be enjoined, for compensation can be adequate at law. *Contra*, if from peculiar circumstances the injury would be irreparable, or complete redress can not be had at law: *Bank v. Debolt*, 1 O. S. 591, I Longsdorf's Notes, 1008.

Repetition of trespasses (as distraining for illegal taxes every six months), though it would lay ground for separate suits, is not such multiplicity of suits which induces equity to interfere: *McCoy v. Chillicothe*, 3 O. 370, I Longsdorf's Notes, 179.

Nor where the other trespasses would be upon other parties, and hence the suits would be by others: *Bank v. Debolt*, 1 O. S. 591, I Longsdorf's Notes, 1009.

A trespass upon several distinct tracts held by different titles, some by deeds and some by leases, may be enjoined in a single suit: *Oil Co. v. Railway*, 4 O. C. C. 210, 2 O. C. D. 505.

It is proper practice in actions founded on trespass to first establish the legal rights of the plaintiff, and when that has been done, in order to avoid a multiplicity of

suits to have the repeating of the trespasses enjoined, and this may be done in the same action, upon sufficient averments for that purpose: *Fisher v. Bourc*, 79 O. S. 248, IV Longsdorf's Notes, 1045. See also *ROADS*.

J. AGAINST NUISANCE.

1. In General.

Equity will not interfere by an injunction to enforce a penal ordinance, unless the act sought to be restrained is itself a nuisance: *Hamilton v. Light Co.*, 8 O. N. P. 319, 11 O. D. (N.P.) 513.

A court of chancery will interfere by way of injunction to prevent or abate a nuisance if the injury resulting therefrom is irreparable by the processes of the law or a multiplicity of suits would be required at law to obtain redress: *Iron Co. v. Hyland*, 74 O. S. 160, IV Longsdorf's Notes, 1008.

Where the business complained of as a nuisance is a permanent one, and the damages to the adjoining property can be ascertained with reasonable certainty and assessed *in solido* to the complaining party, such business will not be enjoined where an injunction would be ruinous to the business of the defendant and of small benefit to the plaintiff. Here it was sought to enjoin the manufacture of glazed brick, sewer-pipe, etc., because the attendant vapor caused plaintiff's property, consisting of a farm house and garden, to be less desirable: *Downs v. Clay Co.* 9 O. C. C. (N.S.) 345, 19 O. C. D. 328.

A public nuisance may be abated by an injunction, and no statute of limitations runs against it: *Horstman v. Railway Co.*, 1 O. N. P. (N.S.) 25, 13 O. D. (N.P.) 670; *Alexander v. Railroad*, 2 O. N. P. (N.S.) 59, 14 O. D. (N.P.) 102.

In an action to restrain the commission of a nuisance and to recover damages therefor, equity has jurisdiction and damages may be awarded, even if the court for some reason considers that it will not grant an injunction: *Paper Co. v. Cleveland*, 2 O. C. C. (N.S.) 111, 15 O. C. D. 380.

Surrounding circumstances are to be considered before enjoining a lawful business: *Neuhs v. Chemical Co.*, 5 O. N. P. 359, 8 O. D. (N.P.) 203.

The establishment of a manufacturing plant will not be enjoined unless it causes a substantial injury to the surrounding property, amounting to an actionable nuisance. The law does not regard every trifling injury or noise an actionable nuisance, although a strict legal right may be invaded: *Neuhs v. Chemical Co.*, 5 O. N. P. 359, 8 O. D. (N.P.) 203.

A foundry located in neighborhood fast becoming a manufacturing district, will not

be enjoined: *Batsche v. Kisinger-Ison Co.*, 15 O. D. (N.P.) 30.

The use of steam power and machinery will not be enjoined at the suit of an adjoining land owner, on the ground that it constitutes a nuisance, unless a clear case of nuisance and irreparable injury be made out: *Goodall v. Crofton*, 33 O. S. 271, III Longsdorf's Notes, 672.

An abutting lot-owner seeking to enjoin an obstruction or encroachment on the highway on his own behalf, and not as taxpayer or for the public, must rely on his private right, and can not enforce public rights; thus, an estoppel against him or his grantor will defeat the action, though it would not have estopped the public: *Mondle v. Plow Co.*, 6 O. N. P. 294, 9 O. D. (N.P.) 281. See also *NUISANCE*.

The owner of rented property can not recover more than nominal damages for nuisance caused by the water-closet of an adjoining proprietor keeping the walls damp and cellar filthy, if there is no loss of rent or damage to the building. But the verdict will not be reduced below nominal damages, so that the judgment may establish his right at law and thus entitle him to injunction: *Dieringer v. Wehrman*, 9 Dec. Rep. 355, 12 Bull. 222. See also *LANDLORD AND TENANT*.

Obstructions in public highways and injuries to the same constitute a nuisance, and the attorney general may invoke the equity powers of the court to have such obstructions removed or the injuries repaired: *Commissioners v. Pennsylvania Co.*, 1 O. C. C. (N.S.) 409, 14 O. C. D. 550. See also *ROADS*.

Where an injunction does not run against the operation of the whole of a manufacturing plant but against part thereof no grace can be allowed, and the party enjoined must immediately set about to remedy the defects: *Beiser v. Grever Co.*, 8 O. N. P. 398, 11 O. D. (N.P.) 444. See also *NUISANCE*.

2. Specific Nuisances.

Injunction may be allowed against a brick kiln where it is shown to be a nuisance: *Harley v. Brick Co.*, 26 Bull. 36.

A boxing match may be enjoined when it is unlawful or a public nuisance: *State, ex rel., v. Hobart*, 8 O. N. P. 246, 11 O. D. (N. P.) 166.

A building which encroaches upon the sidewalk may be treated as a nuisance, and jurisdiction obtained over a nonresident owner of the property by serving him by publication, notwithstanding a decree in injunction operates *in personam*: *Columbus v.*

Philbrick, 5 O. N. P. (N.S.) 449, 18 O. D. (N.P.) 145.

Under evidence which tends to show that an odor is offensive, that it reached and permeated the village council chamber some one thousand feet distant from the origin of the odor; that it reached the public school building where the village board of education was in session, was noticeable on the village streets and reached and permeated homes in the village, such odor can be held to be a public nuisance: *Brown v. St. Bernard*, 9 O. N. P. (N.S.) 296, 20 O. D. (N.P.) 422 [affirmed *Brown v. St. Bernard*, 13 O. C. C. (N.S.) 216, 22 O. C. D. 178].

Injunction will lie to abate a garbage plant where it is shown to be a public nuisance: *Munk v. Sanitary Works*, 7 O. N. P. 542, 5 O. D. (N.P.) 548.

Injunction will not lie to restrain publication of an ordinance establishing a stand for hackney coaches where it does not clearly appear from the ordinance and the facts alleged that the establishing of such a stand will result in a nuisance: *Columbus v. Barr*, 10 O. N. P. (N.S.) 379, 21 O. D. (N.P.) 165.

An injunction will lie against the operation of a drop hammer and the maintenance and operation of a blowpipe or smoke stack in a manufacturing plant, at the suit of a property owner in the vicinity whose house and household goods are injured thereby: *Bieser v. Grever Co.*, 8 O. N. P. 398, 11 O. D. (N.P.) 444.

The operation of heavy hammers and machinery in a manufacturing district can not be enjoined on the petition of the owner of residence property, where no substantial vibration of the building is produced, and the machinery is operated in a prudent manner, and the noise is no greater than is common in a populous manufacturing district: *Grothlich v. Klein and Cohn*, 13 O. C. C. (N.S.) 335, 22 O. C. D. 665.

The erection of a livery stable may be enjoined when it clearly appears that it will be detrimental to the health of the neighborhood: *Collins v. Cleveland*, 2 O. D. (N.P.) 380, 1 Clev. L. Reg. 20.

The operation in a residence neighborhood of a recently established manufacturing plant, which is entirely open, and is equipped with noisy machinery, and fills the air with fine marble and granite dust, a menace to health, and creating much discomfort, will be enjoined upon the petition of the owner and occupant of adjoining residence property: *Amlung v. Lang*, 22 O. D. (N.P.) 61, 8 O. L. R. 286.

The entire obstruction of a navigable river, where it is used by the public, is a public nuisance, and where such nuisance works a private injury, the party injured may re-

strain its continuance by injunction: *Hickok v. Hine*, 23 O. S. 523, III Longsdorf's Notes, 138.

Where a municipal corporation in the maintenance of its waterworks erects a dam, and in so doing, obstructs the flow of the water of the stream to the substantial hurt of the other riparian owners, or to the injury of the watercourse itself, such dam or obstruction is a nuisance *per se*, and will in every instance be abated by the mandatory order of the court, unless equitable estoppel has arisen: *Fox v. Fostoria*, 14 O. C. C. 471, 8 O. C. D. 39 [reversed on other grounds, *Fostoria v. Fox*, 60 O. S. 340, IV Longsdorf's Notes, 787].

The drilling and operating of an oil well on a city lot, in close proximity to the dwelling house on an adjoining lot, is a continuing nuisance and may be enjoined: *Cline v. Kirkbride*, 22 O. C. C. 527, 12 O. C. D. 517.

Supports for an overhead trestle placed in the middle of a street or in the sidewalks by a railroad company under an invalid ordinance or permit granted by council or other municipal board, is a public nuisance, and may be abated or its construction enjoined in a suit by a taxpayer, where the city solicitor has refused to file such suit: *Alexander v. Cincinnati*, 2 O. N. P. (N.S.) 59, 14 O. D. (N.P.) 102.

Injunction will lie to compel the owner of a privy vault to put it in such condition that it will cease to be a private nuisance: *Monroe v. Koring*, 12 O. D. (N.P.) 561.

The erection of a "pesthouse" or additional buildings to a "pesthouse" already established, near a public highway or a school house, will be enjoined on the ground of public nuisance: *Trustees v. Youngstown*, 6 O. C. C. (N.S.) 498, 15 O. C. D. 518.

Such specific acts as the throwing of refuse from the table and kitchen of a "pest house" at such points in the open as to be accessible to the dogs and cats of the neighborhood, and the permitting of nurses and convalescents to walk upon the highway opposite a public school house may be restrained as a public nuisance: *Trustees v. Youngstown*, 6 O. C. C. (N.S.) 498, 15 O. C. D. 518.

The location of a "pesthouse" does not create a nuisance *per se*, and the site may be selected outside the corporate limits, without first obtaining the consent of the authorities of the township: *Lorain v. Rolling*, 3 O. C. C. (N.S.) 660, 14 O. C. D. 82.

A roller coaster erected in a residence neighborhood may become a nuisance and its operation may be enjoined: *Schlueter v. Billingheimer*, 19 Dec. Rep. 513, 14 Bull. 224.

Where a saloon is located fifty feet from an existing schoolhouse and is shown to be

kept in a disorderly manner, it may be abated as a nuisance: *Board of Education v. Saloon*, 7 O. N. P. 289, 5 O. D. (N.P.) 578.

An injunction may be allowed against nuisance by sewage: *Cilly v. Cincinnati*, 7 Dec. Rep. 344, 2 Bull. 135.

Where defendant collects the surface water on his ground into a sewer made by him without an outlet and from thence it finds its way through his grounds and those of another, and thence upon plaintiff, an injunction lies. Such other person need not be joined, for if a joint tortfeasor at all, action lies against each: *Hunter v. Railroad Co.*, 7 O. N. P. 202, 1 O. D. (N.P.) 223.

A slaughter house is not a nuisance *per se*, but may become a *prima facie* nuisance, and the construction and operation of such a plant, even where conducted in a manner recognized as sanitary, will be enjoined where located within two hundred feet of a dwelling house and within fifty feet of the barns of one engaged in raising fine stock, but not as to barns so far away that no injury is likely to accrue therefrom: *Steiner v. Hennon*, 5 O. N. P. (N.S.) 314, 17 O. D. (N.P.) 585.

A steam railroad unlawfully in the streets is a public nuisance, and may be enjoined by one who is specially damaged thereby: *Railroad Co. v. Railway Co.*, 3 O. N. P. (N.S.) 109, 16 O. D. (N.P.) 777.

A mandatory interlocutory injunction to remove a nuisance will not be granted unless the injury is irreparable. An unauthorized railroad track across a street at grade is not an irreparable injury. But trains on such tracks may be restrained, on application of the city, until trial, being for the time an exclusive damage not ascertainable in money, and thus in a sense irreparable: *Railway v. Cincinnati*, 8 Dec. Rep. 554, 8 Bull. 334.

Where a railroad crossing is so constructed as to cause the drains and gutters to fill up and turn surface water into the middle of the street, where gullies have been formed in front of plaintiff's property materially interfering with access thereto, a continuing nuisance is created for which there is no adequate remedy at law, and as to which an injunction will lie: *Hall v. Railway Co.*, 11 O. C. C. (N.S.) 97, 20 O. C. D. 718.

Where the mode of construction of railroad tracks across a street has been such as to cause the drains and gutters to fill up and turn the surface water into the middle of the street, where gullies have formed in front of plaintiff's property, materially interfering with access thereto, a continuing nuisance is created, for which there is no adequate remedy at law, and as to which an injunction will lie: *Hall v. Railway Co.*,

11 O. C. C. (N.S.) 97, 20 O. C. D. 718 [modified *Hall v. Railway Co.*, 85 O. S. 148]. See also RAILROADS.

One who purchases land adjoining the cemetery of a religious society, and builds a house 160 feet from the nearest lot therein, and makes other improvements, is not entitled to an injunction restraining the society from using for cemetery purposes lands purchased by them bordering on the established cemetery grounds, where the part to be so used is more than 100 yards from the plaintiff's dwelling, although the nearest boundary line is less than 100 yards from his dwelling: *Morlock v. Horstman*, 10 O. C. C. (N.S.) 599, 12 O. C. D. 778 [affirmed, without opinion, *Morlock v. Horstman*, 60 O. S. 629]. See also CEMETERIES.

Where a factory is located in a residence neighborhood, after notice of strong objection thereto and efforts to prevent such location, and it is so operated as to give rise by the pounding and riveting of iron to continuous noises which interfere with conversation or the use of the telephone in the neighborhood and to produce actual physical discomfort to persons of ordinary sensibilities, and the evidence shows that by the use of improved machinery and modern methods much of the noise could be obviated, injunction will lie upon petition of property owners thus annoyed or injured for an abatement of the noise, notwithstanding a nearby railroad upon which many trains are operated contributes to the disquiet of the neighborhood: *Gau v. Ley*, 15 O. N. P. (N.S.) 1.

K. AGAINST APPROPRIATION PROCEEDINGS.

Where the law does not authorize the county commissioners to compensate those who may be injured by the appropriation of their lands to a public purpose, without their consent, an attempt to so appropriate such property will be stayed by injunction: *McArthur v. Kelly*, 5 O. 139, I Longsdorf's Notes, 254; *Anderson v. Commissioners*, 12 O. S. 635, II Longsdorf's Notes, 591.

Relief in equity, by restraining the appropriation of private property for a public road, will not be granted on the ground that compensation therefor has not been paid to the owner in money, in a case where the owner having actual notice of the proceedings in which the property is sought to be taken and of the time and place of the view, neglected to present his application for compensation, in writing, to the viewers, and where it is not shown that the default was occasioned by inevitable casualty, or by other circumstances against which reasonable precaution could not have provided: *Rock-*

ner v. Warner, 22 O. S. 275, III Longsdorf's Notes, 73.

The power to change or alter the course of a highway, and to vacate a portion thereof for the purpose of doing away with a grade crossing, does not permit the commissioners to also change the course and vacate a portion of an adjacent highway intersected by the railway by a crossing not at grade and the abutting land owners on the latter highway may enjoin such change where the injury they will suffer thereby is different from or in excess of that which will be suffered by the general public: *Grinnell v. Commissioners*, 6 O. C. C. (N.S.) 180, 17 O. C. D. 118.

The owner of improved real estate may restrain county commissioners from changing grade for the purpose of making an approach to a county bridge, until he has been first compensated: *Gawn v. Wilson*, 7 O. N. P. 33, 9 O. D. (N.P.) 683.

An unlawful appropriation of land for road purposes may be prevented by injunction, but the building of the proposed road can not be enjoined as a whole unless it is necessary to go to that extent in order to give the plaintiff the relief to which he is entitled: *Strahlem v. Commissioners*, 1 O. N. P. (N.S.) 249, 14 O. D. (N.P.) 85.

Where a city proceeds to condemn lands for park purposes it may enjoin an owner from cutting down trees, and such owner can not by a cross-petition enjoin the condemnation suit on any ground which might be set up as a defense thereto: *Put-in-Bay v. Webb*, 18 O. C. C. 780, 7 O. C. D. 478.

Injunction will not lie to prevent the prosecution of appropriation proceedings on the ground that such appropriation will be an abuse of corporate power or destruction of the public use to which the land is already devoted: *Railroad v. Railroad*, 72 O. S. 368, IV Longsdorf's Notes, 991.

Where a municipal corporation exercises the power to appropriate for the purpose of opening or extending streets or alleys across railway tracks and lands held or owned by a railway company, under R. S., § 2233 (repealed, 96 v. 96, § 231), and cognate sections, and is about to file in the probate or common pleas court, an application for the assessment of compensation to the holder or owner of such railway property, the company may resort to a court of equity by filing a petition against the municipality, alleging sufficient facts to show that such extension of the streets or alleys will unnecessarily interfere with reasonable use of said tracks and other property to be affected, and the court may upon such petition, restrain further proceedings for the assessment of compensation until the claim of the company

may be judicially determined: *Railway Co. v. Greenville*, 69 O. S. 487, IV Longsdorf's Notes, 963.

It was queried but not decided whether the common pleas court has jurisdiction in equity to enjoin a proceeding by a city in the probate court to appropriate land for a street, on the ground that the city did something in its council proceedings which is in contravention of law and can not be reached by the probate court: *Railway Co. v. Akron*, 13 O. D. (N.P.) 411 [affirmed, *Railway v. Akron*, 1 O. C. C. (N.S.) 174, 15 O. C. D. 759].

Proceeding in the probate court to fix compensation for the extension of a street over a railroad may be enjoined until there has been a determination of whether such extension will unnecessarily interfere with the use of the company's tracks and other property: *Railway v. Akron*, 6 O. N. P. (N.S.) 81, 18 O. D. (N.P.) 231.

Whether, when property exempt from appropriation is sought to be condemned, injunction against the proceedings is the proper remedy: *Railroad v. Ironton*, 19 O. S. 299, II Longsdorf's Notes, 948.

Land taken for one public use is not exempt from being taken for another public use if both uses may co-exist, but not if the latter will destroy the former, unless such power is expressly or necessarily given: *Railroad Co. v. Dayton*, 23 O. S. 510, III Longsdorf's Notes, 136.

In a proceeding by the council of a municipality to appropriate property for the purpose of extending a street, it is necessary to pass the preliminary resolution and give notice to the owners as required by R. S., § 1536-105, but the probate court before which application is made to assess compensation has no jurisdiction to determine whether or not the preliminary resolution so required was passed, and the notice given; the only remedy of the land owners in such case is an action to restrain the proceeding to assess compensation and taking possession of the property: *Railroad Co. v. Youngstown*, 5 O. C. C. (N.S.) 332, 16 O. C. D. 679.

An ordinance of a municipal corporation appropriating private property for the building of a dike is an ordinance for the expenditure of money, and is void if no certificate has been previously filed and recorded by the proper officer as required by G. C., § 3806, and an injunction will be granted restraining the municipality from proceeding in the probate court to assess compensation to the land-owner for the land appropriated: *Hurst v. Belle Valley*, 11 O. C. C. (N.S.) 235, 20 O. C. D. 563.

Where the property taken is the merest legal figment and without real substance, the

owner is not entitled to an injunction because of § 19, Art. I, of the constitution of 1851, as a matter of right, when the general equities of the case do not commend it to the chancellor's conscience: *Railway Co. v. Transportation Co.*, 1 O. C. C. (N.S.) 117, 15 O. C. D. 146. See also EMINENT DOMAIN.

L. AGAINST ASSESSMENTS.

1. In General.

The court will weigh the respective inconveniences of the parties and where an injunction will impede a great public improvement and cause inconvenience to the public at large, it will be refused: *Fogarty v. Cincinnati*, 7 O. N. P. 100, 9 O. D. (N.P.) 753.

An injunction is prematurely brought when no steps have been taken to make the assessment: *Lutman v. Railway Co.*, 56 O. S. 433, IV Longsdorf's Notes, 694.

Property owners are not required to wait until the assessment is actually levied, to sue to be relieved from it: *Potter v. Norwood*, 21 O. C. C. 461, 12 O. C. D. 146.

Abutting property owners may enjoin the levy of an illegal assessment and they are not required to request the village solicitor to bring suit before bringing such private action: *Mills v. Norwood*, 6 O. C. C. 305, 3 O. C. D. 465.

Where there is an entire failure to give the notice required by law, and the owner has no notice or knowledge of the making of the improvement until after it is wholly completed, an assessment upon his abutting property to pay for such improvement will be perpetually enjoined: *Joyce v. Barron*, 67 O. S. 264, IV Longsdorf's Notes, 930.

An injunction against collection of an assessment does not lie because similar legislation was declared invalid long afterwards: *Shoemaker v. Cincinnati*, 68 O. S. 603, IV Longsdorf's Notes, 949.

A bill in chancery to obtain a perpetual injunction against collecting a tax assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, can not be sustained, even if the law authorizing the tax is unconstitutional: *McCoy v. Chillicothe*, 3 O. 371, I Longsdorf's Notes, 179.

A board of equalization will not be enjoined from making an addition or increase in the personal property of plaintiff over and above the return as made, on the ground that such board is intending to make an excessive, collusive or fraudulent assessment: *Railway Co. v. Board of Equalization*, 8 O. N. P. 487, *sub nomine*, *Railway Co. v. Vickery*, 11 O. D. (N.P.) 629.

Where the complaining owner alleges that the assessment upon his land is grossly in excess of the benefits conferred, injunction will lie notwithstanding it is directed against the action of a judicial board, for in such a case a court of equity may do justice even though no error is found in the proceedings: *Stemen v. Hizey*, 11 O. C. C. (N.S.) 347, 22 O. C. D. 640 [affirming *Stemen v. Hizey*, 7 O. N. P. (N.S.) 601, 19 O. D. (N.P.) 155].

While a county auditor has power to fix the valuation of any property which has been omitted from the tax duplicate, yet if property has been correctly valued on the tax duplicate, but under a wrong description as to the amount of frontage, and the auditor attempts to correct the duplicate by adding to the frontage and increasing the valuation accordingly, a court of equity will enjoin the increase in the valuation: *Deshler v. Sims*, 2 O. N. P. (N.S.) 385, 14 O. D. (N.P.) 532.

An action to recover damages for the wrongful appropriation of real estate, and also to recover a wrongful assessment, may be joined with an action to restrain further assessments: *Murphy v. Cincinnati*, 8 O. N. P. 106, 10 O. D. (N.P.) 541.

An injunction restraining the certification of assessments to the county auditor, under G. C., § 3906, operates to suspend the power to certify only for the time the injunction is in force: *Bell v. Cincinnati*, 7 O. N. P. (N.S.) 393, 53 Bull. 415.

Where the council of a village determines that an improvement within its power to make is necessary, this decision in the absence of fraud is final, and the improvement will not be enjoined on the ground that it is unnecessary, unreasonable, unjust, and arbitrary: *Sparks v. Sabina*, 10 O. N. P. (N.S.) 138, 20 O. D. (N.P.) 333.

A corner lot being assessed for a lengthwise improvement, without deduction for lack of depth, the illegal part will be enjoined only on condition the valid part, if ascertainable, be paid: *Ehni v. Columbus*, 3 O. C. C. 493, 2 O. C. D. 283; *Baker v. Schott*, 10 O. C. C. 81, 6 O. C. D. 738. See also ASSESSMENTS.

Division of costs is not an abuse of discretion, where an amended petition to enjoin an assessment departs from the original, and the case is decided against the plaintiff, though the defects in the assessment were cured by statute after the beginning of the suit: *Reed v. Cincinnati*, 8 O. C. C. 393, 6 O. C. D. 588. See also COSTS.

One seeking to enjoin an assessment levied by a city council on the ground that a statutory requirement has been omitted, has the burden of establishing such fact by evidence, and it is not incumbent upon the city to show affirmatively its compliance with the

statute: *Close v. Parker*, 11 O. C. C. (N.S.) 85, 20 O. C. D. 384 [affirmed, without opinion, *Close v. Parker*, 79 O. S. 444].

2. Street and Road Assessments.

An injunction may be allowed to restrain a sale of real estate for a city assessment to improve a street upon the ground that the proceeding is illegal and void, but nevertheless under legal color, and would cast a cloud upon the title: *Burnet v. Cincinnati*, 3 O. 73, I Longsdorf's Notes, 150; *Culbertson v. Cincinnati*, 16 O. 574, I Longsdorf's Notes, 786; *Jonas v. Cincinnati*, 18 O. 318, I Longsdorf's Notes, 849; *Stephan v. Daniels*, 27 O. S. 527, III Longsdorf's Notes, 372.

Where an assessment for a street improvement, whether payable in installments or not, is larger than allowed by law, and a sufficient sum has been paid, though voluntarily, to equal or exceed the amount which could be lawfully assessed, the collection of the remainder of such assessment may be enjoined. In such case the action is not to recover payments already made, but to prevent the collection of unpaid illegal installments: *Cincinnati v. James*, 55 O. S. 180, IV Longsdorf's Notes, 657.

The collection of an assessment made to pay the expense of a street improvement will not be enjoined by reason of irregularities in the proceedings where, under the municipal code, the amount of such assessment is, notwithstanding such irregularities and defects, properly chargeable against the property assessed: *Steele v. Oriatt*, 24 O. S. 248, III Longsdorf's Notes, 173.

A property owner may enjoin an illegal assessment for street improvement and he is not obliged to wait until the assessment is actually levied before bringing action to be relieved from it: *Potter v. Norwood*, 21 O. C. C. 461, 12 O. C. D. 146.

Where an assessment is laid wholly on one side of a street, instead of on both sides, injunction will be granted only on condition the complainants pay the half justly chargeable to them; or, at the city's option, will be enjoined without prejudice to a right to reassess: *Huntington v. Cincinnati*, 2 O. N. P. 35, 3 O. D. (N.P.) 126.

Where an assessment according to benefits for a street improvement has been in all respects duly and regularly made, and all proceedings are complete, and no complaint is made by the property owners until an action is commenced to enjoin the collection of such assessment on the ground that it exceeds the benefits, the court will not grant such relief, in the absence of fraud or acts tantamount to fraud, or the assessment is so excessive as to clearly exceed the benefits

conferred: *Price v. Toledo*, 4 O. C. C. (N.S.) 57, 15 O. C. D. 617.

An illegal assessment for the opening of a county road may be enjoined: *Southard v. Stephens*, 27 O. S. 649, III Longsdorf's Notes, 381.

In cases arising under the road improvement statutes, where no remedy is named, and the jurisdiction of the board of county commissioners is made the question, proceedings in equity to inquire into the jurisdictional facts, and for injunction, is a proper remedy: *Hays v. Jones*, 27 O. S. 218, III Longsdorf's Notes, 350.

An injunction would not lie under a former statute authorizing county commissioners to construct roads, where it appeared lands were benefited, and ought to have been assessed and the assessment was equitable and just: *Burgett v. Norris*, 25 O. S. 308, III Longsdorf's Notes, 232.

An injunction will not lie to restrain the collection of assessments from an abutting owner for a sidewalk and the paving of the street constituting the approach to a bridge constructed by county commissioners within a municipality, notwithstanding the approach is at such a grade as to render access thereto impracticable from the property which it is proposed to assess: *Slusser v. Sidney*, 11 O. N. P. (N.S.) 297.

Actions brought by the proper parties against a municipality to enjoin the collection of a street improvement assessment, where submitted on the issues and decided against the plaintiffs by the upholding of the assessment, amount to a conclusive adjudication of the validity of the assessment, in an action brought by the city against other parties to enforce the collection of assessments against other property for said improvement: *Columbus v. Schneider*, 14 O. C. C. (N.S.) 312 [affirmed, without opinion, *Schneider v. Columbus*, 54 O. S. 617].

An abutting property owner, who petitioned for improvement of the street and that the improvement be made in a certain manner, can not thereafter enjoin collection of the assessment on the ground that the improvement was made in an improper and negligent manner, where it was made in the way designated in the petition: *Breuer v. Gibson*, 14 O. C. C. (N.S.) 48, 22 O. C. D. 492 [affirmed, without opinion, *Breuer v. Cincinnati*, 77 O. S. 602].

A taxpayer's suit to enjoin executing an unconstitutional local road act is too late after he has paid in all taxes assessed or to be assessed for the purpose without objection: *State, ex rel., v. Bader*, 56 O. S. 718, IV Longsdorf's Notes, 701 [affirming *State, ex rel., v. Commissioners*, 13 O. C. C. 15, 7 O. C. D. 11].

A corner lot being assessed for a lengthwise improvement, without deduction for lack of depth, the illegal part will be enjoined only on condition the valid part, if ascertainable, be paid: *Ehni v. Columbus*, 3 O. C. C. 493, 2 O. C. D. 283; *Baker v. Schott*, 10 O. C. C. 81, 6 O. C. D. 738.

Street paving assessments will not be enjoined as excessive and inequitable unless so established by a preponderance of proof: *Prentice v. Toledo*, 11 O. C. C. (N.S.) 299, 20 O. C. D. 568. See also ASSESSMENTS.

3. Ditch and Sewer Assessments.

Under the act of March 24, 1864 (61 v. 57), "supplementary to the act to provide for the locating, establishing, and constructing ditches, drains, and watercourses," it was held that a court ought not by reason of such defects and errors to perpetually enjoin the collection of an assessment to pay for the making of a ditch, but ought to set aside the proceedings and orders of the commissioners and leave the parties to pursue the remedies provided in the said act: *Miller v. Graham*, 17 O. S. 1, II Longsdorf's Notes, 809; *Peck v. Watros*, 30 O. S. 590, III Longsdorf's Notes, 546.

If the trustees find that the notice to the parties interested "was duly and legally given," the fact, that the facts upon which such finding was made do not appear in the record, is no ground for enjoining the construction of the ditch: *Keys v. Williamson*, 31 O. S. 561, III Longsdorf's Notes, 605.

Where the assessment for a township ditch is in excess of the benefits conferred, its collection may be enjoined, notwithstanding the trustees had jurisdiction to order the improvement and all the proceedings were regular: *Stemen v. Hizey*, 7 O. N. P. (N.S.) 601, 19 O. D. (N.P.) 155.

A municipal riparian owner is not estopped from exercising its right and power to prevent the pollution of a natural watercourse, simply because it has been guilty of the same offence by emptying its sewage into the stream. Hence, the collection by a municipality of an assessment, to pay the cost of constructing a sewer to carry off sewage which otherwise would be drained into the stream, can not be enjoined merely because the municipality has also emptied its sewage into the stream: *Hildebrand v. Toledo*, 6 O. C. C. (N.S.) 450, 17 O. C. D. 427.

Where high rolling uplands not needing drainage are assessed for a ditch, injunction against the assessment will not lie, for the party had an adequate remedy at law by error or appeal from the county commis-

sioners' order establishing the ditch, for no want of power or jurisdiction is averred: *Moody v. George*, 55 O. S. 657, 37 Bull. 189 [without opinion in the supreme court]. See also DITCHES.

Where the trustees have jurisdiction to order the improvement and all the proceedings are regular, the collection of an assessment for a township ditch in excess of the benefits conferred may be enjoined; in such a case an exception on the journal of the trustees and the prosecution of a petition in error does not afford an adequate remedy at law. *Stemen v. Hizey*, 7 O. N. P. (N.S.) 601, 19 O. D. (N.P.) 155 [affirmed, *Stemen v. Hizey*, 11 O. C. C. (N.S.) 347, 22 O. C. D. 640]. See also DITCHES.

Adjournment of a joint board of county commissioners without fixing a day or place for the next meeting, after voting down a motion to approve the engineer's report concerning a joint county ditch, is an adjournment *sine die*, and no presumption of knowledge of any proceedings of the joint board after such adjournment is raised by an entry on the record of a later meeting, reciting that it was held "per agreement," where such later meeting was in fact held without notice; and in the absence of a showing that interested owners had knowledge that such a meeting was to be held, injunction will lie to prevent the carrying out of the improvement; but if the joint board fixes a time and place for a new hearing and gives notice thereof to interested parties, proceedings relating to the ditch may be continued and completed as from the adjourned meeting: *Anderson v. Miller*, 13 O. N. P. (N.S.) 42, 22 O. D. (N.P.) 166.

Allegations by a railway company that its right-of-way has ample and sufficient drainage and the construction of a county ditch would be of no benefit to the company, are good against demurrer in an action to enjoin the levying of an assessment against the company's right-of-way for the construction of such a ditch: *Railway v. County Commissioners*, 15 O. C. C. (N.S.) 236.

An injunction will lie against a ditch improvement where the testimony warrants the conclusion that the water collected will overflow the lands of a lower owner, because such ditch is without a sufficient outlet: *Love v. Simon*, 11 O. C. C. (N.S.) 359, 20 O. C. D. 639. See also DITCHES.

M. AGAINST TAXATION.

Where a board of equalization adds to the return of a taxpayer an item of property not taxable, and directs the county auditor to carry the amount so added on the duplicate, and assess against it the rate

of taxation fixed for state, county, and city purposes, an injunction will lie to enjoin the auditor from so doing: *Jones v. Davis*, 35 O. S. 474, III Longsdorf's Notes, 799.

The collection of a tax can not be enjoined for an error in the assessment: *McCoy v. Chillicothe*, 3 O. 370, I Longsdorf's Notes, 179; *Mills v. Board of Equalization*, 13 Dec. Rep. 724, 1 C. S. C. R. 566.

The collection of further taxes under an unconstitutional law may be enjoined: *State, ex rel., v. Gibson*, 8 O. N. P. 367, 11 O. D. (N.P.) 90.

Injunction will not lie to prevent execution of an unconstitutional act when the taxpayer has voluntarily paid all taxes assessed: *State v. Bader*, 56 O. S. 718, IV Longsdorf's Notes, 701.

A petition to enjoin the collection of a tax upon an addition made to a tax valuation by board of equalization, which alleges that the action of the board of equalization in making the addition to the tax valuation was arbitrary, is good on demurrer: *Harvesting Machine Co. v. Sims*, 14 O. D. (N.P.) 15.

Lessee of land from the Ohio University may enjoin for himself and others, levy of taxes: *Matheny v. Golden*, 5 O. S. 361, II Longsdorf's Notes, 192.

Injunction will lie against levy by a county treasurer, for unpaid Dow tax, on a boat belonging to a citizen of another state, which has been brought without his consent into the waters of this state, and intoxicating liquors sold therefrom within the limits of a county which has been voted "dry" under the Rose county local option law: *Haas v. Remick*, 13 O. C. C. (N.S.) 1, 21 O. C. D. 591.

Payment of taxes after dissolution will not prevent prosecution of error to test validity: *Railway v. Martin*, 53 O. S. 386, IV Longsdorf's Notes, 606.

If G. C., § 12075, which allows an injunction against the levy and collection of taxes does not apply because it is superseded by a later statute (G. C., § 1465-31) the taxpayer has undoubtedly the right to recover an illegal tax paid under threat of distress: *Railway v. Tax Commission*, 12 O. N. P. (N.S.) 93.

G. C., § 1465-31, is valid and constitutional; and being a later statute than G. C., § 12075, it deprives the courts of the right to issue injunctions against the levy of taxes as far as the state tax commission and the officers named in such section are concerned: *Railway v. Tax Commission*, 12 O. N. P. (N.S.) 93.

Injunction does not lie to restrain the tax commission of Ohio from certifying to the auditor of the state the gross intra-

state earnings of a railway company, to be used as a basis for levying an excise tax against the said company; but in such a case the appeal against a violation of constitutional rights in the matter of taxation lies, either in an action against the secretary of state to restrain him from canceling the articles of incorporation of the plaintiff company for refusing payment of the taxes assessed, or in an action against the state treasurer for recovery of taxes illegally paid: *Railway v. Tax Commission*, 12 O. N. P. (N.S.) 93.

Jurisdiction may be exercised by a court of equity to restrain the Ohio tax commission from improperly taxing corporations under the excise law: *Railway v. Poland*, 10 O. N. P. (N.S.) 617, 21 O. D. (N.P.) 630.

The proceeds of a tax levy for county bridges under G. C., § 5635, constitute a trust fund, which can be expended for no other purpose than that for which the levy was made and collected; and a prosecuting attorney who has waited until the money is in the treasury is estopped from enjoining its expenditure for the purpose designated, even if it were true that the levying and collection of such a tax could have been enjoined originally: *State, ex rel., v. Wright*, 9 O. N. P. (N.S.) 321, 20 O. D. (N.P.) 231.

Where property has been correctly valued upon the duplicate, but under a wrong description as to the amount of frontage, and the auditor attempts to correct the duplicate by adding to the frontage and increasing the valuation accordingly, a court will enjoin the increase in the valuation: *Deshler v. Sims*, 2 O. N. P. (N.S.) 385, 14 O. D. (N.P.) 532.

In injunction against adding omitted personality to returns, if the auditor properly added part and improperly part, it is just to require each party to pay his own costs: *Lee v. Dawson*, 8 O. C. C. 365, 4 O. C. D. 442.

In a suit to enjoin a tax as unconstitutional, both parties having claimed too much, the court divided the costs: *Express Co. v. Ratterman*, 10 Dec. Rep. 469, 21 Bull. 238.

Money paid into the county treasury voluntarily by taxpayers under a levy of taxes to meet the interest and create a sinking fund for the payment of bonds at maturity, issued under an unconstitutional law must be devoted to the purpose for which it was collected; and the treasurer of the county can not be enjoined at the instance of a taxpayer from paying the same to the holders of the bonds; the treasurer, however, will be enjoined from collecting any levy of taxes for such purpose in the future: *State v. Gibson*,

8 O. N. P. 367, 11 O. D. (N.P.) 90. See also TAXATION.

A taxpayer may enjoin a tax to pay township bonds issued under an unconstitutional statute for the building of a railroad by the township, and the fact that the bonds have been issued and the proceeds spent with plaintiff's knowledge in constructing a railroad which enhanced the value of all property, including plaintiff's, and the plaintiff had not sought to enjoin the work or the bonds, is not sufficient to estop the plaintiff: *Counterman v. Trustees*, 38 O. S. 515, III Longsdorf's Notes, 989. See also ESTOPPEL.

The acts of the board of review, acting within its powers, are not reviewable. To act within its powers it is necessary, (1) that it act as a board; (2) the reason for acting must be set out on its journal; (3) it must act on evidence: *Brewing Co. v. Hagerty*, 1 O. N. P. 68, 1 O. D. (N.P.) 687. See also TAXATION.

The decisions of valuing and equalizing officers are generally conclusive: *Wagoner v. Loomis*, 37 O. S. 571, III Longsdorf's Notes, 939; *Treasurer v. Walker*, 10 Dec. Rep. 558, 22 Bull. 106; *Heffner v. Mahoney*, 10 Dec. Rep. 260, 19 Bull. 369; *Brewing Co. v. Hagerty*, 1 O. N. P. 68, 1 O. D. (N.P.) 687. See also TAXATION.

The statute which provides for the Ohio tax commission and prescribes its powers and duties (G. C., §§ 1465-1, *et seq.*, 102 v. 224), makes no provision by which the taxpayer may have a review by the state tax commission either on error or appeal of the action of the board of review in making an addition to the tax rate of the taxpayer arbitrarily, capriciously and without any evidence of information to warrant such action. Injunction against the collection of such taxes is the proper and only remedy: *Standard Oil Co. v. Hopkins*, 24 O. C. D. 170.

When a taxpayer claims that a city board of review has made an addition to his tax return arbitrarily and without evidence, it is not necessary to appeal to the tax commission of Ohio before plaintiff can bring suit to enjoin the levy of such addition: *Lumber & Veneer Co. v. Robinson*, 1 O. C. C. A. 241.

N. AGAINST ACTIONS AT LAW.

1. When Proper.

When there is a full and adequate defense to an action for the recovery of money only, before a justice of the peace, involving equitable relief, such equitable relief may be granted in a separate action in a court of competent jurisdiction and the prosecution of the action at law before the justice of

the peace may be restrained by injunction: *Sloane v. Clauss*, 64 O. S. 125, IV Longsdorf's Notes, 868.

The rule that an injunction will not be granted against an action at law, where full defense may be made in such action is general but not universal. A distinctly marked exception to this rule is where a pledge is a subject of controversy and is a family relic, ornament or heirloom having a special value to the owner, and for the loss of which damages in money would not be an adequate compensation: *Sloane v. Clauss*, 64 O. S. 125, IV Longsdorf's Notes, 868.

Injunction will lie to restrain a justice of peace from attempting to exercise the duties of his office in a township other than that in which he was elected: *State, ex rel., v. Davies*, 12 O. C. C. 218, 5 O. C. D. 525.

Where a matter of fact, properly a subject of defense at law, is not litigated at law, equity does not relieve by an examination into that fact, and no injunction will be issued in such a case: *McCarty v. Burrois*, 2 O. 20, I Longsdorf's Notes, 104; *Lacy v. Garrard*, 2 O. 7, I Longsdorf's Notes, 103; *Duckwall v. Zimmerman*, 2 O. 23, I Longsdorf's Notes, 104; *Lieby v. Ludlow*, 4 O. 469, I Longsdorf's Notes, 236; *Reynolds v. Reynolds*, 3 O. 268, I Longsdorf's Notes, 165.

A claim that defendant in replevin had been induced to give the mortgage by fraud, and that the mortgagee was about to sell the goods at a great sacrifice, can be set up in defense in the replevin suit, and hence no injunction will lie against the suit and to have the mortgage declared void: *White v. Semper*, 8 O. C. C. 346, 4 O. C. D. 408.

A mortgagor is entitled to injunction against a threatened replevin where the mortgage was without consideration, was procured by threats and duress, and the debt is not due: *Totten v. Lawton*, 8 O. C. C. 377, 4 O. C. D. 518.

Injunction against ejectment will not be granted on the ground that defendant's ancestor had agreed to convey to plaintiff, and had made a will and an informal deed to carry it out, for if the deed or will is valid it will be a defense at law: *Coleman v. Toop*, W. 315, I Longsdorf's Notes, 25.

A person who has filed a suit for rescission of deeds of exchange of real estate, possession not having changed, is entitled to an injunction against a forcible detainer suit until the right to a rescission is determined: *Worden v. Klag*, 13 O. C. C. 627, 6 O. C. D. 359.

An injunction will not lie to restrain a constable from executing a writ of restitution in an action of forcible entry and detainer, where the defendants had only an

equitable defense, and having notice to leave the premises and full knowledge that they were in default for rent, permitted a judgment at law to be taken against them: *Katsampos v. Hull*, 17 O. D. (N.P.) 747, 5 O. L. R. 140.

Forcible detainer as to a house which plaintiff for valuable consideration had agreed that defendant should occupy, rent free for a time, will not be enjoined because all rights can be settled in the proceeding at law: *Van Tyne v. Short*, 7 Dec. Rep. 720, 4 Bull. 1149.

A citizen of this state may be enjoined from prosecuting an attachment in another state, against a citizen of this state, to subject to the payment of his claim the earnings of the debtor, which, by the laws of this state, are exempt from being applied to the payment of such claim: *Snook v. Snetzer*, 25 O. S. 516, III Longsdorf's Notes, 258.

Action by a citizen of one state against a citizen of the same state in courts of another state for the purpose of evading the laws of the state of which they are both citizens, may be enjoined: *Archer v. Belding*, 12 O. D. (N.P.) 418.

When an action is brought in the courts of the state to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, and in actions of a similar nature, and under the statutes of that state the parties interested in the *res* may be made parties either by personal service or by publication, will the courts of another state refuse even to hear a case upon petition to enjoin the proceedings in such state until the court which first acquired jurisdiction has disposed of it, *quære*: *Archer v. Belding*, 12 O. D. (N.P.) 418.

The superior court of Cincinnati in general term has the right to grant a temporary restraining order against the action of the court in special term, where important and difficult questions are involved: *Runck v. Cloud*, 8 O. N. P. 436, 11 O. D. (N.P.) 444.

Where it appears that as many as six actions are being prosecuted by the same plaintiff as administrator of as many different estates against the same defendant, which can result only in void judgments, a court of equity will intervene by injunction to prevent a multiplicity of suits and vexatious litigation: *Railway v. Copenhagen*, 12 O. C. C. (N.S.) 69, 21 O. C. D. 515.

If a judgment pleaded as an estoppel in another suit is taken up to this court on error, this court can enjoin the other suit until the error case is determined: *Yeoman v. Lasley*, 36 O. S. 416, III Longsdorf's Notes, 863.

Injunction will lie against parties to the injunction proceeding restraining them from proceeding further with the taking of depositions incidental to the prosecution of the cause, but the restraining order can not be made to extend to a notary who has been appointed to take such depositions by a court in a sister state: *Cash Register Co. v. Heyne*, 10 O. N. P. (N.S.) 465.

Enforcement of the ejectment will not be enjoined, for that would be doing indirectly what the court refuses to do directly: *Cowles v. Raguet*, 14 O. 38, I Longsdorf's Notes, 655. See also COMPOUNDING FELONY.

Injunction is a remedy for preventing the breach of the duty not to take an unwarrantable advantage of the process of law, a duty partly legal and partly equitable only; and here the remedy, an injunction, is primary: *Boring v. Hunt*, 12 O. N. P. (N.S.) 472, 22 O. D. (N.P.) 543.

2. Effect on Statute of Limitations.

An injunction against the commencement of an action does not save the running of the statute of limitations unless the statute so provides: *Hunter v. Insurance Co.*, 73 O. S. 110, IV Longsdorf's Notes, 999.

Only parties who were actors in procuring the injunction against commencing an action are estopped to plead the statute: *Hunter v. Insurance Co.*, 73 O. S. 110, IV Longsdorf's Notes, 999.

O. IN AID OF AN ACTION AT LAW.

An injunction may be granted in aid of an action at law: *Upson v. Quarry Co.*, 4 Dec. Rep. 547, 2 Clev. L. Rep. 355.

An injunction will not be allowed, in aid of an action at law if there is a legal defence to such action: *Van Tyne v. Short*, 7 Dec. Rep. 720, 4 Bull. 1149; *White v. Semper*, 8 O. C. C. 346, 4 O. C. D. 408; *Coleman v. Toop*, W. 315, I Longsdorf's Notes, 25.

Where a party is compelled to ask for an injunction because of inability to set up a defense, in an action brought against him, and also where matters should remain in the position in which they are until the question is determined, an injunction is properly issued: *Worden v. Klag*, 13 O. C. C. 627, 2 O. C. D. 687.

In an action to reach stockholder's liability and unpaid subscriptions the directors may be temporarily enjoined from interfering with the assets if danger appears. But a receiver will not be appointed if a bond is given to secure the fund when collected: *Upson v. Quarry Co.*, 4 Dec. Rep. 547, 2 Clev. L. Rep. 355.

A preliminary injunction may be granted without waiting until the right at law is established, and even without having any opinion as to it, as where its object is to secure plaintiff from damage pending decision on the merits: *Piatt v. Piatt*, 3 Dec. Rep. 92, 13 Dec. Rep. 250, 3 Gaz. 140, 2 D. 408.

A devisee may have injunction against the heir collecting rents pending probate of the will if waste is threatened: *Piatt v. Piatt*, 3 Dec. Rep. 92, 13 Dec. Rep. 250, 3 Gaz. 140, 2 D. 408.

A municipal corporation which has begun proceedings to condemn land for park purposes can obtain temporary injunction against the owner cutting down trees thereon, and the owner can not in his cross petition seek to enjoin the condemnation suit on any ground that might be set up as a defense thereto: *Put-in-Bay v. Webb*, 18 O. C. C. 780, 7 O. C. D. 478.

Courts will not issue restraining orders in divorce proceedings to prohibit criminal or immoral acts, or enforce moral obligations or duties, unless such acts incidentally interfere with property rights, or the custody, management or protection of children: *Hawksworth v. Hawksworth*, 11 O. D. (N. P.) 817. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

A petition in the nature of a partnership bill for an account and distribution of assets, and making a casualty company defendant and asking injunction against it, states but one cause of action. The injunction is incidental to the main relief: *Watson v. Brown*, 8 O. N. P. 330, 11 O. D. (N. P.) 800. See also PARTNERSHIP.

This court, though without original jurisdiction of suits for injunction, may, in an original action in *quo warranto* to determine the right of rival boards to exercise official functions, grant an ancillary injunction to protect those having the *prima facie* right from interference by other claimants during the pendency of such original action: *State v. Board of Deputy State Supervisors*, 70 O. S. 341, IV Longsdorf's Notes, 974. See also COURTS.

P. AGAINST ARBITRATION.

An injunction will not lie against a proposed arbitration: *White v. Mann*, 5 O. N. P. 386, 9 O. D. (N.P.) 407.

A court of equity will not enjoin, temporarily, the enforcement of an award of arbitrators, unless it be shown that the award is void because of fraud on the part of the arbitrators or in the arbitration: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N.P.) 309.

Injunction will not be granted against an arbitration on the ground that the submission includes matters as to which one of the parties—being statutory trustees—have no power to submit. Nor will the injunction issue as to such illegal part, for an award thereon would be void and set aside on petition: *Cincinnati v. Railway*, 6 O. C. C. 247, 3 O. C. D. 438 [affirmed, on opinion of circuit court, *Cincinnati v. Bishop*, 52 O. S. 637]. See also ARBITRATION.

Q. AGAINST JUDGMENTS.

1. When Proper.

(a) Valid Judgments.

Injunction will not lie to prevent enforcement of a judgment or a lien for alimony: *Lemert v. Lemert*, 2 O. C. C. (N.S.) 233, 15 O. C. D. 253.

A mortgagee of a railroad property can not enjoin a creditor from enforcing a judgment lien: *Coe v. Bank*, 10 O. S. 412, II Longsdorf's Notes, 447.

Injunction will not lie to restrain the collection of a judgment, where the attorneys entered into a compromise of the cause in ignorance of the fact that a judgment had already been entered therein, and the defendant now threatens to collect his judgment and refuses to abide by the compromise: *Boyle v. Beattie*, 13 Dec. Rep. 1027, 2 C. S. C. R. 490.

The provision of G. C., § 10450, that a judgment in an action for forcible entry and detainer shall not be a bar to a second action, constitutes an exception to the general rule that equity will not enjoin the enforcement of a judgment where a defense at law was available; and if the facts alleged by one praying for an injunction against the enforcement of such a judgment entitle him to a decree quieting his title or fixing the extent of his title, injunction which is merely ancillary to the main issue of title, will lie until the question of title has been determined: *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513.

Whether a motion will lie to vacate a temporary restraining order enjoining execution of a judgment by a justice of the peace for restitution of demised premises to the owner of the fee, depends solely on the question whether the justice had jurisdiction to render such a judgment: *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513].

Injunction will be refused to restrain the enforcement of a judgment of a justice of peace, no misconduct, fraud or collusion being chargeable to the defendant or his at-

torneys: *Dixon v. Varnish Co.*, 10 Dec. Rep. 481, 21 Bull. 258.

Equity can grant a new trial of a case at law to a party who lost his appeal by the clerk's mistake in drawing the appeal bond, he having a meritorious case or defense, and equity will retain the case and try it: *Oliver v. Pray*, 4 O. 175, I Longsdorf's Notes, 214.

If a matter properly triable at law has been there tried, equity can not correct the decision in the absence of fraud or accident: *Lieby v. Parks*, 4 O. 469, I Longsdorf's Notes, 236.

A judgment lien where there was no service of summons on the defendant will not be decreed invalid by a court of equity unless a meritorious defense is shown, if the defendant had actual knowledge of the pendency of the action, and there was no misconduct, for a new action would have the same result: *Gifford v. Morrison*, 37 O. S. 502, III Longsdorf's Notes, 932 [affirming *Gifford v. Morrison*, 4 Dec. Rep. 153, 1 Clev. L. Rep. 77].

A person seeking an injunction against a judgment at law upon a written contract claiming that the contract by mistake called for a larger sum, or a different currency than he had agreed to pay, must show an offer to pay the amount he admits to be due, and a continued readiness to do so. That defendant had stated that he would not receive such payment does not excuse failure to tender it: *Edwards v. Morris*, 1 O. 524, I Longsdorf's Notes, 99.

A suit to enjoin a judgment by confession on a forged cognovit is not abated by the pendency of a suit by the defendant to sell land under the judgment, for the former attacks all executions anywhere on the void judgment, while this defense to the latter suit only reaches its enforcement in one county or on one tract: *Waite v. Ellis*, 5 O. N. P. 415, 8 O. D. (N.P.) 51.

A suit to quiet title brought by A against B will not prevent B from bringing forcible entry and detainer against A for the same premises. B can not be deprived of his summary remedy unless an injunction was granted against so doing. Execution of the judgment in the forcible entry may, however, be enjoined: *Gladwell v. Hume*, 18 O. C. 845, 9 O. C. D. 767. See also ABATEMENT AND REVIVOR OF ACTIONS.

(b) Voidable and Erroneous Judgments.

A judicial error made by a court of last resort can not be corrected by a bill in equity and no injunction will lie: *Stiver v. Stiver*, 3 O. 19, I Longsdorf's Notes, 144;

Spencer v. King, 5 O. 182, I Longsdorf's Notes, 261.

A judgment rendered upon default against a married woman, in an action to which coverture would have been a defense, is not void, but voidable; and the enforcement of such judgment will not be enjoined, unless some equitable ground of relief be shown, such, for instance, as fraud or coercion: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149.

So long as a voidable judgment against a married woman remains in full force and is unsatisfied, its enforcement in any proper action or proceeding, or by any lawful process will not be enjoined, unless some equitable grounds of relief be shown such as fraud, collusion, or coercion: *Hart v. Manahan*, 70 O. S. 189, IV Longsdorf's Notes, 972 [approving and following, *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149].

Injunction lies to enjoin the collection of a judgment fraudulently entered: *Hildebrand v. Windisch*, 6 Dec. Rep. 784, 4 Bull. 289.

The amount equitably due must be tendered to enjoin a judgment at law for usury: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

The complainant should have tendered the amount justly due, but the objection not being made until after hearing will not be considered: *Brockway v. Clark*, 6 O. 45, I Longsdorf's Notes, 321.

Sureties against whom a judgment was taken by a bank on a bond wholly void for usury, on warrant of attorney without notice, can not impeach the judgment for usury without tendering the amount justly due either by original bill or by cross bill when the bank seeks to subject securities: *Bank v. Stevens*, 1 O. S. 233, I Longsdorf's Notes, 966; *Bank v. Stevens*, 6 O. S. 262, II Longsdorf's Notes, 236.

The doctrine that a party seeking affirmative relief in a court of equity against a usurious contract must do equity by tendering the just amount, does not apply to parties strictly on the defensive, as other lienholders resisting foreclosure of a mortgage, as being wholly void for usury: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645. See also INTEREST AND USURY.

A justice's judgment that a lease has terminated and the defendant is holding after his term, if beyond his power to adjudicate, is nevertheless merely erroneous and not void for want of jurisdiction, and hence not enjoinable, for he had jurisdiction of the original case and the parties, and such evidence showing that the action was

misconceived, merely shows an erroneous exercise of powers conferred: *Brennen v. Cist*, 6 O. N. P. 1, 9 O. D. (N.P.) 18. See also **FORCIBLE ENTRY AND DETAINER**.

The remedy under G. C., § 11631, authorizing a court to vacate its own judgment for fraud practiced by the successful party in obtaining it, is cumulative to an original action to impeach or enjoin: *Bank of Wooster v. Stevens*, 1 O. S. 233, I Longsdorf's Notes, 966; *Coates v. Bank*, 23 O. S. 415, III Longsdorf's Notes, 131; *Darst v. Phillips*, 41 O. S. 514, IV Longsdorf's Notes, 75; *Wheeler v. White*, 2 Dec. Rep. 584, 4 W. L. M. 110. See also **JUDGMENT**.

Coverture not pleaded, even before a justice, does not make a judgment void, but voidable, and its enforcement will not be enjoined unless some equitable ground of relief as fraud, or coercion, is shown: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149. See also **HUSBAND AND WIFE**.

(c) Void Judgment.

A sheriff may be enjoined from selling goods levied under a void judgment: *Wood v. Stanberry*, 21 O. S. 142, III Longsdorf's Notes, 15.

Court of equity will enjoin further proceedings upon void judgment: *Sigler v. Shaffer*, 9 O. C. C. (N.S.) 267, 19 O. C. D. 423.

A void domestic judgment entered on a forged cognovit not without notice may be enjoined: *Waite v. Ellis*, 5 O. N. P. 415, 8 O. D. (N.P.) 51.

A judgment of the justice of the peace rendered during interim of terms is void and should be enjoined: *Bushnell v. Koon*, 8 O. C. C. (N.S.) 163, 18 O. C. D. 367 [affirmed, without opinion, *Koon v. Bushnell*, 71 O. S. 521].

Injunction will lie where judgment of justice of peace is not voidable but void: *Doran v. Collins*, 8 O. N. P. (N.S.) 169, 19 O. D. (N.P.) 406, 54 Bull. 91.

Whether a motion will lie to vacate a temporary restraining order enjoining execution of a judgment by a justice of the peace for restitution of demised premises to the owner of the fee, depends solely on the question whether the justice had jurisdiction to render such a judgment: *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N.S.) 399, 21 O. C. D. 513].

An injunction will not lie to restrain the enforcement of a void judgment of a justice of peace on the ground that it was void for want of jurisdiction, when the identical question was, or could have been, determined in a proceeding brought for leave to file a

petition in error in the court of common pleas: *Brennen v. Cist*, 6 O. N. P. 1, 9 O. D. (N.P.) 18.

But an injunction will not lie against an action on a foreign judgment void for want of jurisdiction: *Nicola Bros. v. Hambrick*, 17 O. D. (N.P.) 377.

A void judgment is not validated by the reversal by the circuit court of a decree of the court of common pleas enjoining the collection of such void judgment: *Greene v. Railroad Co.*, 62 O. S. 67, IV Longsdorf's Notes, 824.

2. Laches of Complainant.

Chancery will not relieve against a judgment at law and grant a new trial, where the matter complained of arose in any way from the negligence of the complainant: *Green v. Dodge*, 6 O. 80, I Longsdorf's Notes, 323.

An Ohio court, having jurisdiction of the parties to an Ohio judgment which has become inoperative, can enjoin the judgment creditor from proceeding in another state to enforce the judgment against the property of the debtor in such state: *Manahan v. Hart*, 2 O. C. C. (N.S.) 606, 14 O. C. D. 527.

A judgment at law will not be enjoined on facts that could have been set up in defense at law, but were not by neglect: *Wood v. Archer*, 2 O. 22, I Longsdorf's Notes, 104.

Or where the party by ignorance of law omitted to defend: *Duckwall v. Zimmerman*, 2 O. 23, I Longsdorf's Notes, 104.

Or mistook his defense at law: *Abbott v. Hughes*, 3 O. 278, I Longsdorf's Notes, 168.

But in so far as the judgment is for the benefit of another party to whom nothing is due it may be enjoined: *Abbott v. Hughes*, 3 O. 278, I Longsdorf's Notes, 168.

Or where he failed to be present and defend by reason of misinformation of his council: *Dorflinger v. Coil*, 2 O. 311, I Longsdorf's Notes, 129.

Or where he mismanaged by miscalculating the effect of his evidence: *Pollard v. Collier*, 8 O. 43, I Longsdorf's Notes, 412.

Or neglected to set up a defense of usury in a loan: *Morgan v. England*, W. 112, I Longsdorf's Notes, 9.

Or failed to show that the bond in judgment was procured from him while intoxicated: *Lacy v. Garrard*, 2 O. 7, I Longsdorf's Notes, 103.

A judgment entered on an award can not be enjoined for error, surprise, partiality in the evidence at the arbitration, for all these should have been urged against the entering of the judgment, and thus the remedy at

law was adequate: *Johnson v. Laughead*, T. 61.

A husband personally served in an action of divorce and alimony, in which alimony was adjudged against him, can not obtain an injunction against the decree on the ground that by a previous agreement he had conveyed property to the wife in full satisfaction of all claims against him as husband, and that he did not know that alimony was asked for. The failure to set up the defense was his own neglect: *Voight v. Voight*, 6 Dec. Rep. 1127, 10 Am. L. Rec. 564.

If a judgment creditor, out of forbearance, omits to levy, it is not fraud in another creditor knowing this, and in order to get a preference to obtain a judgment by confession and levy; equity can not prevent the legal preference: *Riggs v. Vandever*, W. 325, I Longsdorf's Notes, 26.

A judgment on a contract taken while defendant was an infant should be remedied by writ of error, and if he has slept on his rights ten years until that is barred, equity will not aid him, else every law case would after laches be reviewed in equity: *Clark v. Bond*, W. 282, I Longsdorf's Notes, 22.

That a person has by mistake prosecuted a groundless action of replevin, and thus been subjected to judgment for the value of the property, will not warrant equity in relieving against it: *Love v. Lowry*, 4 O. 77, I Longsdorf's Notes, 204.

A judgment for plaintiff in ejectment will not be enjoined on the ground that since the trial the defendant had in part procured the legal title and would soon procure a perfect legal title, though it might furnish ground for a new trial in the court of law: *Tremper v. Barton*, 18 O. 418, I Longsdorf's Notes, 853.

R. TO RESTRAIN CRIMINAL PROCEEDINGS.

A court of equity will not interfere with criminal prosecutions pending or contemplated unless, with other necessary conditions, violations of property rights are clearly threatened. Such rights must necessarily be those of the party invoking the action of the court: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

A court of equity will not interfere with an executive officer charged with the duty of protecting the public from violations of penal statutes and prosecuting the violators thereof, so long as such officer acts reasonably and in good faith within the executive discretion conferred on him by his office: *Distilling Co. v. Brown*, 8 O. N. P. (N.S.) 105, 19 O. D. (N.P.) 661.

Injunction will not lie to prevent enforcement of the county local option law, as an adequate remedy at law is afforded in a criminal prosecution under the act: *Gassman v. Kerns*, 7 O. N. P. (N.S.) 626, 19 O. D. (N.P.) 317 [affirmed, without opinion, *Gassman v. Kerns*, 81 O. S. 496].

A court of equity is without jurisdiction to enjoin the police department and mayor from acting within their discretion in the enforcement of law: *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623.

A court of chancery will not grant an injunction to enjoin the violation of the Sunday closing law: *Fisher v. Hotel Co.*, 4 O. N. P. 329, 7 O. D. (N.P.) 67.

Injunction will not lie to restrain a municipal corporation, its mayor and marshal from enforcing an ordinance prohibiting the sale of intoxicating liquor within the municipality: *Arnold v. Van Wert*, 3 O. C. C. 545, 2 O. C. D. 314.

If the complainant's right at law is established by judicial declaration that the ordinance is void, injunction would doubtless issue to prevent a multiplicity of prosecutions: *Arnold v. Van Wert*, 3 O. C. C. 545, 2 O. C. D. 314.

The well established rule that injunction will not lie against criminal proceedings is applicable to proceedings brought before the mayor of a village against violators of the local option law in a neighboring city; and defendants in such actions must have resort to their remedy at law: *Powell v. Ashville*, 11 O. N. P. (N.S.) 369, 21 O. D. (N.P.) 434.

The operation in a residence neighborhood of a recently established manufacturing plant, which is entirely open, and is equipped with noisy machinery, and fills the air with fine marble and granite dust, a menace to health, and creating much discomfort, will be enjoined upon the petition of the owner and occupant of adjoining residence property: *Amlung v. Lang*, 22 O. D. (N.P.) 61, 8 O. L. R. 286.

The court has jurisdiction to issue an injunction to prevent the distribution, by pickets in a labor union boycott, of cards warning patrons of a hotel and saloon not to patronize the same, and threatening to publish the names of all who do so. But mere peaceable persuasion, oral or printed, not accompanied by any violence or form of intimidation will not be enjoined: *McCorrick v. Local Unions*, 13 O. C. C. (N.S.) 545, 22 O. C. D. 165.

A city's right to arrest for exhibiting without license is not a right to close the place before a conviction, and an injunction to the extent of preventing an illegal interference with property, but not against the

arrest, will be granted: *Ryan v. Jacob*, 8 Dec. Rep. 167, 6 Bull. 139.

An injunction will not be issued against the food commissioner on charges of maliciously prosecuting everyone who sold plaintiff's commodity, and threatening such prosecutions, and making false and libelous publications as to the nature of such commodity. Officers of the state can not be restrained in equity on the ground that their acts under a statute affects property rights and libels a business: *Food Co. v. McNeal*, 1 O. N. P. 266, 4 O. D. (N.P.) 356.

The arrest of one who is maintaining a bakery below ground would not cause him such irreparable injury as would warrant a court of equity in preventing a threatened arrest by injunction: *Bernhardt v. Kearns*, 12 O. N. P. (N.S.) 298, 22 O. D. (N.P.) 707.

The constitutionality of a law may be determined on a motion to dissolve an injunction restraining proceedings under it where the probable loss to plaintiff is hardly susceptible of ascertainment or compensation. And enforcement of an invalid penal statute involving destruction of property will be granted: *French v. Shirley*, 7 O. N. P. 26, 9 O. D. (N.P.) 181.

A court of equity is not warranted in interfering by injunction to prevent a search and seizure under G. C., § 6169 (98 v. 12), because the officials are insolvent, nor because the property is of great value: *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623. See also INTOXICATING LIQUOR.

Whether or not certain vessels and fixtures in a building are used for the unlawful sale of intoxicating liquors and as such liable to seizure and destruction under G. C., § 6169 (98 v. 12), is a question for the mayor's court in which proceedings are instituted; it can not be determined in an action to enjoin such search and seizure: *Schmidt v. Brennan*, 4 O. N. P. (N.S.) 239, 16 O. D. (N.P.) 623.

S. AGAINST ILLEGAL AND CRIMINAL ACTS.

Equity is not the forum to enforce criminal laws: *Boiler & Engine Co. v. Benner*, 14 O. D. (N.P.) 357.

While, ordinarily, equity will not enjoin the commission of a crime, yet where the action complained of, in addition to its criminal element, also involves an invasion of property rights of individuals, equity will interfere by injunction to preserve and protect such rights: *Shaw v. Loan and Trust Corporation*, 5 O. N. P. 411, 8 O. D. (N.P.) 510; *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305.

A violation of law, as by operating an amusement park with merry-go-rounds and scenic railway on Sunday, is not enjoined: *Fisher v. Hotel and Amusement Co.*, 4 O. N. P. 329, 7 O. D. (N.P.) 67.

A court of equity has no jurisdiction in a divorce proceeding to issue an injunction against criminal or immoral acts unless such acts incidentally interfere with property rights, or the custody, management or protection of children: *Hawthornth v. Hawthornth*, 11 O. D. (N.P.) 817.

Property rights of partners in illegal business will not be protected by injunction: *Backenstoe v. Backenstoe*, 14 O. D. (N.P.) 353.

Where a tenant has forfeited his lease by reason of an unlawful sale of liquor on the premises and his continued possession and use of the premises for selling liquor is likely to endanger the landlord's title by placing a statutory lien thereon, the tenant being insolvent, the landlord may seek protection in equity by injunction: *Moser v. Stebel*, 9 O. C. C. (N.S.) 217, 19 O. C. D. 487.

A court of equity will not lend its aid to one monopoly as against another, permitting one party to drive another out of business by underselling him: *Kuhn v. Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292; *Kuhn v. Spice Co.*, 13 O. C. C. 547, 7 O. C. D. 289.

A contract hiring out a workhouse convict, violating G. C., § 2244, which limits the number that can be hired out, is not to be remedied by injunction against its execution, but in an action subsequent to its execution by the labor commissioner and attorney general, as provided in the statute: *Fitzpatrick v. Brush & Wire Goods Co.*, 5 O. N. P. 165, 7 O. D. (N.P.) 216.

Plaintiff, in an action to enjoin an illegal combination under the anti-trust law and for damages can not refuse to disclose the names of dealers from whom he has succeeded in obtaining a partial supply of the goods the combination has refused to furnish him: *Jones v. Goode*, 7 O. C. C. (N.S.) 589, 18 O. C. D. 475.

Injunction will not lie to restrain criminal prosecution except as far as may be necessary to protect private property: *Bernhardt v. Kearns*, 12 O. N. P. (N.S.) 298, 22 O. D. (N.P.) 707.

Although it is not within the province of equity to enjoin the mere threatened commission of a crime, yet when its commission would result in the destruction of property or interfere with the rights of persons to conduct their business, equity will interpose for their protection: *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305.

T. TO RESTRAIN A LIBEL.

Courts of equity will not grant an injunction to restrain a threatened libel: *Grocery Co. v. Wholesale Grocers' Association*, 7 O. N. P. 668, 5 O. D. (N.P.) 582; *Riggs v. Waiters' Alliance*, 5 O. N. P. 386, 8 O. D. (N.P.) 565; *Food Co. v. McNeal*, 1 O. N. P. 266, 4 O. D. (N.P.) 356; *Dopp v. Doll*, 9 Dec. Rep. 428, 13 Bull. 335; *Richter Bros. v. Tailors' Union*, 11 Dec. Rep. 45, 24 Bull. 189.

A court of chancery has no jurisdiction to restrain the publication of a lewd, obscene, and lascivious pamphlet merely because it is libel, and will injure plaintiff in his reputation: *Judson v. Zurhorst*, 10 O. C. C. (N.S.) 289, 20 O. C. D. 9.

Libelous placards, maliciously displayed in front of plaintiff's place of business, urging people not to patronize it, as being unfair to unionists, are not enjoined. If the street is obstructed thereby plaintiff must show special damage different from the public in order to enjoin: *Riggs v. Waiters' Alliance*, 5 O. N. P. 386, 8 O. D. (N.P.) 565.

Libels upon plaintiff's business are not enjoined, although circulation thereof has already been begun: *Grocery Co. v. Wholesale Grocers' Association*, 7 O. N. P. 668, 5 O. D. (N.P.) 582.

A court of equity will enjoin the carrying on of an established business in the old firm name, where such business is transferred without the good will passing to the purchaser, and such purchaser will be enjoined from advertising under the old firm name, and from publishing thereby any libelous matter affecting the credit or business standing of the seller: *Christy v. Groves*, 3 O. N. P. 293, 2 O. D. (N.P.) 384.

The fact that in an action for an injunction one of the grounds of complaint is, that the defendants, acting under an unconstitutional statute, are about to publish a libel, does not deprive a court of equity of jurisdiction in that behalf: *Chemical Co. v. Calvert*, 7 O. N. P. (N.S.) 103, 18 O. D. (N.P.) 583.

Injunction does not lie to restrain libel to business or character though committed and threatened by a combination of persons. It was so held on a charge that a trades-union was injuring plaintiff's business by circulars stating that he could not turn out satisfactory work because he employed scab and inferior hands: *Richter v. Tailor's Union*, 11 Dec. Rep. 45, 24 Bull. 189.

Libels or slanders—as circulars warning people from purchasing plaintiff's patent as an infringement on defendant's—is not within equity jurisdiction to enjoin. Art. I, § 19, of the constitution, guarantees freedom of

the press or of free speech except by actions for damages: *Dopp v. Doll*, 9 Dec. Rep. 428, 13 Bull. 335.

The constitutional right of freedom of speech does not extend to prevent enjoining libels confessedly false, which attack a trader's credit, as that stock purchased from him was forced by his creditor at sheriff's sale or at bankrupt sale: *Christy v. Groves*, 3 O. N. P. 293, 2 O. D. (N.P.) 384.

Libels upon plaintiff's business are not enjoined, although circulation thereof has already been begun: *Grocery Co. v. Wholesale Grocers' Association*, 7 O. N. P. 668, 5 O. D. (N.P.) 582.

U. OTHER QUESTIONS.

The practice of medicine or surgery will not be enjoined merely because such practice is unskillful and patients may be injured rather than benefited thereby, or because the patients are deceived by false claims of skill: *Merz v. Murchison*, 11 O. C. C. (N.S.) 458, 20 O. C. D. 646.

R. S., § 4403c (repealed 99 v. 511), prescribing who may practice medicine, is designed to protect the public, and notwithstanding some incidental benefits result to those having the necessary qualifications to practice by excluding others not qualified, it is not intended to confer special privileges upon licensed practitioners for the protection of which as a property right they may invoke equitable aid to restrain unlawful competition by unlicensed practitioners: *Merz v. Murchison*, 11 O. C. C. (N.S.) 458, 20 O. C. D. 646. See also PHYSICIANS AND SURGEONS.

The effect of filing an affidavit of bias and prejudice against a common pleas judge is to disqualify him from presiding at the trial of the cause, and a declaration by the judge in open court of his intention to proceed with the trial, notwithstanding the filing of the affidavit, is sufficient ground for proceeding in mandamus and injunction: *State v. Dirlam*, 7 O. C. C. (N.S.) 457, 18 O. C. D. 69 [reversed, without opinion, *Dirlam v. McBride*, 76 O. S. 594]. See also COURTS.

An agent with power to draw on his employer drew drafts and sent them to his individual creditors, by whom they were put in a bank and collected, the identical money still being in bank, and the creditors not having parted with any consideration for them, the bank may be enjoined from paying, and the money decreed to the employer. Indorsing the part payment on a note of the agent is not parting with consideration: *Express Co. v. Hough*, 3 O. N. P. 289, 3 O. D. (N.P.) 169. See also AGENCY.

A court of equity, in a suit to enjoin further operations and to quiet the title of the lessor to premises under an expired oil and gas lease and extension thereof, will grant the relief sought; but where the lessees have made an effort to complete a first well within the term, and have met with delay but not of an excusable character which would extend the lease, equity will permit the completion of the well for the purpose of ascertaining the results of the work, and will apportion the cost between the parties: *Hollister v. Vandergrift*, 12 O. C. C. (N.S.) 586, 20 O. C. D. 759.

Where a telephone line has been erected along a highway by virtue of an express agreement with the grantor of the present abutting owner, injunction will lie against destruction of the line years afterward by the present owner, because of failure of the company to accede to his demand for a large sum as compensation for the increased burden upon his lands arising from the erection of the telephone line: *Telephone Co. v. Hughes*, 14 O. C. C. (N.S.) 468, 23 O. C. D. 406.

An inspector employed by the food commissioner can not have injunction to compel a dealer in an article to furnish him a sample as required by G. C., § 12758. The remedy for refusal is prosecution under succeeding sections, and is exclusive. It is not a case of preventing interference with an officer, for the inspector is a mere employee: *State v. Dairy Co.*, 62 O. S. 123, IV Longsdorf's Notes, 826. See also FOODS AND DRUGS.

The construction on land bordering a railway viaduct of a building which is necessary to the use and enjoyment of the land and which will not unreasonably interfere with the operation of the viaduct, will not be enjoined although it will cause some inconvenience to the railway company: *Railway v. Baum*, 15 O. C. C. (N.S.) 383, 23 O. C. D. 462 [affirmed, without opinion, *Railroad v. Baum*, 78 O. S. 427].

An injunction against the stationing of police about a place of business in such a manner as to interfere with the business carried on therein will be refused, where the court has reasonable ground for the belief that things of a forbidden character, such as gambling, are being carried on in connection with such business, and the plaintiff in his testimony exhibits a lack of candor and a willingness to suppress the facts, and otherwise by his conduct forfeits his claim on a court of equity: *Hirsch v. Hunt*, 13 O. N. P. (N.S.) 137, 23 O. D. (N.P.) 143.

Where a fence has been recognized for more than twenty-one years as the true line between the lands of adjacent owners, the procuring by one of the owners of a survey

which located the line twelve feet over on his land, together with a verbal direction given by him to the adjoining owner to build a new fence on the new line, does not estop such owner from afterward insisting that the line of the old fence shall be treated as the dividing line; and in such a case injunction lies to restrain the adjoining owner from the ancient line: *Thomas v. Webber*, 13 O. N. P. (N.S.) 301, 22 O. D. (N.P.) 624.

Mandatory injunction is an appropriate remedy to enforce the right of inspection of a petition under the Brannock Law: *Krickenberg v. Wilson*, 3 O. N. P. (N.S.) 179, 15 O. D. (N.P.) 779. See also INTOXICATING LIQUOR.

When, after a railroad spur track was constructed, with full knowledge of the turnpike company, and maintained across a turnpike for five years, the turnpike company tore up the track, the railroad company will not be enjoined from relaying the track, and the turnpike company, having tacitly acquiesced in laying the track and having an adequate remedy at law, may be enjoined from tearing it up when relaid: *Turnpike Co. v. Railroad Co.*, 12 O. C. D. 723 [affirmed, without opinion, *Turnpike Co. v. Railroad Co.*, 62 O. S. 635]. See also RAILROADS.

A court of equity will not interfere by injunction to enforce a stale equity: *Defiance Water Co. v. Defiance*, 68 O. S. 520, IV Longsdorf's Notes, 947 [following *Kellogg v. Ely*, 15 O. S. 64, II Longsdorf's Notes, 703].

Inasmuch as the taking of depositions is an incident to the prosecution of the cause in which they are to be used, the prosecution of which was prayed for, injunction will lie against parties to the proceeding restraining them from proceeding further with the taking of such depositions, but the restraining order can not be made to extend to a notary who has been appointed to take such depositions by a court in a sister state: *Cash Register Co. v. Heyne*, 10 O. N. P. (N.S.) 465. See also DEPOSITIONS.

V. JURISDICTION.

A. IN SUPREME COURT.

Under the constitution of this state, the general assembly can not confer on a judge of the supreme court jurisdiction at chambers to grant or dissolve an injunction pending in another court: *Railway v. Hurd*, 17 O. S. 144, II Longsdorf's Notes, 823; *Kent v. Mahaffy*, 2 O. S. 498, I Longsdorf's Notes, 1076; *Wheeler v. Lynn*, 8 O. S. 393, II Longsdorf's Notes, 352.

The allowance of an injunction by the supreme court in a case on error, under

G. C., § 11877, this is not the exercise of original jurisdiction, but of appellate jurisdiction, and is intended only for the protection of the rights of the parties in the suit or matter under review. Where the judgment, for the reversal of which error is prosecuted in the supreme court, is pleaded as an estoppel in another suit between the same parties, it is competent for this court to enjoin the prosecution of such suit until the case in error is determined: *Yeoman v. Lasley*, 36 O. S. 416, III Longsdorf's Notes, 863.

Pending a suit in the common pleas court, the supreme court had no constitutional jurisdiction of a motion to dissolve an injunction therein: *Griffith v. Commissioners*, 20 O. 609, I Longsdorf's Notes, 926.

The supreme court may allow a temporary injunction in the exercise of its appellate jurisdiction, respecting the subject of action pending, whenever any act is threatened which would render the judgment ineffectual: *Yeoman v. Lasley*, 36 O. S. 416, III Longsdorf's Notes, 863 [followed and approved in *Wagner v. Railway*, 38 O. S. 32, III Longsdorf's Notes, 950].

Where the relief sought in the court below was an injunction which was refused, the supreme court may proceed to render the judgment which should have been rendered below: *Wagner v. Railway*, 38 O. S. 32, III Longsdorf's Notes, 950.

As to the jurisdiction of the supreme court to grant an ancillary injunction in connection with *quo warranto*, see *State, ex rel., v. Supervisors*, 70 O. S. 341, IV Longsdorf's Notes, 974.

B. IN CIRCUIT COURT.

If the common pleas court grants a perpetual injunction and an appeal to the circuit court is then taken, a subsequent violation of such decree should be punished as a contempt by the circuit court: *Menuez v. Candy Co.*, 77 O. S. 386, IV Longsdorf's Notes, 1033.

An injunction may be allowed in a case pending in a district court on appeal. The injunction may be the very object of the suit—the final decree sought; and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The power to allow these is a part of the appellate jurisdiction, the grant of which is authorized by the constitution: *Kent v. Mahaffy*, 2 O. S. 498, I Longsdorf's Notes, 1076.

C. IN SUPERIOR COURT OF CINCINNATI.

The general term of the superior court has power to grant a temporary injunction

pending error proceedings or to suspend a dissolution of a temporary injunction: *Furniture Co. v. Railway*, 7 O. N. P. 640, 9 O. D. (N.P.) 674.

The superior court of Cincinnati in general term has the right to grant a temporary restraining order against action of court in special term where important or difficult questions are involved: *Runck v. Cloud*, 8 O. N. P. 436, 11 O. D. (N.P.) 444.

D. IN PROBATE COURT.

This jurisdiction conferred on the probate judge to grant injunctions when other judges are absent is constitutional: *Phelon v. Railway*, 5 O. C. C. 545, 3 O. C. D. 267.

E. CONCURRENT JURISDICTION.

Where there are courts of equal and concurrent jurisdiction, the court possesses the case in which the jurisdiction first attaches: *Merrill v. Lake*, 16 O. 373, I Longsdorf's Notes, 770.

F. ON APPEAL.

Where the relief desired, during the pendency of a proceeding in error, is an order to stay further action in the proceedings which it is the object of the original action to enjoin, such relief should be brought under G. C., § 11879: *Croll v. Franklin*, 36 O. S. 316, III Longsdorf's Notes, 852.

Supersedes, or an order to stay execution of judgment below, is not the proper remedy where the relief desired during the pendency of proceedings in error is an order to stay further action in the proceedings, which, by the original action, the plaintiff seeks to enjoin: *Croll v. Franklin*, 36 O. S. 316, III Longsdorf's Notes, 852.

VI. PARTIES.

A. PLAINTIFF.

1. In General.

Although not parties to the suit, the court, under the authority of G. C., § 4316, will protect the interests of contractors and bond purchasers where it appears that their rights are the rights most seriously affected by the suit: *Friedman v. Cincinnati*, 13 O. D. (N. P.) 404.

A stranger to a contract sought to be annulled, although claiming under an impairing contract, is not a necessary party: *Telephone Co. v. Telephone Co.*, 13 O. C. C. (N. S.) 337, 22 O. C. D. 17 [affirming, *Telephone Co. v. Telephone Co.*, 7 O. N. P. (N.S.) 425, 19 O. D. (N.P.) 202].

By reason of the provision contained in the Tayler ordinance of the city of Cleveland, and the supervision that the city has over the operation of street railways, the city of Cleveland is a necessary party to an injunction brought by a private corporation, owning and operating a resort, to restrain an electric railway from violating its agreement or contract for carrying passengers to said resort: *Humphrey v. Railway*, 9 O. N. P. (N.S.) 609, 20 O. D. (N.P.) 510.

Injunction lies to restrain the construction of an electric railway in a public street at the suit of an abutting property owner: *Weber v. Railway Co.*, 13 O. D. (N.P.) 194.

Want of sufficient consents does not give the city solicitor a right to ask for an injunction against the grant to a railway company to construct its tracks in a public street or highway, under G. C., § 4311, as only an abutter can complain of this: *Hamilton v. Railroad Co.*, 5 O. N. P. 457, 8 O. D. (N.P.) 174; *Simmons v. Toledo*, 5 O. C. C. 124, 3 O. C. D. 64; *Glidden v. Cincinnati*, 4 O. D. (N.P.) 223, 30 Bull. 213; *Barney v. Railway*, 11 Dec. Rep. 880, 30 Bull. 286.

Injunction will not lie on behalf of a city, being the debtor against the sale of its railroad, in that it will impair the obligation of its contract; the remedy belongs to the creditors, the bondholders: *Cincinnati v. Dexter*, 55 O. S. 93, IV Longsdorf's Notes, 654.

Where a foreign corporation is a taxpayer, it has the same right as a resident corporation or individual to bring an action under G. C., §§ 4311-4314, to enjoin a municipality from abuse of its corporate powers: *Cigar Stores v. Von Barga*, 7 O. N. P. (N.S.) 420, 53 Bull. 399.

Individual owner of adjacent lots may enjoin proprietors from making private appropriations of square dedicated for public purposes: *Brown v. Manning*, 6 O. 298, I Longsdorf's Notes, 337.

A landowner whose claims for damages were disallowed by viewers, is not entitled to injunction against petition proceeding with order to open a road on the ground that the proceedings are erroneous: *Frevert v. Finck*, 31 O. S. 621, III Longsdorf's Notes, 614.

A court will not enjoin a trial by the judiciary of a fraternal association at the suit of a member: *Hershiser v. Williams*, 6 O. C. C. 147, 3 O. C. D. 389 [affirmed, without opinion, *Hershiser v. Williams*, 53 O. S. 663].

Members of a Masonic lodge can not obtain an injunction against a trial to be had with a view to their expulsion on the charge of joining a Cerneau body, though it be averred that an illegal, unfair trial is intended. Moreover, they can not join as plain-

tiffs in one suit: *Hershiser v. Williams*, 6 O. C. C. 147, 3 O. C. D. 389 [affirmed, without opinion, *Hershiser v. Williams*, 53 O. S. 663].

Injunction and not mandamus is the proper remedy for a member illegally expelled from a club: *Cheney v. Ketcham*, 5 O. N. P. 139, 7 O. D. (N.P.) 183.

If owners of lands in a subdivision mutually fix the lines of a private way previously laid out for common benefit, and fence and improve and use the way, their subsequent grantors are bound thereby. Injunction by a buyer from one against a buyer with notice from another to prevent interference is a proper way to enforce the agreement: *Shields v. Titus*, 46 O. S. 528, IV Longsdorf's Notes, 346. See also EASEMENT.

A court of equity will entertain an action by a stockholder of a corporation to restrain improvident business methods, as selling below cost: *Arbuckle v. Woolson Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

A board of education has the capacity to bring suit to enjoin oppressive and arbitrary acts of another state agency, whereby school-houses are closed and school children deprived of the advantages of the public schools: *Board of Education v. Sawyer*, 7 O. N. P. (N.S.) 401, 19 O. D. (N.P.) 1, 53 Bull. 383. See also SCHOOLS, PUBLIC.

A deed granting life estate to daughter of grantor and husband with covenant that the premises after the death of the life tenants "shall vest in and become the legal property of the heirs" of the grantor's son, in the absence of words of perpetuity is a conveyance of a fee simple estate in the remainder to the children of the grantor; and the children of the son of the grantor, if any interest in the property was conveyed to them, took a life estate only, and are not entitled to an injunction against operations under an oil lease executed by the daughter of the grantor and her husband: *Wollam v. Van Vleck*, 12 O. C. C. (N.S.) 517, 20 O. C. D. 743. See also DEEDS.

A general demurrer will not lie to a petition averring that a contract to which plaintiff is a party has been enjoined in an action to which he was not a party, and praying for vacation of the decree of injunction and for its specific performance: *Ferris v. Commissioners*, 9 O. C. C. (N.S.) 169, 19 O. C. D. 622. See also SPECIFIC PERFORMANCE.

An agreement in writing between the owner of realty and a railway company, by which the railway company agrees to build a suitable roadway cross its right of way to connect the two tracks on each side of such right of way belonging to such promisee, is not a covenant which runs with the land; and

the grantee of such original owner can not maintain an action for specific performance or mandatory injunction against the successor in title of such railway company: *Zens v. Railway*, 14 O. N. P. (N.S.) 202, 23 O. D. (N.P.) 182.

To enjoin enforcement of an illegal liquor ordinance, it is a misjoinder for persons having no community of interest, except liability to separate prosecutions, to join as plaintiffs: *Arnold v. Van Wert*, 3 O. C. C. 545, 2 O. C. D. 314. See also PARTIES.

County commissioners have no authority to bring an action to restrain persons from obstructing township roads under G. C., § 2408 or § 2424, the former authorizing them to bring actions to prevent injury to "public, state and county roads," and the latter to bring suits in certain cases for injuries to "bridges, roads and buildings": *Commissioners v. Leighty*, 1 O. C. C. (N.S.) 431, 15 O. C. D. 240. See also ROADS.

County commissioners have only such jurisdiction over public highways as is provided by statute, and are without power to maintain a suit to enjoin injury to a county road; their remedy is in an action for damages, under the provisions of G. C., § 2424: *Commissioners v. Pennsylvania Co.*, 1 O. C. C. (N.S.) 409, 14 O. C. D. 550; *Law v. Commissioners*, 1 O. C. C. (N.S.) 431, 15 O. C. D. 240. See also COUNTIES AND COUNTY COMMISSIONERS.

Only an abutter can have injunction for want of consents—a taxpayer, as such, can not: *Simmons v. Toledo*, 5 O. C. C. 124, 3 O. C. D. 64; *Sommers v. Cincinnati*, 6 Dec. Rep. 887, 8 Am. L. Rec. 612; *Glidden v. Cincinnati*, 30 Bull. 213; *Harrison v. Railway Co.*, 9 Dec. Rep. 805; 17 Bull. 265. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

G. C., § 3729, authorizing the vacation of streets and alleys by a city council is a summary proceeding having reference to the interests of the general public, and is not binding upon abutting property owners who do not petition or consent. Such proceeding invokes governmental functions, which can not be reached by process of injunction on the part of one who is individually affected: *Schlemmer Co. v. Furniture Co.*, 2 O. N. P. (N.S.) 293, 15 O. D. (N.P.) 92 [affirmed, *Schlemmer Co. v. Furniture Co.*, 7 O. C. C. (N.S.) 468, 18 O. C. D. 474]. See also STREETS.

The insecure building law of 1887, being to protect life, will be liberally construed. The court will aid it by injunction against using the building on application of the inspector. And a petition in the name of the city, verified by the inspector, will be deemed to be filed on his application: *Cincinnati v.*

Moorman, 11 Dec. Rep. 162, 25 Bull. 126. See also BUILDINGS AND BUILDING REGULATIONS.

2. Solicitor.

The solicitor or a taxpayer of a municipality can not enjoin the misapplication of funds belonging to the county under G. C., §§ 4311-4314: *McCaslin v. Perrysburg*, 10 O. C. C. (N.S.) 325, 20 O. C. D. 3 [affirming *McCaslin v. Perrysburg*, 6 O. N. P. (N.S.) 48, 18 O. D. (N.P.) 196].

A city solicitor is clearly authorized under G. C., § 4311, to bring suit in the name of the municipality to enjoin a public utility company from violating its obligations to the city and its inhabitants: *Springfield v. Gas Co.*, 12 O. C. C. (N.S.) 392, 21 O. C. D. 446 [affirmed, without opinion, *Gas Co. v. Springfield*, 81 O. S. 537].

In an action brought by the solicitor of a city or village in his own name as such, and also as a taxpayer, but in behalf of the corporation, to compel by mandatory injunction, a railroad company to remove from a public street its abutments placed therein to support an overhead crossing of its railroad, the court, under favor of G. C., § 11363, in furtherance of justice and upon proper terms, may amend the petition by striking from the title of the cause the name of the solicitor and taxpayer, and adding in lieu thereof the name of the city or village as plaintiff and the real party in interest, in which name the action may proceed against the defendant, and in like manner and for like purpose the court may amend the body of the petition by striking therefrom the name of the solicitor and taxpayer and other words describing his relation to the cause of action: *Railway v. Elyria*, 69 O. S. 414, IV Longsdorf's Notes, 961 [modifying and affirming, *Elyria v. Railway*, 3 O. C. C. (N.S.) 250, 13 O. C. D. 482, appealed from *Elyria v. Railway*, 12 O. D. (N.P.) 609].

An action must be brought in the name of a corporation or in the name of some one on its behalf, by the officer designated by statute to bring the action, or by a taxpayer in case of the refusal of such officer: *Johnson v. Farley*, 8 O. N. P. 498, 11 O. D. (N.P.) 639.

The city solicitor may apply for an injunction in the name of a taxpayer of the corporation, if such taxpayer consents to having the action brought in his name, even though it is not shown that the taxpayer has requested the city solicitor in writing to bring such suit: *Railroad v. Smith*, 29 O. S. 291, III Longsdorf's Notes, 467.

The action is to be brought in the name of the municipal corporation: *Hensley v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114.

A private citizen, claiming to be the lowest bidder for a street railroad route, and that the city council is about to pass an ordinance granting route to a higher bidder, can not enjoin passage of ordinance. He must first apply to city solicitor to enjoin: *Johnson v. Cincinnati*, 11 Dec. Rep. 383, 26 Bull. 223.

Police commissioners of a city constitute a state board. Hence a city solicitor or taxpayer can not, under G. C., §§ 4211, *et seq.*, ask to enjoin their exercise of a power conferred on them by statute as being unconstitutional: *Fitzpatrick v. Bromwell*, 5 O. N. P. 165, 7 O. D. (N.P.) 216.

The solicitor is not required to give bond, if he seeks to enjoin the misappropriation of money by the council: *Porsythe v. Winans*, 44 O. S. 277, IV Longsdorf's Notes, 210.

No action of the council of a municipal corporation is necessary to authorize the city solicitor to commence proceedings under G. C., § 4311: *State, ex rel., v. Bowers*, 4 O. C. C. (N.S.) 345, 16 O. C. D. 326 [affirmed, without opinion, *Bowers v. State, ex rel.*, 70 O. S. 423].

An action may be maintained by the city solicitor in the name of the municipal corporation, without showing contractual relations between the municipal corporation and the gas company, against which such action is brought: *Chillicothe v. Fuel Co.*, 8 O. N. P. 88, 11 O. D. (N.P.) 24 [affirmed, without opinion, *Chillicothe v. Fuel Co.*, 45 Bull. 11, and reversed, *Fuel Co. v. Chillicothe*, 65 O. S. 186, IV Longsdorf's Notes, 883].

3. Taxpayer.

(a) Non-resident Taxpayer.

A taxpayer may sue under G. C., § 4314, and the preceding sections, even though he is a nonresident of the municipal corporation: *McClain v. McKisson*, 15 O. C. C. 517, 8 O. C. D. 357 [affirmed, without opinion, *McClain v. McKisson*, 54 O. S. 673].

Such action may be brought by a taxpayer who is a foreign corporation: *Cigar Stores Co. v. Von Bargaen*, 7 O. N. P. (N.S.) 420, 19 O. D. (N.P.) 120.

(b) Interest.

It is not necessary that the taxpayer have an interest which is peculiar to himself and which he does not have in common with the other taxpayers: *Knorr v. Miller*, 5 O. C. C. 609, 3 O. C. D. 297; *Rogers v. Railway*, 12 O. D. (N.P.) 136.

An action to enjoin the levy or collection of a tax can be maintained only by one who is a taxpayer: *Board of Education v. Guy*, 64 O. S. 434, IV Longsdorf's Notes, 874.

In order to maintain such an action, it is according to many of the cases necessary that the taxpayer show that such illegal action will result in an increase in taxation, or that he will otherwise suffer a financial injury by reason thereof: *Buning v. Railway*, 1 O. C. C. 323, 1 O. C. D. 178; *Cincinnati v. Allison*, 12 O. D. (N.P.) 376; *Sommers v. Cincinnati*, 6 Dec. Rep. 887, 8 Am. L. Rec. 612; *Landis v. Darke County*, 32 Bull. 313 [without opinion in supreme court].

The action can not be sustained unless the defects and irregularities in the proceedings are jurisdictional in character: *Sloane v. Railway*, 7 O. C. C. 84, 3 O. C. D. 674.

The right of a taxpayer to sue under G. C., §§ 4311, *et seq.*, depends on whether the solicitor has refused to bring the action, and whether the party who brings the action is a taxpayer. It is not necessary that the taxpayer show any injury peculiar to himself, the action being brought to protect the rights of the municipal corporation: *Knorr v. Miller*, 5 O. C. C. 609, 3 O. C. D. 297.

In determining whether the party who brings the action is a taxpayer or not, the time at which the taxes are to be paid is not material: *State, ex rel., v. Taylor*, 3 O. N. P. (N.S.) 505, 16 O. D. (N.P.) 66 [affirmed, without opinion, *State, ex rel., v. Taylor*, 77 O. S. 597].

The plaintiff is not obliged to show any substantial injury, it being sufficient if he shows that an illegal act was intended by the corporate authority: *Fergus v. Columbus*, 6 O. N. P. 82, 8 O. D. (N.P.) 290.

A taxpayer can not sue unless he shows some threatened invasion of his rights, even if such threatened right be no greater than that of the general public: *Cincinnati v. Allison*, 12 O. D. (N.P.) 376.

A special statute required county commissioners to vacate a certain county road on petition of a majority of abutters and on their paying certain damages. A taxpayer for himself and others asked injunction, claiming the statute to be unconstitutional. Refusal of the injunction was affirmed by even division of the supreme court on the ground that plaintiff had not such special interest as to entitle him to injunction, the other judges holding that he had such an interest and that such mandatory legislation is unconstitutional: *Landis v. Darke Co.*, 32 Bull. 313 [without opinion, in supreme court].

If the solicitor of the municipal corporation refuses to act, a taxpayer may sue in equity to enjoin unauthorized acts and the unauthorized expenditure of money by a municipal corporation without showing any personal injury to himself different from that

sustained by other taxpayers of the municipal corporation: *Doster v. Cleveland*, 20 O. D. (N.P.) 548.

G. C., §§ 4311, *et seq.*, authorizing proceedings by injunction against municipal officers in certain cases limit and regulate the bringing of the action therefor, but do not provide remedies to the citizen which were not cognizable under the common law: *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125 [reversed, *Cleveland v. Raynolds*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215].

The basis of the action to enjoin municipal officers from the performance of certain acts under G. C., §§ 4311, *et seq.*, is the right of the citizen to have the conscience of the corporation preserved inviolate and the execution of the trust delegated by the state thereto performed in accordance with law. Hence, it is essential that such an action be brought in good faith and maintained by the real parties in interest: *Raynolds v. Cleveland*, 13 O. D. (N.P.) 125 [reversed *Cleveland v. Raynolds*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215].

That a city's act under legislative authority will violate the obligation of its contracts is not ground of injunction on the application of a taxpayer. The creditor being the only person who can be injured, the remedy is his: *Cincinnati v. Deater*, 55 O. S. 93, IV Longsdorf's Notes, 654.

A taxpayer may enjoin the misapplication of public funds: *State v. Commissioners*, 6 O. N. P. 405, 9 O. D. (N. P.) 76; *Moss v. Board of Education*, 58 O. S. 354, IV Longsdorf's Notes, 741.

A taxpayer may bring suit to prevent violation of a city ordinance: *Rogers v. Railway*, 12 O. D. (N.P.) 136.

Injunction lies at the suit of a taxpayer to enjoin the payment of a bill approved and ordered paid by the county commissioners, provided the bill is in satisfaction of an illegal contract and that the prosecuting attorney has refused to bring the suit: *Stolz v. Selz*, 12 O. D. (N.P.) 664.

When a taxpayer brings an action under G. C., § 4314, to restrain a misapplication of funds of a municipal corporation, the taxpayer must sue in his own name on behalf of the corporation, and not merely as a taxpayer: *Hensly v. Hamilton*, 3 O. C. C. 201, 2 O. C. D. 114.

A taxpayer suing in his individual capacity can not maintain a suit to enjoin the issue of bonds by a municipality for the building and equipping of an electric light plant; such suit must be brought on behalf of the corporation: *Hallock v. Columbus*, 1 O. N. P. (N.S.) 205, 13 O. D. (N.P.) 488.

When suit is brought by a taxpayer in his own name, leave will be given to amend

the title of the action so as to comply with the statute: *Stolz v. Selz*, 12 O. D. (N.P.) 664.

A taxpayer, to bring an action under G. C., §§ 4311, *et seq.*, specifying the grounds upon which a city solicitor shall apply for injunction, need not have a private interest to protect an injury peculiar to himself in order to proceed under G. C., § 4312, authorizing taxpayers to institute such proceedings when the solicitor refuses to do so: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136.

Although not parties to the suit, the court, under the authority of G. C., § 4316, will protect the interests of contractors and bond purchasers, where it appears that their rights are the rights most seriously affected by the suit: *Friedman v. Cincinnati*, 13 O. D. (N.P.) 404.

A taxpayer wrongly suing on behalf of himself and all other taxpayers may amend so as to sue on behalf of the corporation, which is the only kind of action permitted by G. C., § 4314: *Shaw v. Jones*, 4 O. N. P. 372, 6 O. D. (N.P.) 453.

The company claiming under the grant or ordinance sought to be enjoined may be made a co-defendant with the city in a taxpayer's suit to enjoin. It is not a misjoinder of actions and it would not be necessary to test such company's rights by *quo warranto*: *Ampt v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394.

Whether a taxpayer seeking an injunction against the county has estopped himself by acquiescence can not be considered on demurrer to the petition, for facts suggesting it may be explained if the claim were made by answer: *Ruffner v. Commissioners*, 12 Dec. Rep. 571, 1 D. 196.

(c) Motive.

Whether the motive of a taxpayer in bringing a suit affects his right to bring it is a question upon which there is a diversion of authority. In some cases it is held that such motive is immaterial: *Raynolds v. Cleveland*, 2 O. C. C. (N.S.) 139, 14 O. C. D. 215 [affirmed, without opinion, *Cleveland v. Raynolds*, 76 O. S. 619]; *Peppard v. Cincinnati*, 6 O. N. P. 57, 9 O. D. (N.P.) 302.

In other cases it is said that G. C., §§ 4311, *et seq.*, does not authorize a taxpayer to bring an action to further private claims: *Fergus v. Columbus*, 6 O. N. P. 82, 8 O. D. (N.P.) 290; *Johnson v. Farley*, 8 O. N. P. 498, 11 O. D. (N.P.) 639; *Ampt v. Cincinnati*, 2 O. N. P. (N.S.) 489, 15 O. D. (N.P.) 237.

If a taxpayer sues at the instance of a person whose interests are adverse to that of a municipal corporation, and he is in-

demnified against fees and charges of the suit, by the person who desires him to bring such suit, he can not maintain such suit under G. C., §§ 4311, *et seq.*: *Brown v. Toledo*, 10 O. C. C. 642, 5 O. C. D. 115; *Vadakin v. Crilly*, 7 O. C. C. (N.S.) 341, 18 O. C. D. 634 [affirming *Vadakin v. Crilly*, 3 O. N. P. (N.S.) 609, 16 O. D. (N.P.) 719, and affirmed, without opinion, in *Vadakin v. Crilly*, 73 O. S. 380]; *Gallagher v. Johnson*, 1 O. D. (N.P.) 264, 31 Bull. 24.

A taxpayer suing under G. C., §§ 4311, *et seq.*, to enjoin the sale of municipal bonds, whose sole purpose is to favor a water company as against the municipality, and prevent the municipality from building its own waterworks, and who has been indemnified from the payment of costs and expenses of such suit, has no standing in court, and said suit should be dismissed: *Vadakin v. Crilly*, 7 O. C. C. (N.S.) 341, 18 O. C. D. 634 [affirming *Vadakin v. Crilly*, 3 O. N. P. (N.S.) 609, 16 O. D. (N.P.) 719; affirmed, without opinion, *Vadakin v. Crilly*, 73 O. S. 380].

If a taxpayer, suing under G. C., §§ 4311, *et seq.*, to enjoin a street railway grant, sues at the request of a competing bidder, who has indemnified him against all expenses, the suit not being to protect the public, should be dismissed: *Gallagher v. Johnson*, 1 O. D. (N.P.) 264, 31 Bull. 24.

It has, however, been said that if he desires to bring the suit on his own behalf, the fact that the person who is to be benefited financially by the suit, if successful (in this case the lowest bidder), has agreed to indemnify the taxpayer for the fees and charges of the suit, could not prevent such taxpayer from maintaining such suit: *McClain v. McKisson*, 15 O. C. C. 517, 8 O. C. D. 357 [affirmed, *McClain v. McKisson*, 54 O. S. 673, IV Longsdorf's Notes, 650].

A competing bidder, being interested adversely to the public, can not in the role of taxpayer ask for an injunction against an award to another as a corporate abuse: *Mathers v. Cincinnati*, 7 Dec. Rep. 521, 3 Bull. 709.

If a taxpayer can enjoin under G. C., §§ 4311, *et seq.*, where the corporation has no solicitor, he can only do so on behalf of the corporation and not to assert some right of his own, such as an abutter disputing a proposed improvement: *Wood v. Pleasant Ridge*, 12 O. C. C. 177, 5 O. C. D. 516.

Motives of plaintiff are not material if an illegal expenditure of money is to be restrained, and his costs and attorney's fees will be allowed in a proper case brought: *Peppard v. Cincinnati*, 6 O. N. P. 57, 9 O. D. (N.P.) 102.

Although injunction may be the proper remedy for preventing the award of a con-

tract for public work to another than the lowest bidder, it does not lie where the suit is brought by the lowest bidder, unless he sue in his capacity of taxpayer, or become the beneficiary of a suit brought by a taxpayer whom he may agree to indemnify against cost and expenses: *Carmichael v. McCourt*, 6 O. C. C. (N.S.) 561, 17 O. C. D. 775 [overruling *Foundry v. Cleveland*, 8 O. C. C. 671, 4 O. C. D. 230]. See also PUBLIC CONTRACTS.

That a suit to recover public money illegally paid is brought in the name of a village on relation of a taxpayer instead of in his name for the use of the village or on behalf of all the taxpayers has not sufficient merit to require a denial of relief, but the court may treat the action as in the taxpayer's name on behalf of the village: *Walker v. Dillonvale*, 82 O. S. 137. See also MUNICIPAL CORPORATIONS.

If an action by a taxpayer to enjoin a municipal corporation from splitting a contract between several bidders can be maintained under any circumstances, it can not be maintained where a taxpayer attempts to enjoin a contract as to one of the successful bidders only, and where he makes no attempt to enjoin the city from entering into contracts with the other bidders; and especially if the taxpayer is a mere figurehead by which an unsuccessful bidder attempts to enjoin a successful rival: *Roberts v. Columbus*, 23 O. D. (N.P.) 368.

(d) Request.

If the municipal corporation has a solicitor, a taxpayer can not sue by virtue of G. C., §§ 4311, *et seq.*, until he has requested the solicitor to bring such suit by a request made in writing, and the solicitor has failed upon such request to bring such suit: *Gas Light Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463; *Brown v. Toledo*, 10 O. C. C. 642, 5 O. C. D. 115.

The fact that the request will in all probability be useless does not exclude the taxpayer from making it: *Gas Light Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463; *Brown v. Toledo*, 10 O. C. C. 642, 5 O. C. D. 115.

The fact that the act in question is beyond the power of the municipal corporation does not excuse failure on the part of the taxpayer to make demand upon the solicitor: *Gas Light Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463.

A taxpayer should aver in the petition that he has requested the solicitor to bring the suit, and that the latter has failed so to do: *Gas Light Co. v. Findlay*, 2 O. C. C. 237, 1 O. C. D. 463.

If the municipal corporation has no solicitor, G. C., §§ 4311, *et seq.*, does not restrict his right to sue, and no request on the part of the taxpayer is necessary: *Kissell v. Columbus Grove*, 53 O. S. 650, IV Longsdorf's Notes, 617 (for common pleas decision, see 11 Dec. Rep. 501); *Pierce v. Hagans*, 79 O. S. 9, IV Longsdorf's Notes, 1043; *Smith v. Rockford*, 4 O. N. P. (N.S.) 513; *Cope v. Wellsville*, 25 Bull. 250.

A resident taxpayer, owning property within an incorporated village subject to be taxed for the support of the revenues of the village, in which village there is no solicitor or other legal counsel whose duties require him, in the name of the corporation, to apply to a court to restrain the illegal use of the funds of the corporation, is not without legal capacity to maintain for himself and on behalf of the village, an action against the municipal authorities to enjoin the unauthorized expenditure of the funds of the village: *Pierce v. Hagans*, 79 O. S. 9, IV Longsdorf's Notes, 1043.

It can not be held that a city solicitor has "failed," to bring a suit when so requested as contemplated by statute where at a time of unusual pressure of official duty, the solicitor refused to bring the suit on the day requested or the next day, or until he had been given time to determine whether the suit was one which should be brought; and especially is this true where the plaintiff had been in position for some months to make the request. In such case the plaintiff has slept upon his right, and the imminence of the loss thereof by the going into effect of a new law will not relieve him from the consequences of his neglect: *Ampt v. Cincinnati*, 2 O. N. P. (N.S.) 489, 15 O. D. (N. P.) 237, 1 Hosea, 304.

The request must be made upon the solicitor in office at the time that the suit is brought, and not upon his predecessor: *Rienoehl v. Huonker*, 66 O. S. 657, IV Longsdorf's Notes, 920.

The owner of property which is assessed for a public improvement may sue to enjoin the proceedings without first requesting the solicitor to bring such suit: *Mills v. Norwood*, 6 O. C. C. 305, 3 O. C. D. 465; *Moore v. Cincinnati*, 9 Dec. Rep. 587, 15 Bull. 196.

The owner of abutting property which is injured by an improper structure in the street in front of such property, may sue for an injunction without first applying to the solicitor: *Herrick v. Cleveland*, 7 O. C. C. 470, 4 O. C. D. 684.

In jurisdictions which recognize the right of a bidder, to enjoin the awarding of the contract, to the lowest bidder on the ground that the statutes have not been complied with, such next lowest bidder may sue for

an injunction without first requesting the city solicitor to bring such suit: *Lake Shore Foundry v. Cleveland*, 8 O. C. C. 671, 4 O. C. D. 230.

Under G. C., §§ 4311, *et seq.*, a taxpayer may in a proper case bring a suit for an injunction, if the city solicitor fails so to do after written request therefor: *Alexander v. Railway*, 2 O. N. P. (N.S.) 54, 14 O. D. (N.P.) 102.

A taxpayer of Hamilton county who has previously requested the solicitor of said county to begin an action in a court of competent jurisdiction to enjoin the completion of a contract entered into by officials of said county in contravention of law, on the refusal of said solicitor to bring such action, may commence such action in the name of the state: *State, ex rel., v. Gibson*, 8 O. N. P. 367, 11 O. D. (N.P.) 90.

When a taxpayer brings an action in his own name, under G. C., §§ 4311 and 4314, leave will be given to amend the title of the action, so as to comply with the statute: *Stolz v. Selz*, 12 O. D. (N.P.) 664.

Abutting proprietors may maintain injunction against being assessed for an illegal improvement and need not first apply to the solicitor: *Mills v. Norwood*, 6 O. C. C. 305, 3 O. C. D. 465.

Upon the refusal of corporation counsel to bring suit for an injunction against the city to prevent it from allowing, and to prevent a private corporation from using its public streets for certain purposes, a taxpayer under G. C., §§ 4311, *et seq.*, has authority to bring such suit: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805.

Two taxpayers may join in asking injunction after refusal of the city solicitor to do so: *Mathers v. Cincinnati*, 7 Dec. Rep. 496, 3 Bull. 551.

A suit by one taxpayer to enjoin bars suit by another, for each represents the public: *Mathers v. Cincinnati*, 7 Dec. Rep. 496, 3 Bull. 551.

The fact that a proceeding in *quo warranto* can only be brought by a designated public officer, and that if such officer should decline to bring such proceeding, a taxpayer is without remedy, is not sufficient to authorize an action under G. C., §§ 4311, *et seq.* Taxpayers are left in many cases without remedy except by the faithful performance of duty by public officers, the law presuming that such officers will properly perform the duties incumbent upon them: *State v. Craig*, 21 O. C. C. 175, 11 O. C. D. 553.

The city solicitor having decided not to carry an adverse decision to a higher court, there is no authority for permitting a taxpayer to become a party in order that he may prosecute error: *Cincinnati v. Edison*

Co., 9 O. D. (N.P.) 828, 42 Bull. 153 (editorial).

Although the corporation counsel, in obedience to a request from a taxpayer, brings a suit, under G. C., §§ 4311, *et seq.*, to enjoin some contemplated corporate action, such taxpayer may, on leave from the court, be also made a party to such suit for the purpose of joining in the prosecution of the questions therein involved: *Cincinnati v. Ferguson*, 12 O. D. (N.P.) 439 [affirmed, without opinion, *Cincinnati v. Ferguson*, 66 O. S. 658].

A taxpayer under G. C., § 4313, upon refusal of the city solicitor to bring an action to test the validity of regulations, requiring cash deposit for water from certain classes of consumers only, may bring an action in his own name: *Rogers v. Cincinnati*, 14 O. N. P. (N.S.) 193.

(e) *Attorney's fees and Costs.*

Attorney's fees can not be allowed to a taxpayer, though successful, if the municipality has no solicitor. The statute allows them only after demand and refusal of the solicitor. Public money can not be taken unless authorized by statute: *Brundige v. Ashley*, 62 O. S. 526, IV Longsdorf's Notes, 841.

The attorney's compensation, under G. C., §§ 4311, *et seq.*, should be measured by reference to that paid public officers rather than to that paid by individuals to their attorneys. Hence, in this case, although the city may have been saved a million of dollars, the allowance to the taxpayer's attorney will be \$5,500: *Guckenberger v. Deater*, 18 O. C. C. 244, 10 O. C. D. 174.

If a taxpayer's suit to enjoin, though unsuccessful, was founded on irregularities that might reasonably seem to justify it, costs may be apportioned: *Sloane v. People's Railway*, 7 O. C. C. 84, 3 O. C. D. 674.

Where a village has no solicitor a taxpayer obtaining an injunction against the issue of unconstitutional bonds can not recover his attorney's fees. G. C., §§ 4311, *et seq.*, do not apply if there is no corporation solicitor: *Kissell v. Columbus Grove*, 34 Bull. 50 [without opinion, in the supreme court].

Taxpayers must litigate at their own cost, unless they show reasonable cause to check meddlesomeness. But if they employ counsel and prosecute with the consent of the city solicitor the court may allow reasonable counsel fees: *Miller v. Pearce*, 13 Dec. Rep. 758, 2 C. S. C. R. 44.

Even though the solicitor brings the suit for the taxpayer: *Miller v. Pearce*, 13 Dec. Rep. 758, 2 C. S. C. R. 44.

Solvency of the plaintiff seeking to enjoin a city from turning off his gas unless he pays the disputed price is immaterial: *Goblet Co. v. Findlay*, 5 O. C. C. 418, 4 O. C. D. 205.

(f) *Property-owners in Villages.*

Since the right of a taxpayer to sue for the purpose of enjoining a threatened abuse was not created by this and the preceding sections, it is not to be regarded as restricted to the property owners in cities, but it extends also to the property owners in villages: *Smith v. Rockford*, 4 O. N. P. (N.S.) 513, 17 O. D. (N.P.) 649.

B. DEFENDANT.

An action for an injunction in the superior court will bind both of two defendants united in interest, although only one is served; and such action speaks from the giving of the bond under the temporary restraining order: *Totton v. Hall*, 12 O. C. D. 724.

To render a person amenable to an injunction it is not necessary that the person should have been a party to a suit in which an injunction was issued, nor to have been actually served with a copy of summons, so long as he appears to have had actual notice: *Miller v. Grain and Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629; *In re Lennon*, 166 U. S. 548, 10 O. F. D. 456.

An unincorporated labor-union and its individual members may be enjoined: *Hillenbrand v. Trades Council*, 14 O. D. (N.P.) 628, 1 Hosea, 327.

In an action by a citizen against a municipal officer to restrain the execution of a contract, railroad companies can not become parties defendant and by answer or cross-petition seek to enforce rights which they claim vested in them by such ordinance: *Johnson v. Farley*, 8 O. N. P. 498, 11 O. D. (N.P.) 639.

The city is the proper defendant in an action to enjoin a nuisance in a public street: *Herrick v. Cleveland*, 7 O. C. C. 470, 4 O. C. D. 684.

In an action by a municipality to compel by a mandatory injunction the removal from the sidewalk of so much of a building as encroaches thereon, the owner of the property as well as the lessee who erected the building is a necessary party: *Columbus v. Philbrick*, 5 O. N. P. (N.S.) 449, 18 O. D. (N.P.) 145.

In an action to enjoin the replevin of certain property the sheriff is an unnecessary party: *Corbin v. Bouve*, 13 Dec. Rep. 537, 1 C. S. C. R. 259.

It is incorrect practice to make a sheriff or other officer, who has an execution in his

hands for collection, defendant in a petition to enjoin a judgment upon which the execution has been issued: *Allen v. Medill*, 14 O. 445, I Longsdorf's Notes, 680.

Trust company and not beneficiaries is the proper defendant in an action to enforce inspection of books by stockholder: *Kennon v. Trust Co.*, 16 O. D. (N.P.) 733, 4 O. L. R. 352.

An injunction lies to enjoin trustees of religious corporation from conveying away its property: *Sunday School Association v. Espy*, 17 O. C. C. 524, 9 O. C. D. 695.

An action to restrain the city from allowing and a corporation from using the streets for certain purposes is to enjoin the misuse of streets and the defendant company and all parties against whom relief is sought may be joined as defendants: *Ampt v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805 [affirming *Ampt v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394]. See also PARTIES.

The trustees under the original grant from donor of the Toledo University are proper and necessary parties to a proceeding to enjoin instruction in certain branches of study: *State v. Toledo*, 3 O. C. C. (N.S.) 469, 13 O. C. D. 327. See also TOLEDO.

For the general discussion of the subject of parties, see PARTIES.

VII. PLEADING.

The mere averment in the petition that the invasion of the right complained of will work an irreparable injury is insufficient on demurrer to entitle complainant to an injunction: *Wood v. Pleasant Ridge*, 12 O. C. C. 177, 5 O. C. D. 516.

In an action for an injunction a mere averment of irreparable injury is insufficient: *White v. Semper*, 8 O. C. C. 346, 4 O. C. D. 408.

An injunction will be denied where the petition does not show that the plaintiff may not have full and adequate relief at law: *Steinau v. Gas Co.*, 48 O. S. 324, IV Longsdorf's Notes, 417.

Very general allegations will warrant evidence to aid in determining whether a judgment should be enjoined: *McCurdy v. Baughman*, 43 O. S. 78, IV Longsdorf's Notes, 149.

Where an action has been commenced by a taxpayer to enjoin a municipality from carrying out the terms of an alleged *ultra vires* contract, the termination of the contract by the city prior to the commencement of the action, and the further fact that no vouchers are about to be or will be drawn to pay for work done thereunder, is proper matter to be pleaded by answer, and will, if proven, constitute a defense: *Fritter v. Bohl*, 2 O. N. P. (N.S.) 365, 14 O. D. (N.P.) 710.

A petition in an action to enjoin defendants from using plaintiff's trade design or device which merely alleges that defendants have been using such design or device, but not alleging that they are now using it, and containing no allegation of threatened injury in the future is insufficient: *United Hatters v. Loeb*, 22 O. C. C. 339, 12 O. C. D. 272.

Where an injunction is sought on the ground of apprehended injury to real property, facts must be stated showing that the injury would be irreparable, the mere statement of the fact is insufficient: *Van Wert v. Webster*, 31 O. S. 420, III Longsdorf's Notes, 594.

To enjoin a judgment at law, on the ground of illegal interest, the petition must show a tender of the amount equitably due: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575.

An injunction against a proposed expenditure by a society or fraternal order will not lie unless the petition alleges affirmatively that the plaintiff has exhausted all the remedies provided by the constitution and by-laws of the organization: *Coss v. Lodge*, 4 O. C. C. (N.S.) 11, 14 O. C. D. 36.

Where the remedy sought is a permanent injunction, the petition may be verified on belief; but if the petition request a temporary injunction the request will on motion be stricken out unless the verification be sworn to positively, or an affidavit which is sworn to positively is filed: *Jarret v. Koch*, 14 O. N. P. (N.S.) 92.

A petition must be sworn to positively to use it as an affidavit for a restraining order: *Ett v. Snyder*, 5 Dec. Rep. 523, 6 Am. L. Rec. 415.

Under a former statute where the jurisdiction in error of the supreme court depended upon the sum or value involved, and it was not disclosed by the record presented for review, the petition in error must contain averments as to the amount involved: *Koch v. Barbour*, 65 O. S. 173, IV Longsdorf's Notes, 883.

A petition in an action to restrain a board of revision from adding to the valuation of certain property, alleging the service of notice of an intention to increase, and complaining of the refusal of the board to allow the property owners to offer any testimony as to the value of such property, sufficiently states that the board is about to place the property on the tax duplicate at an increased valuation, which being conceded by demurrer entitles complainant to relief: *Britton v. Baker*, 12 O. D. (N.P.) 107.

In an action under G. C., §§ 4311, *et seq.*, to restrain the officers of a municipal cor-

poration from making payments to a water company, alleging that the claims are illegal, and the invalidity thereof arises from the invalidity of the contract with the city, which is denied by the water company, claiming as assignee under a contract with another person, and that the city, having induced such company to complete the contract, is estopped, a determination of the issue requires a consideration of the contract, which is sufficiently raised by the pleadings, and if its illegality appears, judgment on the pleadings should be granted: *Defiance v. Council of Defiance*, 13 O. C. D. 96.

If a street railroad company proposes to do a strict railroad business on the streets of a city without any ordinance or contract right to do so, it may be treated as a trespasser, or as committing a nuisance, and be proceeded against under G. C., § 4311, by a taxpayer having a peculiar interest or by the properly constituted city authorities, but where the petition to enjoin such company from doing business therein does not allege that the company has no grant or contract with the city or that it is about to violate any of its ordinances, no cause of action is stated cognizable under G. C., § 4311: *Rogers v. Railway Co.*, 12 O. D. (N.P.) 136. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

An action seeking to restrain the city from allowing, and a corporation from using, the streets for certain purposes, is not a joinder of separate causes of action against several defendants, or a case in which it is necessary to proceed by *quo warranto* against the private corporation: *Ampf v. Cincinnati*, 21 O. C. C. 300, 11 O. C. D. 805 [affirming *Ampf v. Cincinnati*, 6 O. N. P. 401, 9 O. D. (N.P.) 394].

A cause of action for damages for wrongful appropriation of plaintiff's property in improving the street, and another cause of action for the recovery of money paid on an assessment wrongfully made by the city on the remaining land for the street assessment and asking for an injunction, are causes arising from the same transaction, and may properly be joined in one action: *Murphy v. Cincinnati*, 8 O. N. P. 106, 10 O. D. (N.P.) 541. See also PLEADINGS.

In an action for injunction which was denied, a supplemental petition asking for another injunction and for damages, does not alter the nature of the cause from equitable to an action at law: *Weitzel v. Delhi*, 12 O. C. D. 737. See also AMENDMENT.

For the general discussion of the subject of pleading, see PLEADINGS.

VIII. NOTICE.

An injunction does not operate until notice of it to the defendants: *Ramsdall v. Craighill*, 9 O. 197, I Longsdorf's Notes, 476.

As to the necessity of notice when the act is not of itself illegal and is unintentional, see *Hunter v. Condron*, 12 O. D. (N.P.) 577.

Service is not necessary where there is actual notice: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629.

IX. INTERLOCUTORY HEARING.

On a motion to dissolve a preliminary injunction on the grounds that the allegations of the petition are untrue, the burden of proof rests upon the defendant to prove that fact, but such full and positive proof is not requisite as would be required in a final hearing of the case: *Kuhn v. Woolson Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292.

A temporary restraining order or a preliminary injunction is a provisional remedy, and is allowed or disallowed without intention on the part of the court of thereby forecasting what may be the final decree on full hearing; and on the question of allowing such an order and permitting it to continue until a full hearing is had, the relative rights of the parties and the injury to each by a continuance of the order will be considered, and the *status quo* will be maintained by granting the order where the injury to the moving party will be immediate, certain and great if it is denied, while the loss or injury to the opposing party by its continuance will be comparatively insignificant: *Gould v. Railway*, 10 O. N. P. (N.S.) 129, 21 O. D. (N.P.) 733.

An order of the court of common pleas granting a temporary injunction in a suit in which the ultimate relief sought is an injunction, is not either a judgment or a final order which may be reviewed by the circuit court on petition in error: *May Co. v. Bailey Co.*, 81 O. S. 471.

Whether a motion will lie to vacate a temporary restraining order enjoining execution of a judgment by a justice of the peace for restitution of demised premises to the owner of the fee, depends solely on the question whether the justice had jurisdiction to render such a judgment: *Ellison v. Foster*, 19 O. D. (N.P.) 849, 6 O. L. R. 666 [affirmed, *Foster v. Ellison*, 12 O. C. C. (N. S.) 399, 21 O. C. D. 513].

A motion to dissolve a temporary injunction will not be granted, in an action for a permanent injunction, where it will be necessary on the final disposition of the case to determine important questions arising from the issue of the case, and on which depends

the right to the injunction: *State v. Commissioners*, 21 O. C. C. 780, 12 O. C. D. 328.

Where grave questions of law are involved, including the constitutionality of the statute under which defendants claim to be acting, and the property rights of the plaintiff will be jeopardized by enforcement of the statute while comparatively slight injury will result from delay in its enforcement, a preliminary injunction will be granted to preserve the *status quo* until the court has been given opportunity to properly consider and determine the questions in issue: *Chemical Co. v. Calvert*, 8 O. N. P. (N.S.) 361, 19 O. D. (N.P.) 571 [affirmed, without opinion, *State, ex rel., v. Chemical Co.*, 80 O. S. 754].

An injunction *pendente lite* will not be granted unless the right to it is clear, and unless it be further shown that justice can not be meted out on final decree if everything be not kept in *statu quo* until final decision: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

An injunction *pendente lite* will not be granted in an action to enjoin a city and a electric railway company, and the city officials from carrying into effect the provisions of an ordinance, granting to such company a new franchise on the ground that the passage of such ordinance was an abuse and in excess of the corporate powers of the city, where it appears that the provisions of such ordinance were more beneficial to the city and its citizens than was the franchise under which the company was operating before its passage: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

If merely preventive relief is sought a preliminary injunction will not be continued or made perpetual if the cause has been removed and the danger has ceased: *Wiswell v. Church*, 14 O. S. 31, II Longsdorf's Notes, 633.

A provisional injunction will not be granted where there is no right to a final injunction, and the right to injunction as a final remedy has not been affected by G. C., § 11876: *Light Co. v. Bowman*, 12 Dec. Rep. 147, 1 H. 289.

If all the mischief of a final decree against plaintiff would result from dissolving an interlocutory injunction, it will be continued until final hearing if there is a possibility of plaintiff sustaining his right finally: *Foundry Co. v. Dodds*, 10 Dec. Rep. 154, 19 Bull. 84.

A restraining order without notice should only run until hearing of an application by the same party for a temporary injunction can be had, the time and place for which ought to be fixed in the allowance of the order: *Vornholt v. Gordon*, 11 Dec. Rep. 817, 30 Bull. 33.

G. C., § 11875, defining an injunction as a command to refrain does not prevent interlocutory mandatory injunctions, which, in effect, require an act to be done: *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500.

An interlocutory mandatory order will not be granted unless there is promptness. A seven-years' acquiescence is too long: *Harrison v. Craighead*, 7 Dec. Rep. 634, 4 Bull. 500.

On motion for a preliminary injunction the court will consider not whether the applicant has actually a right, but whether he has a fair question to raise as to its existence; also whether on balance of convenience or inconvenience to one or the other party interference is expedient: *Hotel Co. v. McClain*, 3 O. N. P. 247, 4 O. D. (N.P.) 309.

Dissolving a preliminary injunction on motion on the ground that the averments in the petition are not true is not a trial, and hence does not authorize final judgment or dismissal of the case, for the party is entitled to show the contrary if he can on a trial: *Trustees v. McClannahan*, 53 O. S. 403, IV Longsdorf's Notes, 607.

Dissolution of a temporary injunction is an order affecting a substantial right in a special proceeding, and is reviewable on error: *Furniture Co. v. Railway Co.*, 7 O. N. P. 640, 9 O. D. (N.P.) 674. See also ERROR.

X. FINAL HEARING.

Burden of proof is upon the party asking for an injunction and he must show a clear right thereto: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

To entitle a party to an injunction *pendente lite*, he must show a clear right thereto, and must further show that, he can not obtain complete justice on the final decree, if everything is not kept in *statu quo* until the final decision: *Ross v. Columbus*, 8 O. N. P. 420, 11 O. D. (N.P.) 679.

It is no defense to an action for an injunction that others are contributing or doing like damage: *Dayton v. Railway*, 12 O. D. (N.P.) 258 [affirmed, on appeal, *Dayton v. Railway*, 6 O. C. C. (N.S.) 41, 16 O. C. D. 736].

XI. EVIDENCE.

Although the statutes permit the use of affidavits on the hearing of a motion to dissolve an injunction before a judge of the common pleas court sitting in chambers, the oral testimony of witnesses is competent, upon a hearing of that character: *State v. Budd*, 65 O. S. 1, IV Longsdorf's Notes, 879.

Affidavits may be used in the district court on motion to dissolve a temporary injunc-

tion in a case brought up by appeal, G. C., § 12224, from a dissolution of the order by the common pleas: *Keys v. Williamson*, 31 O. S. 561, III Longsdorf's Notes, 605.

An injunction standing on the petition and full direct denial without testimony will be dissolved on motion: *Afsprung v. Althoff*, 7 Dec. Rep. 550, 3 Bull. 890; *Railroad v. Hamilton*, 3 O. C. C. 455, 2 O. C. D. 259; *Lowe v. Canal Co.*, W. 616, I Longsdorf's Notes, 48; *Wood v. Pratt*, 2 O. 23, I Longsdorf's Notes, 104.

The burden to show a right to a perpetual injunction is on the party claiming it, and it will be granted only if a clear right thereto is shown: *Spangler v. Cleveland*, 43 O. S. 526, IV Longsdorf's Notes, 181.

On application to enjoin taking plaintiff's property without compensation where the answer does not deny this, but pleads affirmative defenses as contract, consent or estoppel, the burden is on defendant: *Detweiler v. Railroad*, 6 O. N. P. 485, 8 O. D. (N.P.) 166.

The rule dissolving an injunction, as of course, on an answer coming in denying the facts, does not apply where the answer is by one defendant who is only an agent of the other, and shows the former had no interest: *Smith v. Simmons*, T. 265.

Denial of fraud in the answer will be overcome by slight circumstances if on the whole case the defendant appears unworthy of credit: *Questel v. Questel*, W. 492, I Longsdorf's Notes, 39.

The defendant may file and read his answer on plaintiff's application for a provisional injunction, and thus try the whole case at once: *Hulse v. Wright*, W. 61, I Longsdorf's Notes, 5.

One who knowingly and willfully testifies falsely in a material matter at a hearing on motion to dissolve an injunction is guilty of perjury: *State v. Budd*, 65 O. S. 1, IV Longsdorf's Notes, 879.

For the general discussion of the subject of evidence, see EVIDENCE.

XII. DECREE.

A. ORDER AND SERVICE.

When an injunction is allowed and endorsed upon the summons, it has practically the same effect as if made and served upon the party after the commencement of the action. When "injunction allowed" is endorsed upon the summons, the defendant must take notice of what the petition contains: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 14 O. C. C. (N.S.) 186, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

Summons served without a copy of the injunction notifying the parties what they are

restrained from doing, is not sufficient to authorize a court of equity to punish persons who have not willfully and intentionally violated the order and whose acts were not in themselves illegal: *Hunter v. Condron*, 12 O. D. (N.P.) 577.

A nonresident owner of real estate may be served by publication in an action to remove a building erected by a lessee from the sidewalk: *Columbus v. Philbrick*, 5 O. N. P. (N.S.) 449, 18 O. D. (N.P.) 145.

An injunction to stay the proceedings upon a judgment operates upon the parties to the judgment, and through them upon all officers of the law acting in consequence of that judgment: *Olin v. Hungerford*, 10 O. 268, I Longsdorf's Notes, 510; *Allen v. Medill*, 14 O. 445, I Longsdorf's Notes, 680.

Where the court allows an injunction on an unfilled petition, which is then at once carried to the clerk, who then first issues a summons on it and then files it, these acts constitute a continuous transaction, and the injunction is deemed granted "at" the time of commencing action, G. C., §§ 11877, *et seq.*: *Howe v. Seiberling*, 2 O. N. P. 8, 2 O. D. (N. P.) 51.

An injunction irregularly issued must be obeyed until dissolved: *Howe v. Seiberling*, 2 O. N. P. 8, 2 O. D. (N.P.) 51.

B. EFFECT OF DECREE.

An injunction against a custodian of intangible property gives to the court such control of the property as authorizes a decree transferring the title from the owner of the property before the injunction issued to another party to the suit who has been duly served with summons: *Transit Co. v. Beeman*, 12 O. C. C. (N.S.) 460, 21 O. C. D. 500 [affirmed, without opinion, *Realty Co. v. Beeman*, 81 O. S. 509, on authority of *Benner v. Benner*, 63 O. S. 220, IV Longsdorf's Notes, 853].

A court will not, by mandamus, compel a party to do what, by a subsisting decree of injunction, he is prohibited from doing, although the party seeking the remedy by mandamus is not a party to the decree of injunction: *Railroad Co. v. Commissioners*, 7 O. S. 278, II Longsdorf's Notes, 297.

An injunction speaks from the giving of the bond under the temporary restraining order: *Totton v. Hall*, 12 O. C. D. 724.

An injunction operates from the time of notice to the defendant, or from its service: *Ramsdall v. Craighill*, 9 O. 197, I Longsdorf's Notes, 476.

Injunction against judgment does not operate as a release of errors: *Gano v. White*, 3 O. 20, I Longsdorf's Notes, 144.

A judgment lien is not prolonged by the fact that the judgment creditor has been enjoined from issuing execution: *Tucker v. Shade*, 25 O. S. 355, III Longsdorf's Notes, 238.

In a suit by a taxpayer, against the board of county commissioners and the party to whom the bonds of the county are delivered without authority of law, to enjoin the delivery of the bonds, the court may render a money judgment against such party for money had and received or for a conversion of the bonds, when it appears from the facts disclosed on hearing, but not known to the plaintiff when he brought his suit, that the bonds had already been issued and delivered and had been transferred to a *bona fide* holder: *Commissioners v. State*, 78 O. S. 287, IV Longsdorf's Notes, 1041.

An injunction irregularly issued must be obeyed until dissolved: *Howe v. Seiberling*, 2 O. N. P. 8, 2 O. D. (N.P.) 51.

A turnpike company seeking to enjoin a railroad from constructing over the pike a bridge as being not high enough, but on which much work has been done, the decree will, instead of compelling a higher bridge, require the railroad to pay the expense of lowering the pike if that would be much less costly: *Turnpike Co. v. Railroad Co.*, 15 O. C. C. 268, 8 O. C. D. 269. See also RAILROADS.

A decree enjoining the operation of a void street railway franchise will adjust the equities as may be proper under all the circumstances: *Horstman v. Railway Co.*, 14 O. D. (N.P.) 545. See also STREET RAILWAYS AND INTERURBAN RAILWAYS.

C. ENFORCING DECREE.

1. What Constitutes Violation.

An injunction irregularly issued must be obeyed until dissolved: *Howe v. Seiberling*, 2 O. N. P. 8, 2 O. D. (N.P.) 51.

Where an injunction was granted restraining a manufacturer of flour from dressing and labeling his goods by certain ornamental designs and labels in imitation or similar to others, it is a violation of such injunction for persons who were agents of such manufacturer and had knowledge of the injunction to sell flour upon their own responsibility upon a design made by themselves which violates such injunction and they are liable in contempt without an original proceeding for an injunction: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629.

A defense in a contempt proceeding for violation of an injunction against interfering with plaintiff's business by striking employes, that defendant was only trying to protect himself from injury by grabbing and

undertaking to stop one of plaintiff's wagons while leaving the factory, will not be accepted where the evidence shows that the team started at least one hundred feet away from defendant and started straight towards him, and he made no effort to get out of the way and let it pass: *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305. See also BOYCOTTS AND STRIKES.

Where striking employes have been enjoined from in any manner interfering with persons in or who may desire to enter the employ of plaintiff, either by threats, violence or intimidation, from congregating or loitering about or in the neighborhood of plaintiff's factory with intent to interfere with employes while at work and to interfere with or obstruct plaintiff's business, from interfering with any person delivering or hauling plaintiff's product or in any way interfering with or hindering the free conduct or control of plaintiff's business or property, it is a violation of such injunction for a striking employe, upon whom the injunction has been served, to place an obstruction across a passage-way leading to plaintiff's factory which precludes the passage of a wagon which plaintiff was about to send out, and to grab the lines or reins as the driver was attempting to drive out, and stop the team and use violent and abusive language to the driver: *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305.

While there may be no harm in one person, or two or more, loitering or standing in the neighborhood of a factory or other place, such acts in themselves, associated with the fact that there is a lockout or a strike in progress, that the men who loiter about, patrol or picket, are employes who have been discharged, that they are members of the union whose purpose, under the evidence, is to stop the operation of the factory so far as they can, until the men in their employ have been discharged or have joined the union, amounts to a violation of an injunction against loitering about, picketing or patrolling the factory, or intimidating or interfering with employes or non-union men, and particularly where non-union men have been threatened and assaulted, though it does not appear that the parties enjoined were individually involved in making the assaults or the threats: *Brunsmann v. Atherton*, 12 O. D. (N.P.) 547.

Merely asking a person approaching a manufacturing concern if he was there looking for a job, if he belonged to the union, and advised him not to go there, that there was trouble with the concern, but making no threats or using any force to prevent his going, does not sustain a charge that the accused accosted, stopped and interfered with

persons going to and from such concern and prevented their leaving or entering the same, so as to make the accused guilty of contempt of court for violating an injunction against picketing and interfering with such company's employees: *Hunter v. Condron*, 12 O. D. (N.P.) 577. See also PICKETING.

2. Necessity for Undertaking.

Where an injunction is allowed, but no undertaking given as required by law, a fine, with imprisonment, imposed upon the party enjoined for an alleged contempt, is void: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

Where an injunction is allowed but no undertaking given as required by law, a person imprisoned thereunder for alleged contempt may bring an action for such imprisonment without alleging malice and want of probable cause: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

Where an injunction is allowed but no undertaking given as required by law a person imprisoned for alleged breach thereof will be released on *habeas corpus*: *In re George*, 5 O. C. C. 207, 3 O. C. D. 104.

An injunction without bond is void: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929; *In re George*, 5 O. C. C. 207, 3 O. C. D. 104.

If a party, upon being informed that an injunction has been allowed to restrain him from doing a particular act, does the act before there is time to give such undertaking, what, if any, power has the probate court to punish for contempt, was referred to but not decided in *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

3. Necessity for Service or Knowledge Thereof.

It is not necessary that a person accused of violating an order of injunction and brought before the court on attachment should be served with a copy of the affidavit or of the order which he is charged with disobeying; but it is sufficient if the record in the contempt proceeding discloses that the charges were read to the defendant in open court: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

Persons accused of violating an injunction and brought before the court upon attachment need not be served with a copy of the affidavit, or the order which they have disobeyed. Upon being served with the injunction they are supposed to inform themselves at once as to what they are enjoined from doing: *Ray v. Railway*, 10 O. C. C. (N.S.)

577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

A court, in punishing for disobedience, must consider whether the accused had knowledge of the order, but this rule does not apply where the acts done were illegal: *Hunter v. Condron*, 12 O. D. (N.P.) 577.

To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which it was issued nor to have been actually served with a copy of it, so long as he appears to have actual notice: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629; *In re Lennon*, 166 U. S. 548.

A striking employe can not be held for contempt in violating an injunction against interference with his former employer's business, where the order has not been served on him, and no evidence of knowledge on his part of such order: *Brewing Co. v. Giblon*, 1 O. N. P. (N.S.) 377, 14 O. D. (N.P.) 305.

4. Affidavit of Attachment.

It is not necessary that the affidavit for an attachment for a violation of an order of injunction should state the pendency of the original action, the orders, etc.; all that is required, in addition to what is already upon the record, is a statement of violation of the order not in the presence of the court: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

Persons accused of violating an injunction and brought before the court upon attachment need not be served with a copy of the affidavit, or the order which they have disobeyed. Upon being served with the injunction they are supposed to have informed themselves at once as to what they are enjoined from doing: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

5. Contempt.

A proceeding for contempt of court for violating an injunction, under G. C., §§ 11887 and 11888, in providing that the party may be fined in any sum not exceeding \$200, "for the use of the county," is penal in its nature and must be strictly construed: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629.

One accused of contempt in violating an injunction is not entitled to a jury trial: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

Where there has been a violation of an order of injunction, it is not necessary in

order to prosecute the offender for contempt to docket an independent action, but the order may be enforced in the original action under the provision of R. S., § 5581, for the issuing of an attachment upon affidavit: *Ray v. Railway*, 10 O. C. C. (N.S.) 573, 14 O. C. C. (N.S.) 186, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664]; *Catrow v. Railway*, 11 O. N. P. (N.S.) 561.

Contempts of court being punished as offenses against the administration of justice and not as personal affronts to those who exercise jurisdictional functions, it is not indispensable that the violation of an injunction be punished by the judge who made the decree: *Menuez v. Candy Co.*, 77 O. S. 386, IV Longsdorf's Notes, 1033.

Where there are several defendants, accused of violating an order of injunction, who are before the court on attachment, each must respond for himself for the wrong he has done, and the limitation to \$200 as the fine which may be imposed under the statute applies to each individual and not to the defendants collectively: *Ray v. Railway*, 10 O. C. C. (N.S.) 577, 12 O. C. D. 793 [affirmed, without opinion, *Ray v. Railway*, 57 O. S. 664].

Under G. C., § 11888, a party may be fined in a sum not to exceed \$200 and imprisoned until such fine is paid. But the statute does not provide that a party can be imprisoned until the costs also are paid; and a judgment in such a proceeding that the party be imprisoned until the fine and costs are paid, is erroneous so far as the costs are concerned, and will be modified to that extent: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629.

An injunction does not execute itself, and the court in the event of disobedience, may cause the arrest of the violators and punishment as for contempt by fine or imprisonment or both. The fact that a large number instead of a single individual, are violating the order is wholly immaterial: *Boiler Co. v. Benner*, 14 O. D. (N.P.) 357.

An appeal having been taken to the circuit court from a judgment of the common pleas granting a perpetual injunction, a subsequent violation of the decree should be punished as a contempt by the circuit court, the statute providing that notwithstanding the appeal the injunction was continued in force until suspended by the circuit court or two judges thereof: *Menuez v. Candy Co.*, 77 O. S. 386, IV Longsdorf's Notes, 1033.

The violation of an injunction to restrain the enforcement of unreasonable rules and regulations, by a water company, is punishable by contempt proceedings against the proper officer or employe of the company:

Newark v. Waterworks, 4 O. N. P. 341, 6 O. D. (N.P.) 518.

To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which it was issued nor to have been actually served with a copy of it, so long as he appears to have actual notice: *Miller v. Milling Co.*, 21 O. C. C. 325, 11 O. C. D. 629.

Where a contractor, proceeding with a public improvement, by virtue of a contract duly awarded him by the county commissioners, is enjoined from proceeding therewith, the court predicated its order of injunction upon the unconstitutionality of the statute under which said contract was made and said improvement was being prosecuted, the fact that the entry of record makes no allusion to the grounds of the decision or to the invalidity of said statute, but finds in general terms for the plaintiff and against defendant, and that no appeal or error proceedings were instituted to reverse such findings will not preclude said commissioners from afterwards proceeding under another unquestionably constitutional statute and properly awarding a new contract for said public work to the same contractor; and if such contractor thereupon proceeds again with the work, he is not thereby guilty of contempt of court as for a violation of the aforesaid injunction: *State v. Michael*, 12 O. D. (N.P.) 674.

Fire commissions required to advertise for bids on contracts for \$500 or over, on being enjoined from contracting for \$4,000 worth of hose under an improper advertisement, divided up the amount into successive purchases of less than \$500 each from the accepted bidder. It was held an evasion and violation of the injunction and a contempt, and they will be compelled to repay into the treasury the amount paid out: *Wing v. Cleveland*, 9 Dec. Rep. 551, 15 Bull. 50.

D. EFFECT OF REFUSAL TO GRANT INJUNCTION.

If a second bill is filed to obtain a second injunction, in relation to the same transactions, and between the same parties, it is not enough to allege new ground of equity, not suggested in the former bill. It must be shown that the new matter alleged did not exist at the time the first bill was filed, or that, if it existed, it was unknown to the complainant: *Bank v. Schultz*, 3 O. 61, I Longsdorf's Notes, 148.

An application for an injunction will not be heard if one is already pending in another court: *Cincinnati v. Electric Co.*, 11 Dec. Rep. 315, 26 Bull. 104.

In an action on a promissory note, the maker is not estopped from setting up a want of consideration or fraud, by a judgment dismissing his petition on the merits, in an action brought to enjoin the negotiations of the note and to obtain its surrender and cancellation, although the matter set up as a defense was relied upon as the ground of relief in the petition: *Cramer v. Moore*, 36 O. S. 347, III Longsdorf's Notes, 856.

XIII. ACCOUNTING AND COMPENSATION.

No independent action lies for an account for waste. The account is only consequential on an injunction or other original suit: *Crockett v. Crockett*, 2 O. S. 180, I Longsdorf's Notes, 1038; *Jenks v. Langdon*, 21 O. S. 362, III Longsdorf's Notes, 34. See also WASTE.

A suit to enjoin tracks laid across a ferry landing and for an account of damages sustained is primarily for an injunction, and the right to account depends on the right to injunction: *Railroad v. Horner*, 33 Bull. 332.

A suit to enjoin obstructions placed in a road, although the plaintiff claimed damages occasioned by such obstruction, is in the nature of a bill in equity for an injunction, and incidentally for an account: *Converse v. Hawkins*, 31 O. S. 209, III Longsdorf's Notes, 574.

Where equitable grounds for an injunction are lacking, the court can not proceed to award damages which it is averred arose on the equitable action: *Rauch v. Brewing Co.*, 7 O. C. C. (N.S.) 460, 18 O. C. D. 546.

In an action to restrain the commission of a nuisance and to recover damages therefor, equity has jurisdiction and damages may be awarded, even if the court for some reason considers that it will not grant an injunction: *Bag Co. v. Cleveland*, 2 O. C. C. (N.S.) 111, 15 O. C. D. 380. See also NUISANCE.

XIV. DISSOLUTION AND MODIFICATION.

A. IN GENERAL.

A bill of exceptions can not be taken to an order at chambers dissolving a temporary injunction: *Marshall Field Co. v. Esch*, 18 O. C. C. 749, 4 O. C. D. 162.

The dismissal of a petition upon which a preliminary injunction has been obtained dissolves the injunction: *Krug v. Bishop*, 9 Dec. Rep. 250, 11 Bull. 295.

Constitutionality of a law may be determined on a motion to dissolve an injunction restraining proceedings under it, where the probable loss to plaintiff is susceptible of

ascertainment or compensation: *Snyder v. Shirley*, 7 O. N. P. 26, *sub nomine, French v. Shirley*, 9 O. D. (N.P.) 181.

A motion to dissolve a temporary injunction will not be granted in an action for a permanent injunction, where it will be necessary on the final disposition of the case to determine important questions arising from the issue of the case, and on which depends the right to the injunction: *State, ex rel., v. Commissioners*, 21 O. C. C. 780, 12 O. C. D. 328.

An injunction against an execution on a dormant judgment will not be dissolved because the court might have recalled the execution on motion: *Krinke v. Parish*, 9 O. C. C. 141, 6 O. C. D. 30.

On motion to dissolve a preliminary injunction on the ground that the allegations of the petition are untrue, the burden is on defendant to prove that fact, but such full and positive proof is not requisite as would be necessary upon a final hearing of the case: *Kuhn v. Woolson Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292.

On dissolution of an injunction the court could, no doubt, retain the case and assess the damages caused by it or could leave the parties to their action at law on the injunction bond: *Roberts v. Dust*, 4 O. S. 502, II Longsdorf's Notes, 125.

A judge in vacation has the same power to dissolve an injunction as the court in session. And so, though the court has reserved the case to a higher court, if the parties have not perfected the order by filing and docketing: *Chapman v. Railroad*, 1 Dec. Rep. 565, 10 W. L. J. 399.

And any supreme judge, as member of the district court, may exercise this power in vacation, though assigned to a different district court from the one where the case pend: *Baldwin v. Railroad*, 1 Dec. Rep. 546, 10 W. L. J. 356.

A dissolution at chambers of a temporary order will be suspended by the circuit court, if necessary, until a petition in error can be filed: *Russell v. Fulton*, 6 O. C. C. 185, 3 O. C. D. 407.

On dissolution of injunction against a judgment at law, no penalty can be awarded on the interlocutory decree, but will be awarded at the final dismissal of the case, though at the next term, but only on the amount then unpaid: *Lewis v. Sutliff*, 8 O. 60, I Longsdorf's Notes, 413.

B. EVIDENCE AND BURDEN OF PROOF.

Under the former practice, where there was an appeal from an interlocutory order dissolving an injunction, affidavits were competent testimony in the district court on a

motion to dissolve: *Keys v. Williamson*, 31 O. S. 561, III Longsdorf's Notes, 605; *Railway v. Hurd*, 17 O. S. 144, II Longsdorf's Notes, 823.

On a motion to dissolve a preliminary injunction on the ground that the allegations of the petition are untrue, the burden is on the defendants to prove that fact, but such full and positive proof is not requisite as would be necessary upon a final hearing of the case: *Kuhn v. Spice Co.*, 8 O. N. P. 686, 10 O. D. (N.P.) 292.

C. NATURE AND EFFECT OF ORDER MODIFYING INJUNCTION.

A petition seeking the vacation of an injunction and specific performance of the enjoined contract is not subject to demurrer where plaintiff, a necessary party was not a party to the injunction proceedings: *Ferris v. Commissioners*, 9 O. C. C. (N.S.) 169, 19 O. C. D. 622.

Where an injunction to a judgment at law, for the payment of money, is dissolved, the bill continued, and sundry payments made before its final dismissal, the decree is to be for the balance due at the time of dismissal, with the legal penalty of damages on that balance: *Lewis v. Sutliff*, 8 O. 60, I Longsdorf's Notes, 413.

Where an injunction restrains proceedings of a judgment creditor against certain specified property, claimed by a third person, without interfering with the remedy against other property, or the person of the debtor, who is not made party to the bill, the court will not, on the dissolution of the injunction and dismissal of the bill, decree against the complainant the amount of the judgment and penalty: *Turnpike Co. v. Byington*, 12 O. 114, I Longsdorf's Notes, 600.

The statutory requirement to render judgment for the amount with penalty where an injunction staying levy or sale is dissolved will not be deemed applicable if the property released was not diminished in value and was sold and the proceeds applied to pay the judgment enjoined: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002.

Consent to obtaining a modification of the injunction which is afterwards made perpetual as modified, does not estop the enjoined party from seeking reversal. It only established a *modus vivendi* during litigation: *Zanesville v. Gas Light Co.*, 47 O. S. 1, IV Longsdorf's Notes, 355.

D. REVIEW.

An appeal does not lie from an interlocutory order modifying an injunction: *Forgy v. Railway*, 1 O. C. C. 417, 1 O. C. D. 233.

An order of the Court of Common Pleas dissolving a temporary injunction, is reviewable, on error, before the final disposition of the case in said court: *Railway v. Hamilton*, 3 O. C. C. 455, 2 O. C. D. 259.

But an order of a judge of the common pleas court in a special proceeding made at chambers is not reviewable: *Atwood v. Whipple*, 48 O. S. 308, IV Longsdorf's Notes, 415.

An order of the court of common pleas overruling a motion to dissolve an injunction, may be reviewed, on error, by the circuit court: *Burke v. Railway*, 45 O. S. 631, IV Longsdorf's Notes, 299.

When a party desires to appeal to the circuit court from an interlocutory order made by the court of common pleas, vacating an injunction, and said last named court by its order suspends the operation of the order of vacation of the injunction for ten days, the party desiring so to appeal may perfect the same by giving the notice and entering into the undertaking provided by law, and the refusal of two judges of the circuit court, in vacation, to order a suspension of the order of dissolution will not have the effect of defeating the appeal: *Kewish v. Wire*, 17 O. C. C. 386, 9 O. C. D. 551.

XV. REVIEW.

A. ERROR.

An order of an inferior court dissolving a temporary injunction is not reviewable on the weight of the evidence: *Ferry v. Gottlieb*, 45 O. S. 195, IV Longsdorf's Notes, 268.

Where a petition for an injunction states facts which if true, would entitle the plaintiff to the relief prayed for, it is error for the court, before answer, on motion therefor, to vacate the injunction and dismiss the petition: *Makemson v. Kauffman*, 35 O. S. 444, III Longsdorf's Notes, 796.

An order of the court overruling a motion to dissolve an injunction is an order affecting a substantial right made in a special proceeding which may be reviewed on error: *Burke v. Railway Co.*, 45 O. S. 631, IV Longsdorf's Notes, 299.

An order of the court of common pleas granting a temporary injunction in a suit in which the ultimate relief sought is an injunction, is not either a judgment or a final order which may be reviewed by the circuit court on petition in error: *May Co. v. Bailey Co.*, 81 O. S. 471.

Refusal to grant an injunction is not prejudicial error, when consolidation of actions accomplishes the same purpose: *Taylor v. Brick Co.*, 66 O. S. 360, IV Longsdorf's Notes, 909.

The general term of the superior court of Cincinnati has power to review an order of

the special term dissolving a temporary injunction: *Mitchell v. Railway Co.*, 7 O. N. P. 640, 9 O. D. (N.P.) 674.

In an action to enjoin the collection of taxes levied under an unconstitutional act, the payment of such taxes after the dissolution of the injunction on final hearing, does not prevent the defendant from prosecuting error to test the validity of the act, when by its provisions other taxes are to be levied for one or more years: *Railway Co. v. Martin*, 53 O. S. 386, IV Longsdorf's Notes, 606.

The general term of the superior court has jurisdiction to grant a temporary injunction during the pendency of a proceeding in error: *Furniture Co. v. Railway Co.*, 7 O. N. P. 640, 9 O. D. (N.P.) 674.

The refusal by a judge at chambers to dissolve a temporary restraining order is not reviewable, for it is not the act of the court: *Atwood v. Whipple*, 48 O. S. 308, IV Longsdorf's Notes, 415.

Where the only relief sought in the original petition was an injunction, and upon appeal the injunction was dissolved and the cause retained for an assessment of damages, the filing of a supplemental answer and cross-petition setting forth the specific damages sustained by reason of the injunction is proper procedure; and it is within the discretion of the court to determine the issue as thus presented or to remand the defendant to an action at law upon the bond: *Building Co. v. Electrotype Co.*, 13 O. C. C. (N.S.) 559, 23 O. C. D. 475.

The common pleas, in a suit to enjoin, granted a preliminary injunction, and on defendant's motion to dissolve modified it, and the circuit court, on plaintiff's petition in error thereto, set aside the modification and instructed the common pleas to make the original injunction perpetual. It was held erroneous. The defendant's motion to dissolve and the hearing thereon did not waive defendant's right to a full hearing, and the remand should have been for trial with leave to plead: *Light Co. v. Talmage*, 37 Bull. 313 [without opinion, in the supreme court].

An order granting dissolution of an injunction on motion is reviewable: *Railroad Co. v. Hamilton*, 3 O. C. C. 455, 2 O. C. D. 259, *contra*, *College v. Cincinnati*, 13 Dec. Rep. 535, 1 C. S. C. R. 255. See also ERROR.

A bill of exceptions can not be taken to an order at chambers, as here dissolving a temporary injunction: *Field v. Esch*, 18 O. C. C. 749, 4 O. C. D. 162. See also ERROR.

B. APPEAL.

A decree dismissing an action for an injunction and a money judgment is appealable: *Weitzel v. Delhi*, 12 O. C. D. 737.

Appeal does not lie from interlocutory order modifying injunction: *Forgy v. Railroad Co.*, 1 O. C. C. 417, 1 O. C. D. 233.

An action to vacate an injunction and for specific performance is for equitable relief and appealable: *Ferris v. Commissioners*, 9 O. C. C. (N.S.) 169, 19 O. C. D. 622.

An interlocutory order dissolving an injunction, may be suspended on appeal by order of the court: *Johnson v. Avondale*, 1 O. C. C. 229, 1 O. C. D. 124.

Appeal can be taken from the dismissal of a supplemental petition asking an injunction against the threatened sale of property: *Field v. Esch*, 18 O. C. C. 749, 4 O. C. D. 162.

Appeal from dissolution at chambers of an injunction will be dismissed after appeal from dismissal of the petition, for the latter appeal brings up the case as it stood in the common pleas: *Field v. Esch*, 18 O. C. C. 749, 4 O. C. D. 162.

The effect of an appeal from an interlocutory order dissolving an injunction suspends or vacates the effect of order appealed from until it can be heard: *Railway v. Hurd*, 17 O. S. 144, II Longsdorf's Notes, 823.

The circuit court may suspend an order granting a perpetual injunction on appeal: *McClung v. Coal Co.*, 7 O. C. C. 182, 3 O. C. D. 719.

Injunction may be allowed in case pending in circuit court on appeal: *Kent v. Mahaffy*, 2 O. S. 498, I Longsdorf's Notes, 1076.

Upon appeal in a contempt case for violating an injunction, the validity of the injunction can not be attacked when it appears that the court had jurisdiction of the parties and subject-matter: *Moulders' Union v. Greenwald Co.*, 4 O. N. P. (N.S.) 161, 16 O. D. (N.P.) 678 [reversing *Greenwald Co. v. Moulders' Union*, 16 O. D. (N.P.) 198, 1 Hosea, 242; affirmed, without opinion, *Greenwald Co. v. Moulders' Union*, 77 O. S. 618]. See also CONTEMPT.

A gas company's suit against a city averring a contract to pay for lighting, and asking injunction against the city's interference and destruction of poles and an account due for lighting, states an equitable cause of action, and on demurrer being sustained thereto is appealable. But if on appeal the city's answer shows there is no valid contract, and this is not denied, the claim for money having no longer an equitable cause of action, which is not appealable, and must therefore be dismissed where the city has not submitted to the jurisdiction, but has disputed it at every step: *Wellston v. Morgan*, 59 O. S. 147, IV Longsdorf's Notes, 761.

XVI. BOND.

A. NECESSITY FOR BOND.

A temporary restraining order can not be granted without bond: *Hertenstein v. Herrman*, 6 O. N. P. 93, 9 O. D. (N.P.) 205.

An injunction without an injunction bond is void: *In re George*, 5 O. C. C. 207, 3 O. C. D. 104; *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

An injunction to restrain the misapplication of public funds, under G. C., § 4311, does not require an undertaking: *Forsythe v. Winans*, 44 O. S. 277, IV Longsdorf's Notes, 210.

The announcement by a court of its determination to grant a temporary injunction does not render such an order effective until it is entered upon the journal; and where bond was not executed until the court had approved the entry fixing the amount, at which time it had lost jurisdiction through the filing of a petition for removal, the bond is void and the temporary injunction never became operative or binding on the defendant: *Mannington v. Railway*, 8 O. L. R. 451, 16 O. F. D. 552.

An order of injunction indorsed on a petition has no effect until it is filed and the bond given: *Totten v. Lawton*, 8 O. C. C. 377, 4 O. C. D. 518.

B. EFFECT OF FAILURE TO GIVE BOND.

The fact that no bond is given on a temporary injunction is not ground for dismissal: *Gallagher v. Johnson*, 1 O. D. (N.P.) 264, 31 Bull. 24.

If an injunction bond be not given, disobedience of it is not punishable: *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929.

If a party is informed that an injunction has been allowed to restrain him from doing a particular act, and does such act before there is time to give such undertaking, what, if any, power has the probate court to punish for contempt, was referred to but not decided in *Diehl v. Friester*, 37 O. S. 473, III Longsdorf's Notes, 929. See also *Wing v. Cleveland*, 9 Dec. Rep. 551, 15 Bull. 50.

C. CONSTRUCTION OF BOND.

A bond is within the statute of frauds and must be strictly construed: *Williamson v. Hall*, 1 O. S. 190, I Longsdorf's Notes, 964; *Hall v. Williamson*, 9 O. S. 17, II Longsdorf's Notes, 374.

The principal on the bond is no more liable than the sureties, except in strict accordance

with its terms: *Railway v. Burke*, 54 O. S. 98, IV Longsdorf's Notes, 628.

The statutes in force at the time of the signing are to govern the construction of the bond as to the sureties' liability: *Krug v. Bishop*, 44 O. S. 221, IV Longsdorf's Notes, 205 [reversing, *Krug v. Bishop*, 9 Dec. Rep. 250, 11 Bull. 295].

Dismissal of the injunction and of the action without prejudice, because co-defendants had not been served with summons, is not a breach of the injunction bond conditioned to pay damages, "if it be finally decided that the injunction ought not to have been granted": *Krug v. Bishop*, 44 O. S. 221, IV Longsdorf's Notes, 205 [reversing, *Krug v. Bishop*, 9 Dec. Rep. 250, 11 Bull. 295].

All the words of an injunction bond should have effect if possible: *Roberts v. Dust*, 4 O. S. 502, II Longsdorf's Notes, 125.

An injunction bond to pay all moneys and costs due, and to become due, and all moneys and costs decreed against him, the injunction suit having been dismissed on costs, will be construed to support an action for the damages caused by the injunction: *Roberts v. Dust*, 4 O. S. 502, II Longsdorf's Notes, 125.

An injunction bond under the chancery act of 1831 was simply a bond of indemnity; and, though the clerk makes the condition of the bond broader than required by law, it can only be enforced as a bond of indemnity: *Miller v. Montague*, 12 Dec. Rep. 551, 1 D. 164.

D. ADDITIONAL BOND.

The court, in continuing an injunction, may require additional or new security to be given or a new bond with new and enlarged conditions: and so the court may order the new bond to be given in place of and as a substitute for the former bond, which may be thereby discharged without the consent of the obligee. But if such order be not substantially complied with, as where by mistake of the clerk the new bond is conditioned merely for the payment of the costs, the former bond is not discharged: *Kent v. Bierce*, 6 O. 336, I Longsdorf's Notes, 341; *Kent v. Bierce*, 7 O. (pt. 2) 209, I Longsdorf's Notes, 200.

Where an injunction bond is given and additional bond required and given, which latter alone is sued upon, it not appearing on the record that the sureties on the former were not the same as those sued, and the defense of want of parties not being made, the judgment on the second bond is not erroneous: *Dwelle v. Wilson*, 14 O. C. C. 551, 7 O. C. D. 311.

E. ACTION ON BOND.

1. Preliminary Requisites.

(a) *Decision that Injunction Should Not Have Been Issued.*

An action on an injunction undertaking will not lie unless there is a judicial decision that the injunction is wrongly granted: *Railway v. Burke*, 54 O. S. 98, IV Longsdorf's Notes, 626.

The dissolution of a temporary injunction is not ground of action, and action can not be sustained upon an injunction bond until final determination of the case, showing improper granting of the injunction: *Welch v. Benham*, 6 O. N. P. 33, 8 O. D. (N.P.) 70.

Settlement of the controversy against the plaintiff by an arbitration not subject to the court's approval, is not a judicial determination that the injunction should not have been granted: *Railway v. Burke*, 54 O. S. 98, IV Longsdorf's Notes, 626.

Where an injunction is appealed to the circuit court, although the injunction is made perpetual by the common pleas court, if the appellate court reverses the common pleas court and the injunction is dissolved, the obligors on the injunction bond are liable, although the appellate court did not expressly find whether the injunction was improperly granted: *Williams v. Baker*, 13 O. C. C. 500, 7 O. C. D. 515.

A dismissal without prejudice of an action for an injunction does not constitute a breach of the undertaking provided for in G. C., § 11882: *Krug v. Bishop*, 44 O. S. 221, IV Longsdorf's Notes, 205.

Where an action is dismissed by consent, and a temporary injunction pending in it, dissolved without any judicial action of the court, but as a consequence of the dismissal, such dissolution is of no avail in an action on the injunction undertaking: *Railway v. Burke*, 54 O. S. 98, IV Longsdorf's Notes, 626.

The obligors are liable, though the action enjoined was never tried on its merits: *Bishop v. Bascoe*, 8 Dec. Rep. 423, 7 Bull. 343.

The bond in a suit to enjoin a forcible detainer is not liable if the magistrate had no jurisdiction, because no right of the plaintiff was suspended, but *contra*, if the injunction was also against interfering with possession generally until final hearing: *Bishop v. Bascoe*, 8 Dec. Rep. 423, 7 Bull. 343.

The obligors on an injunction bond are liable on reversal in an appellate court: *Williams v. Baker*, 13 O. C. C. 500, 7 O. C. D. 515.

A person who has filed a suit for rescission of deeds of exchange of real estate, possession not having been changed, is entitled to an injunction against a forcible detainer suit until the right to a rescission is determined. Hence the defendant can not recover on the injunction bond, although the rescission failed because of plaintiff's non-compliance with the terms of the decree of rescission, for the injunction was rightful: *Worden v. Klag*, 13 O. C. C. 627, 6 O. C. D. 359.

The failure of a plaintiff to prosecute in an action for an injunction where a temporary restraining order has been granted and bond given, is a confession by him that he has no case to try, and that his interference with the rights of the defendant by injunction was without warrant, and the surety is liable whether the action is dismissed at the request of the plaintiff, or because of his neglect to prosecute: *Machold v. Railway*, 4 O. N. P. (N.S.) 273, 17 O. D. (N.P.) 54; *Krug v. Bishop*, 44 O. S. 221, IV Longsdorf's Notes, 205.

No action can be maintained on the bond, where a party is compelled to ask for an injunction because of inability to set up a defense, and also where matters should remain in the position in which they are until the question is determined: *Worden v. Klag*, 13 O. C. C. 627, 6 O. C. D. 359.

An action on an injunction undertaking will not lie against a principal when it will not lie against the sureties: *Railway v. Burke*, 54 O. S. 98, IV Longsdorf's Notes, 626.

On dismissal, without prejudice, of an injunction against a forcible entry and detainer case, the justice's jurisdiction of the forcible entry case, or the party's right to possession, can not be inquired into in an action on the injunction bond: *Bishop v. Bascoe*, 8 Dec. Rep. 654, 9 Bull. 111.

(b) *Necessity for Issuance of Execution.*

It is not necessary on the dissolution of an injunction and dismissal of the bill, where the injunction did not operate to stay execution upon a former decree or judgment to sue out execution against the plaintiff before a suit can be sustained on the bond against the sureties: *Kent v. Bierce*, 6 O. 336, I Longsdorf's Notes, 341.

A sheriff's return that he could find no goods or chattels, lands or tenements, of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit on an injunction bond: *Seymour v. King*, 11 O. 342, I Longsdorf's Notes, 564.

Execution against the principal is not necessary before suing on an injunction bond, for it is conditioned to pay on dissolution:

Fogle v. Hanlan, T. 231. See also BONDS, SURETY.

2. Damages.

An indebtedness or liability to pay attorney's fees in procuring a dissolution of an injunction is sufficient damage to sustain an action on the undertaking: *Bishop v. Bascoe*, 8 Dec. Rep. 654, 9 Bull. 111.

Where a person is restrained by injunction from making a race to his mills, and the conditions of the injunction bond are that the obligor will pay all moneys and costs due and to become due from the plaintiff in the bill, and all moneys and costs which shall be decreed against him, and the bill is dismissed at the costs of the plaintiff, the person so restrained can sustain an action on the bond against the plaintiff and his sureties to recover the damages sustained by reason of the injunction: *Roberts v. Dust*, 4 O. S. 502, II Longsdorf's Notes, 125.

In an action on an undertaking for an injunction, whereby the plaintiff agrees to pay the defendant "the damages he may sustain by reason of the injunction," if it be finally decided that it ought not to have been granted; it was held that attorney's fees and expenses necessarily incurred in obtaining a dissolution of an injunction, may be recovered as damages secured by the undertaking, when it is finally decided that the injunction ought not to have been granted: *Noble v. Arnold*, 23 O. S. 264, III Longsdorf's Notes, 123; *Riddle v. Cheadle*, 25 O. S. 278, III Longsdorf's Notes, 229; *Bishop v. Bascoe*, 8 Dec. Rep. 654, 9 Bull. 111.

Attorney's fees, only so far as paid to dissolve or modify the provisional injunction, or occasioned by it, or occasioned by its allowance and not those for the original case, can be recovered: *Riddle v. Cheadle*, 25 O. S. 278, III Longsdorf's Notes, 229.

If the attorney's fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incidental to the result, such fees and expenses are not damages sustained by reason of the injunction, and no recovery therefor can be had upon the undertaking: *Bishop v. Bascoe*, 8 Dec. Rep. 654, 9 Bull. 111.

Attorney's fees incurred in procuring dissolution of injunction, and also the defendant's own expenses in procuring such dissolution, are recoverable on the injunction bond: *Dwelle v. Wilson*, 14 O. C. C. 551, 7 O. C. D. 614.

Only nominal damages can be recovered by a person on an injunction bond, who has been enjoined from fishing in the waters before the land of another, when the injunc-

tion afterwards is dissolved and he was prevented from fishing in the particular spot during that season: *Dwelle v. Wilson*, 14 O. C. C. 551, 7 O. C. D. 614.

Where a stranger to the suit in which the judgment has been rendered, files a bill to restrain a levy upon specific personal property, claiming right therein, on the dissolution of such injunction the person suing it out is not responsible for the whole amount of the original judgment, penalty and costs, but only for the value of the specific property levied upon, and the costs arising from proceedings in injunction, because the judgment has not been enjoined, and the judgment creditor was not hindered from proceeding in any other manner against the judgment debtor: *Hillyer v. Richards*, 13 O. 135, I Longsdorf's Notes, 629; *Turnpike Co. v. Byington*, 12 O. 114, I Longsdorf's Notes, 600.

An injunction bond conditioned to prosecute the case and pay all damages sustained, on dismissal of the injunction merely with costs, covers the damages sustained without their being assessed by the chancellor, and not costs merely: *Kent v. Bierce*, 6 O. 336, I Longsdorf's Notes, 341.

Where the original case was to abate a wooden building in a blocked square as a nuisance and incidentally to enjoin its completion, and a temporary restraining order was granted, but on final hearing the ordinance blocking the square was found to be invalid, the damages on the injunction bond can not include the whole expense of the case, and it being impossible to apportion the attorney's charges, the damages will be limited to the loss of the use of the building for the time: *Tarbell v. Ennis*, 7 O. N. P. 416, 10 O. D. (N.P.) 346.

A turnpike company can not recover as damages tolls that it could not lawfully have collected, if the injunction had not been granted: *Turnpike Co. v. Kelley*, 41 O. S. 144, IV Longsdorf's Notes, 55.

Nominal damages are implied by dissolving an injunction issued in restraint of lawful right, but to recover more the special damages must be averred: *Miller v. Montague*, 12 Dec. Rep. 551, 1 D. 164.

Damages must be proved by plaintiff to recover on the bond after setting aside an injunction against sale of property claimed as exempt: *Tyler v. Ryan*, 5 Dec. Rep. 671, 4 Am. L. Rec. 670.

3. Pleading and Proof.

In a declaration upon an injunction bond, it is necessary to aver that execution had been issued against the principal debtor, and that it appears by its return he had no

goods and chattels, lands and tenements, sufficient to satisfy the same: *Hillyer v. Richards*, 13 O. 135, I Longsdorf's Notes, 629.

Damages in consequence of injunction order must be proved before recovery can be had on injunction bond: *Tyler v. Ryan*, 5 Dec. Rep. 671, 4 Am. L. Rec. 670.

Nominal damages are implied by dissolving an injunction issued in restraint of lawful right, but to recover more the special damages must be averred: *Miller v. Montague*, 12 Dec. Rep. 551, 1 D. 164.

Where the only relief sought in the original petition was an injunction, and upon appeal the injunction was dissolved and the cause retained for an assessment of damages, the filing of a supplemental answer and cross-petition setting forth the specific damages sustained by reason of the injunction is proper procedure; and it is within the discretion of the court to determine the issue as thus presented or to remand the defendant to an action at law upon the bond: *Building Co. v. Electrotypes Co.*, 13 O. C. C. (N.S.) 559, 23 O. C. D. 475.

XVII. INJUNCTION AS GROUNDS FOR MALICIOUS PROSECUTION.

An injunction in a suit brought maliciously and without probable cause, whereby defendant was prevented from enjoying his mining property and prosecuting a profitable business, which suit the plaintiff dismissed after a year, is ground for action: *Coal Co. v. Upson*, 40 O. S. 17, IV Longsdorf's Notes, 2.

The damages is the value of defendant's right to possess this property and prosecute their business, i. e., the value of the use of the property in the business, the expenses of it, the facilities for reaching a market, the demand, the cost of production and market price, the relation of the land to other lands of defendants, are to be considered. Though these facts include the element of profits on possible sales, they are to be considered, not treating said element as the measure of damages, but as one of the facts affecting the value of the use: *Coal Co. v. Upson*, 40 O. S. 17, IV Longsdorf's Notes, 2. See also MALICIOUS PROSECUTIONS AND ACTIONS.

INJURIES.

For actions for injuries to persons, see CARRIERS; MASTER AND SERVANT; NEGLIGENCE.

For actions for injuries to property, see CARRIERS; NEGLIGENCE; TRESPASS.

For damages in relation to injuries, see DAMAGES.

"Injury" in the law and especially in legislation of the character in the case at bar, is a word of well-defined meaning, and means an interference with some legal right belonging to the owner of property, alleged to be injured, and used by him as an appurtenance to such property: *Flickman v. Railway Co.*, 11 Dec. Rep. 547, 27 Bull. 302.

A person is not entitled to recover damages for injuries to his feelings and for his disappointment or disgrace in the community as a result of having been induced to buy worthless mining stock by false representations, made knowingly or recklessly, that the property was unencumbered: *Cable v. Bowlus*, 21 O. C. C. 53, 11 O. C. D. 526. See also DAMAGES.

The danger that a jury may be prejudiced by proof of distressing injuries can not deprive a plaintiff of the best proof in support of his allegations: *Coney Island Co. v. Mitsch*, 3 O. N. P. (N.S.) 81, 15 O. D. (N.P.) 653 [reversed, without opinion, *Coney Island Co. v. Mitsch*, 75 O. S. 607].

The previous exhibition of corporeal injuries, or relation of the distressing character of injuries causing death does not constitute prejudicial error, where in the charge to the jury with reference to the measure of damages, the court distinctly instructs them that recovery can only be had for the pecuniary injury to the next of kin, and that no damages can be awarded for bereavement, mental suffering or as a solace: *Coney Island Co. v. Mitsch*, 3 O. N. P. (N.S.) 81, 15 O. D. (N.P.) 653 [reversed, without opinion, *Coney Island Co. v. Mitsch*, 75 O. S. 607]. See also DEATH BY WRONGFUL ACT.

In a suit brought to recover for personal injuries sustained by one at the hands of a street railway company, a witness for the plaintiff, in answer to the question "Where else was he hurt, if you know?" answered, "He complained of his back and his limb." A motion to take this answer from the jury was overruled. It was held not to be reversible error: *Railway Co. v. Roebuck*, 22 O. C. C. 99, 12 O. C. D. 262. See also EVIDENCE.

A pedestrian who stops at a distance of fifteen feet from a railway crossing and looks for approaching trains in both directions, and then attempts to pass over the crossing without looking again as he comes near to the rails is guilty of negligence, and a motion will lie to direct a verdict for the defendant railway company in an action to recover on account of injuries from being struck by a train under such circumstances: *Devore v. Railway*, 9 O. N. P. (N.S.) 401,

20 O. D. (N.P.) 167 [affirmed, without opinion, *Devore v. Railway*, 81 O. S. 541].

When an accumulation of water along the sides of a railroad is not detrimental to the public health, convenience or welfare, but is injurious to contiguous lands, the injury is a private injury to the contiguous lands, to be redressed by the owners by an action for damages, the probate court not having jurisdiction in such actions: *Railroad Co. v. Keith*, 67 O. S. 279, IV Longsdorf's Notes, 930 [reversing *Railroad Co. v. Keith*, 21 O. C. C. 669, 12 O. C. D. 208]. See also RAILROADS.

INJURIOUS WORDS.

See LIBEL AND SLANDER.

INJURY FROM FRAUD.

See FRAUD AND DECEIT.

INJURY WITHOUT DAMAGE.

See DAMAGES; TORTS.

INLAND BILLS.

See NEGOTIABLE INSTRUMENTS.

INLAND FISHING DISTRICT.

See FISH AND GAME.

IN LOCO PARENTIS.

See INFANTS; PARENT AND CHILD.

INMATES OF PUBLIC INSTITUTIONS.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

INNKEEPER.

Scope Note.—Includes the definition of an innkeeper and of a guest; the limit and nature of the liability of an innkeeper; his lien and power to make and enforce regulations. Excludes livery-stable keepers; nuisances; intoxicating liquors.

Cross References.

For questions of negligence, see also NEGLIGENCE.

For effect of civil-rights statutes, see also CIVIL-RIGHTS STATUTES.

For questions of agency, see also AGENCY.

For livery-stable keepers, see LIVERY-STABLE KEEPER.

For intoxicating liquors in hotels, see INTOXICATING LIQUOR.

For questions concerning nuisances, see NUISANCE.

ANALYTICAL OUTLINE.

- I. Definitions.
- II. When Liability Begins.
- III. When Liability Ends.
- IV. Nature of Liability.
- V. Lien.
- VI. Power to Make and Enforce Regulations.
- VII. Pleading.
- VIII. Evidence.

I. DEFINITIONS.

An innkeeper is a "keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation": *Hotel Co. v. Wiatt*, 9 Dec. Rep. 55, 10 Bull. 310 [reversed on other grounds, *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193].

A person who makes it a business to keep a house of entertainment, is a tavern keeper, within the statute, though he keeps no liquor in his house for any purpose: *Curtis v. State*, 5 O. 324, I Longsdorf's Notes, 287.

The proprietor of a lodging house, in connection with which meals are served and a bar is operated, is an innkeeper and a patron paying a stipulated sum for board and lodg-

ing of such a house is a guest: *Hart v. Roeckers*, 7 O. N. P. (N.S.) 395, 19 O. D. (N.P.) 331 [affirmed, *Roeckers v. Hart*, 11 O. C. C. (N.S.) 380, 20 O. C. D. 709].

The keeper of a saloon or road-house is not an innkeeper in such sense as to be liable for a team hitched in front of his house by a customer: *Taber v. Myers*, 33 Bull. 49.

An inn is a house where a traveler is furnished with everything he has occasion for while on his way: *Hotel Co. v. Wiatt*, 9 Dec. Rep. 55, 10 Bull. 310 [reversed on other grounds, *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193].

II. WHEN LIABILITY BEGINS.

One who deposits money with the clerk in a hotel and announces his intention of taking a room subsequent, but who does not engage a room, is not a guest of such hotel; and if the clerk absconds with such deposit, the proprietor of such hotel is not liable therefor: *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193 [reversing *Hotel Co. v. Wiatt*, 9 Dec. Rep. 55, 10 Bull. 310].

A clerk of an innkeeper has no power to receive money or goods on deposit from any but guests: *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193 [reversing *Hotel Co. v. Wiatt*, 9 Dec. Rep. 55, 10 Bull. 310]. See also AGENCY.

III. WHEN LIABILITY ENDS.

If the guest take his goods from his room into his own exclusive custody and control, the innkeeper is not responsible for their loss: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

If the guest puts them in an unusual and improper place though a proper place is provided, as where he hung his overcoat in the public hall instead of in the checkroom the innkeeper is not liable: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

IV. NATURE OF LIABILITY.

G. C., § 5984, is declaratory of the common law and is valid and constitutional: *Thoma v. Typewriter Co.*, 11 O. C. C. (N. S.) 174, 20 O. C. D. 691.

The rules of common law apply to cases which are within the terms of G. C., §§ 5981 and 5982: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

Articles which are not mentioned in the statute (G. C., § 5981) are within the operation of the rules of common law: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

If an innkeeper maintains a check room for hats and overcoats, and gives notice of

such fact, a guest who hangs his coat upon a hook and does not check it, can not recover from the innkeeper, unless such innkeeper or his servants and employees are negligent: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

An innkeeper who complies with this section (G. C., § 5981) is not liable to a guest for the loss by theft of money, jewelry or other articles named herein, if the guest retains such articles in his possession, and the innkeeper and his servants and employees have not been guilty of negligence: *Lang v. Hotel Co.*, 9 Dec. Rep. 372, 12 Bull. 253.

Where an innkeeper, for the purpose of securing the safety of the goods of his guests, makes a reasonable and proper rule or requirement, to be observed by them, or he will not be responsible therefor, and the goods of a guest having knowledge of the rule are lost from the inn solely by reason of his neglect to comply therewith, the innkeeper is not liable for the loss thus occasioned by the negligence of the guest: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

Where a guest at an inn takes his goods from his room, and from the ordinary care and custody of the innkeeper, into his own exclusive custody and control, and they are lost from the inn while so in his custody, the innkeeper is not responsible for the loss: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

Where a guest at an inn takes his goods from his room into his personal custody, and puts them into a place in the inn not designated by the innkeeper, and without his knowledge, and such place is one unusual, and manifestly hazardous and improper therefor, and they are thereby lost, the innkeeper is not liable for the loss: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

Where one who pays a stipulated amount for his board and lodging deposits a sum of money with his landlord for safekeeping, the latter is liable for the money so taken, whether he be regarded as an innkeeper or a boarding house keeper: *Roeckers v. Hart*, 11 O. C. C. (N.S.) 380, 20 O. C. D. 709 [affirming *Hart v. Roeckers*, 7 O. N. P. (N.S.) 395, 19 O. D. (N.P.) 331].

The proprietor of a lodging house, in connection with which meals are served and a bar is operated, is an innkeeper, and a patron paying a stipulated sum for board and lodging of such a house is a guest; and where the patron deposits valuables with the proprietor for safekeeping and they are lost, the proprietor is liable therefor: *Hart v. Roeckers*, 7 O. N. P. (N.S.) 395, 19 O. D.

(N.P.) 331 [affirmed, *Roeckers v. Hart*, 11 O. C. C. (N.S.) 380, 20 O. C. D. 709].

It was queried but not decided whether a resident of the same city, not a traveler, can become a guest: *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193.

A watch and chain, and gold locket set with diamonds, worn by the guest, and seventy dollars in money, agreed to be a proper sum to defray his ordinary traveling expenses, all of which were retained in his possession and stolen in the hotel, are within the words money, jewelry, and articles of gold and silver manufacture, under G. C., § 5981, and the innkeeper is not liable if he had a safe, and posted notices, and was not negligent. The fact of the loss is not presumptive evidence of negligence: *Lang v. Hotel Co.*, 9 Dec. Rep. 372, 12 Bull. 250.

A watch, seal and chain are part of a traveler's baggage: *Prescott v. Bruce*, 13 Dec. Rep. 767, 2 C. S. C. R. 58.

A watch is part of a traveler's baggage and his trunk is a proper place to carry it in: *Jones v. Voorhees*, 10 O. 145, I Longsdorf's Notes, 496.

A burglary from without as well as from within, whereby a pocketbook of a guest intrusted to the custody of the innkeeper is taken, renders the innkeeper liable: *Gast v. Gooding*, 1 Dec. Rep. 315, 7 W. L. J. 234 [supreme court].

V. LIEN.

G. C., § 5984, relating to the lien of an innkeeper is merely declaratory of the common law and does not violate any constitutional provisions: *Thoma v. Typewriter Co.*, 11 O. C. C. (N.S.) 174, 20 O. C. D. 691.

The lien of an innkeeper attaches to a typewriter, left at the inn by a guest who departed without paying his bill, notwithstanding the guest had no title to the machine, and had obtained possession of it by false pretenses: *Thoma v. Typewriter Co.*, 11 O. C. C. (N.S.) 174, 20 O. C. D. 691.

VI. POWER TO MAKE AND ENFORCE REGULATIONS.

The innkeeper may make reasonable rules for safekeeping of goods, as that overcoats must be put in the check room and a guest not complying therewith must bear the consequent loss: *Fuller v. Coats*, 18 O. S. 343, II Longsdorf's Notes, 895.

A rule of a hotel, prohibiting women who are not guests or employes from occupying any of the private apartments is a reasonable and proper regulation, and a traveling salesman who used his room in the hotel for the purpose of exhibiting his samples, and while so using it took to the room a

customer who wished to inspect the samples and was accompanied by his wife and sister-in-law, can not complain of the management of the hotel in requiring that the ladies leave the room, notwithstanding the indignity so incensed the customer that he refused thereafter to have anything to do with the salesman or his goods, nor can the house by which the salesman is employed recover for loss thus sustained: *Wieseneck v. Havlin*, 10 O. N. P. (N.S.) 173.

VII. PLEADING.

Alleging defendant kept a hotel and entertained plaintiff for compensation sufficiently avers the latter to be a guest, and not a boarder: *Prescott v. Bruce*, 13 Dec. Rep. 767, 2 C. S. C. R. 58.

A bailee or trustee of money losing it as guest in a hotel may recover judgment in his own name: *Hotel Co. v. Wiatt*, 1 O. C. C. 55, 1 O. C. D. 34 [reversed on other grounds, *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193]. See also PARTIES.

A guest's averment that he unlocked his room door to let a servant make a fire, and that the room was entered and his watch stolen without his fault, does not show contributory negligence: *Prescott v. Bruce*, 13 Dec. Rep. 767, 2 C. S. C. R. 58.

VIII. EVIDENCE.

In a suit by a guest against an innkeeper for damages for the loss of ordinary wearing apparel and personal effects left by him in his room the key thereof having been delivered into the custody of the innkeeper, it is not necessary as a part of the case in chief to show that such loss was occasioned by the fault or negligence of the innkeeper. Proof of such loss by the guest makes out a *prima facie* case of liability upon the part of the innkeeper, and G. C., § 5983, does not change the rule of the common law in this regard: *Hotel Co. v. Medart*, 87 O. S. 130.

To show how much money plaintiff had deposited with an innkeeper, it is not competent to show how much he ought to have had when he left his place of business to go to the inn: *Hotel Co. v. Wiatt*, 44 O. S. 32, IV Longsdorf's Notes, 193. See also EVIDENCE.

Negligence on the part of an innkeeper can not be presumed or inferred from the mere fact that water flowed from a tank or pipe upon the apparel of a guest and damaged it: *Miller v. Hotel Co.*, 12 O. C. C. (N.S.) 209, 22 O. C. D. 645. See also NEGLIGENCE.

The fact that goods are lost at a hotel does not make out a *prima facie* case of

negligence on the part of the innkeeper: *Lang v. Hotel Co.*, 9 Dec. Rep. 372, 12 Bull. 253.

INNOCENCE.

For presumption of innocence, see **PRESUMPTIONS; EVIDENCE**.

INNOCENT PARTY MOST AT FAULT MUST SUFFER.

See **FRAUD AND DECEIT; ESTOPPEL**.

INNOCENT PURCHASER.

See **BONA FIDE BUYER**.

INNUENDO.

For the effect of innuendo, see **LIBEL AND SLANDER; PLEADINGS**.

The office of the innuendo is to direct to its object, the charge made. It can neither enlarge nor restrain the natural sense and import of the words used. If they do not convey the sense and meaning when their application is made, the innuendo can not help them: *Tappan v. Wilson*, 7 O. (pt. 1) 190, 1 Longsdorf's Notes, 369.

It is not the office of an innuendo to add to, enlarge or change the natural sense or import of the language used: *State v. Gibbs*, 7 O. N. P. (N.S.) 371, 18 O. D. (N.P.) 694.

A court, in determining whether an innuendo is warranted, must limit its investigation to statements set forth in the indictment: *State v. Gibbs*, 7 O. N. P. (N.S.) 371, 18 O. D. (N.P.) 694.

The question whether language alleged to have been used will bear the meaning ascribed to it by the innuendo is peculiarly one for the court; whether such meaning was intended must be submitted to the jury: *State v. Gibbs*, 7 O. N. P. (N.S.) 371, 18 O. D. (N.P.) 694.

In libel, the innuendo can not add to, enlarge, or change, the sense of the words used, which should have their proper and legitimate interpretation, taken in the light of the extrinsic facts averred: *Railway Co. v. Tribune Co.*, 10 O. D. (N.P.) 725.

The office of the innuendo is to connect the plaintiff with the article and to explain ambiguous terms. It can not be used to enlarge or prevent a meaning clearly expressed: *Dieckman v. Tribune Co.*, 1 Hosea, 480.

An innuendo that does not explain but contradicts the "article" must be stricken out as impertinent: *Dieckman v. Tribune Co.*, 1 Hosea, 480.

The charge in an indictment against officers of a bank that they have been guilty of false pretenses, in that with intent to cheat and defraud they induced and procured persons to deposit in the bank by falsely representing that "we never speculate in stocks; we loan money on real estate; it is solid rock security; we require income-producing property," does not bear the meaning ascribed by innuendo, that the bank did not invest its money in stocks and loaned its money only on security of income-producing real estate, nor does it follow from such statement that the bank loaned all its money on real estate, nor does it appear whether the statement applied to the bank or to the accused individually: *State v. Gibbs*, 7 O. N. P. (N.S.) 371, 18 O. D. (N.P.) 694. See also **FALSE PRETENSES**.

It is for the jury to determine whether the meaning ascribed to the publication by the innuendo was intended by the defendant, but the question is submitted only as bearing on the matter of actual malice and in mitigation of punitive damages, and not as a defense that would prevent recovery: *Todd v. Publishing Co.*, 9 O. C. C. (N.S.) 249, 19 O. C. D. 155. See also **LIBEL AND SLANDER**.

The question of whether the words used by the defendant was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact: *Getchell v. Tailors' Exchange*, 11 Dec. Rep. 390, 26 Bull. 233.

Where the language complained of as libelous will bear the meaning ascribed to it by the innuendo, whether such was the meaning intended is a question of fact for the jury: *State v. Smily*, 37 O. S. 30, III Longsdorf's Notes, 889.

A writing, not libelous on its face, may be shown to have been used and understood in a libelous sense, when a person acquainted with extraneous facts may have understood it in a libelous sense: *Steele v. Edwards*, 15 O. C. C. 52, 8 O. C. D. 161.

If a petition in demurrer alleges the writing of words which are not in themselves libelous, and if no extrinsic facts are alleged which show that they were in fact libelous, such petition is subject to demurrer even if by way of innuendo a meaning is assigned to such words which would render them libelous: *Druck v. Kahle*, 19 O. D. (N.P.) 860.

A demurrer to a petition in an action for libel admits the truth of so much of the innuendo only as is warranted by the natural meaning of the language used in the article: *Shallenberger v. Publishing Co.*, 8 O. N. P. (N.S.) 633, 20 O. D. (N.P.) 651 [affirmed, without opinion, *Shallenberger v. Publishing Co.*, 85 O. S. 492].

A libel which is alleged in the petition to have consisted of "list of lately reported

tenants," in which plaintiff is referred to as "Ed. Druck, 1046 Noble Court, electrician." "K., 18," does not show that such alleged libelous writing charged the plaintiff with failing and refusing to pay rent in the absence of statements by way of inducement showing that such publication was made for persons who owned or rented houses and that the cipher "K., 18," taken in connection with the key to the report amounted to a statement that plaintiff had not paid his rent: *Druck v. Kahle*, 19 O. D. (N.P.) 860.

G. C., § 11341, does not relieve the plaintiff in an action for libel from averring by way of inducement extrinsic facts which will justify the meaning which is imputed to the words used if such meaning does not appear readily in the absence of such averments: *Druck v. Kahle*, 19 O. D. (N.P.) 860.

IN PAIS.

For estoppel *in pais*, see ESTOPPEL.

IN PARI DELICTO.

See CONTRACTS.

IN PARI MATERIA.

For construction of statutes, etc., see STATUTES.

IN PERSONAM.

An action *in personam* is one directed against a specific person: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

A proceeding which seeks the recovery of a personal judgment is one *in personam*: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

See also ACTIONS.

INQUEST.

For coroner's inquest, see CORONERS.

For inquest of lunacy, see INSANE, IMBECILES AND IDIOTS.

INQUEST OF DAMAGES.

See DAMAGES; JUDGMENT; TRIAL.

INQUIRY.

For notice sufficient to put one on inquiry, see NOTICE AND KNOWLEDGE.

INQUIRY OF DAMAGES.

See DAMAGES; JUDGMENT; TRIAL.

IN REM.

For actions and proceedings *in rem*, see ACTIONS.

INSANE ASYLUMS.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS; INSANE, IMBECILES AND IDIOTS.

INSANE CONVICT.

See INSANE, IMBECILES AND IDIOTS.

INSANE DELUSIONS.

See INSANE, IMBECILES AND IDIOTS.

INSANE, HOSPITALS FOR.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS; INSANE, IMBECILES AND IDIOTS.

INSANE PAUPERS.

See INSANE, IMBECILES AND IDIOTS; PAUPERS, POOR AND POOR-LAWS.

INSANE, IMBECILES AND IDIOTS.

Scope Note.—Includes persons affected by mental incapacity of any kind not merely temporary in its nature; rights and disabilities of such persons in general; effect of insanity, idiocy and lunacy upon contracts, before and after adjudication; effect upon conveyances and wills; marriage and divorce; liability for torts and crimes; insanity at time of crime; kinds and tests of insanity and burden of proof; insanity at time of trial; nature and extent of inquisition and jurisdiction and procedure thereof; appointment of guardian, and his powers and duties; and support of inmate while in asylum by the various political subdivisions of the state; superintendent of hospital for insane; Longview hospital, and Institution for Feeble-minded Youth. Excludes competency of insane person as witness, etc.

Cross References.

For insanity as affecting testamentary capacity, see also WILLS, LEGACIES AND DEVISES.

For mental weakness as a ground for rescission, see RESCISSION.

For questions of jurisdiction, see COURTS; JURISDICTION.

For questions of evidence, see also EVIDENCE.

For insanity, etc., as avoiding marriage, see also MARRIAGE.

For competency of insane person as a witness, see WITNESSES.

ANALYTICAL OUTLINE.

- I. Definition, 9027.
- II. Contracts and Conveyances, 9028.
 - A. *Before adjudication*, 9028.
 - 1. Contract for necessities, 9028.
 - 2. Negotiable instruments, 9028.
 - 3. Non-negotiable contracts, 9028.
 - 4. Deeds, 9029.
 - 5. Mortgages, 9030.
 - 6. Lease, 9031.
 - B. *After adjudication*, 9031.
- III. Wills, 9032.
- IV. Designation of Heir, 9033.
- V. Torts, 9033.
- VI. Judgment Against, 9034.
- VII. Marriage and Divorce, 9034.
- VIII. Crimes, 9035.
 - A. *General presumption*, 9035.
 - B. *Kinds of insanity*, 9036.
 - C. *Tests of insanity*, 9037.
 - D. *Order of trial*, 9039.
 - E. *Burden and degree of proof*, 9039.
 - F. *Evidence*, 9040.
 - G. *Charge of court*, 9041.
 - H. *Trial of present insanity*, 9042.
- IX. Capacity to Vote, 9044.
- X. Inquisition, 9044.
 - A. *Jurisdiction*, 9044.
 - B. *Notice*, 9044.
 - C. *Procedure*, 9044.
 - D. *Finding*, 9045.
 - E. *Confinement in infirmary*, 9045.
 - F. *Removal of patient*, 9046.
 - G. *Discharge from hospital for insane*, 9046.
 - H. *Fees and compensation*, 9046.
 - I. *Habeas corpus*, 9047.
- XI. Guardian, 9048.
 - A. *Appointment*, 9048.
 - 1. Jurisdiction, 9048.
 - 2. Grounds for appointment, 9048.
 - 3. Effect, 9049.
 - 4. Procedure, 9050.
 - 5. Notice, 9051.
 - B. *Bonds*, 9051.

C. *Powers*, 9051.

1. Management of estate, 9051.

2. Sale, 9052.

3. Accounts, 9053.

4. Prosecution and defense of suits, 9053.

D. *Reimbursement*, 9054.E. *Removal*, 9054.F. *Collateral attack*, 9056.G. *Claim for services*, 9056.**XII. Support**, 9057.A. *State*, 9057.B. *County*, 9057.C. *Township*, 9057.D. *Estate of insane*, 9058.**XIII. Superintendent of Hospital for Insane**, 9058.**XIV. Longview Hospital**, 9058.**XV. Institution for Feeble-minded Youth**, 9059.

I. DEFINITION.

Insanity is defined to be "a seriously impaired condition of the mental functions involving the intellect, emotions, or will, or one or more of these faculties, exclusive of a temporary state produced by and accompanying acute intoxications or acute febrile diseases." Insanity is a scientific and colorless word for marked disturbances of the mental functions: *State v. Rieber*, 51 Bull. 208.

G. C., § 10988, provides that the word "imbecile" as used in the chapter on guardians and trustees (G. C., §§ 10915, *et seq.*), means a person who, not born idiotic has become so.

G. C., § 1983, defines the terms, "insane" and "lunatic" as including every species of insanity or mental derangement. The term idiot is restricted to a person foolish from birth, or supposed to be naturally without a mind: *Ross v. Todd*, 4 O. C. C. 1, 2 O. C. D. 385.

G. C., § 4677, provides that the terms "insane" and "lunatic" include every species of mental derangement.

"Insane" in the act against having carnal knowledge of an insane woman means unsound in mind and includes an idiot: *State v. Crow*, 1 Dec. Rep. 586, 10 W. L. J. 501. See also RAPE.

One who for some years has been wasting his property, making disadvantageous contracts, spending large sums of money in which he had only a life estate, for property which was not worth, when the money was invested, half the sum expended for it, is an imbecile within the meaning of G. C., § 10989: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

II. CONTRACTS AND CONVEYANCES.

A. BEFORE ADJUDICATION.

1. *Contracts for Necessaries.*

The note of a person *non compos mentis* is invalid, but if given for necessities or for adequate consideration to the maker, without knowledge of his condition, may be enforced to the value of the consideration furnished to him: *Hosler v. Beard*, 54 O. S. 398, IV Longsdorf's Notes, 641.

2. *Negotiable Instruments.*

A note is not negotiable which is made by a person *non compos mentis*, and an indorsee for value before maturity and without notice takes only the payee's title, and is subject to the same burden of proof as he: *Hosler v. Beard*, 54 O. S. 398, IV Longsdorf's Notes, 641.

3. *Non-negotiable Contracts.*

Insanity unknown to the other party will not avoid a contract if there is no fraud: *Beckroeger v. Schmidt*, 6 Dec. Rep. 411, 9 Am. L. Rec. 410, 8 Dec. Rep. 121, 5 Bull. 788.

In an action upon a contract where insanity is made an issue, the burden of proof is upon the party alleging the insanity: *Plageman v. Stroppel*, 16 O. D. (N.P.) 190 [reversed on the weight of the evidence, *Stroppel v. Plageman*, 3 O. N. P. (N.S.) 501, 16 O. D. (N.P.) 273].

In an action upon a contract where insanity is made an issue, the evidence must be confined to the time of the execution of the contract, and it must be shown that the contract was the direct offspring or result of the insanity alleged: *Plageman v. Stroppel*, 16

O. D. (N.P.) 190 [reversed on the weight of the evidence, *Stroppel v. Plageman*, 3 O. N. P. (N.S.) 501, 16 O. D. (N.P.) 273].

Rescission is only allowed in contracts with insane persons on the restoration of the consideration, if the other party acted in good faith: *Hosler v. Beard*, 54 O. S. 398, 1V Longsdorf's Notes, 641. See also RESCISSION.

4. Deeds.

Weakness of understanding will not invalidate a conveyance if there is intelligent consent, that is, a knowledge of the subject matter, and of the effects of the transaction in changing the title, and of the consequences not only between the parties, but as to others who would inherit: *Lore v. Truman*, 1 Dec. Rep. 510, 10 W. L. J. 250.

A mental condition which causes forgetfulness of the ties of blood as a result of real or fancied wrongs, although not amounting technically to unsoundness of mind, should be taken into consideration in determining whether the making of a deed was a free and voluntary act: *Beyer v. Beyer*, 9 O. N. P. (N.S.) 88.

In deciding whether a party to a deed is of sufficient mental capacity, equity will look only to the competency of the understanding, and neither age, sickness, extreme distress, nor debility of body will affect the capacity to make the conveyance, if it be shown that sufficient intelligence remain to understand the transaction: *Plageman v. Stroppel*, 16 O. D. (N.P.) 190 [reversed on the weight of the evidence, *Stroppel v. Plageman*, 3 O. N. P. (N.S.) 501, 16 O. D. (N.P.) 273].

The proper test of mental capacity on the part of one executing a deed conditioned for his support, etc., is his relations to those who are the natural objects of his bounty, and his capacity to understand to a reasonable degree the condition of his property and the nature and effect of what he is doing: *Kime v. Addlesperger*, 2 O. C. C. (N.S.) 270, 14 O. C. D. 397.

The fact that a grantor may believe that he communicates with his dead relatives at night does not invalidate deeds made by him at least if the supposed communications from his dead relatives did not influence the making of such deed: *Boyer v. Boyer*, 14 O. C. C. (N.S.) 305, 23 O. C. D. 279.

Lack of mental capacity to enter into a contract and make a deed is not shown, where the grantors evidently understood the transaction they were entering into, and explained their reasons for so doing, and designated as the trustee to hold the deed in escrow an old and trusted friend and agent, and in other respects behaved in a rational manner,

and were without children or direct heirs: *Foster v. Long*, 8 O. N. P. (N.S.) 75.

A conveyance by a parent, who had formerly been under guardianship for imbecility, to a son in consideration of support for the rest of his life, and also as an advancement to equalize him with the other children, is in effect a final disposition of the property, and does not require the capacity necessary to uphold a transaction with a stranger, but will be sustained if the father had testamentary capacity, that is, ability to comprehend the extent and value of his estate, and the names and rights of his children: *Pepple v. Pepple*, 13 O. C. C. 43, 7 O. C. D. 102.

Where deeds are testamentary in character, the proper test of the capacity of the grantor is the capacity required to execute a will: *Taphorn v. Taphorn*, 6 O. N. P. (N.S.) 579, 18 O. D. (N.P.) 748 [affirmed, *Taphorn v. Taphorn*, 12 O. C. C. (N.S.) 180, 22 O. C. D. 96].

Where incapacity on the part of a grantor to execute a deed is charged, and the conveyance was itself reasonable and proper, the burden is upon the one assailing the transaction to show incapacity at the time the deed was executed; and where the testimony shows that the grantor selected the notary whom he desired to draw the deed and gave him instructions as to what he desired to have done, and when the deed was ready for signature himself discovered that a life estate had not been reserved as he directed, and this omission having been supplied he executed the deed and gave directions that it be placed on record, and its execution seems to have been in accordance with a purpose of the testator to make a testamentary disposition of the property in question, the deed will not be set aside on the ground of mental incapacity or the feebleness of old age: *Boyer v. Boyer*, 14 O. C. C. (N.S.) 305, 23 O. C. D. 279.

Where the act of making the deed is in itself reasonable and proper and furnished no intrinsic evidence of mental incapacity, the burden is on the party assailing the act to show the incapacity of the grantor at the time the deed was made: *Kime v. Addlesperger*, 2 O. C. C. (N.S.) 270, 14 O. C. D. 397.

The officer certifying the acknowledgment of a deed is not disqualified to testify to the grantor's mental incapacity: *Truman v. Lore*, 14 O. S. 144, II Longsdorf's Notes, 641.

5. Mortgages.

The rule that a mortgage executed by an insane person is valid and enforceable in so far as the consideration was for the benefit of such person, is applicable to that part of

the consideration which was used in liquidating a previous mortgage subject to the same infirmity: *McCracken v. Levi*, 1 O. C. C. (N.S.) 566, 14 O. C. D. 584.

The mortgage of an insane person is valid, so far as the consideration was for her benefit or account. But so far as it was not paid for, or by her direction, or was for an antecedent debt of her husband, it will be avoided: *Mahoney v. Goepfer*, 8 Dec. Rep. 154, 6 Bull. 33.

An insane mortgagor is not bound by an agreement made for him by unauthorized persons before decree of foreclosure, that the buyer shall hold the land in trust to sell and pay off the debt. Nor is he bound by the decree which formed part of it. The decree may be operative as to third persons, but the buyer's title is in trust: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

Such contract having been made pending a suit by the mortgagor to impeach the debt for usury, his trustees may require an account of the usury on bill for an account of purchase money: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

6. Lease.

If a lease is given by one of unsound mind it is not necessary that the lessor shall sue in equity to have such lease declared void; but such lease may be treated as void in an action at law in ejectment or in forcible entry and detainer: *Express Co. v. Zimmerman*, 11 O. N. P. (N.S.) 609, 22 O. D. (N. P.) 203.

B. AFTER ADJUDICATION.

The appointment of a guardian is conclusive evidence of the ward's incapacity to make or ratify a contract, pending the guardianship; as to ward's capacity to marry, to make a will or commit a crime, it is only *prima facie* evidence of incompetency: *Jordon v. Dickson*, 10 Dec. Rep. 147, 19 Bull. 64.

Where a person adjudged insane remains in control and management of his own property, a guardian being appointed chiefly to obtain a pension, and disclaiming authority over the property, a contract by such insane person for repairs on his property, which are judicious and worth the price and are necessary to operate the property, will be enforced, though such repairs are not technically necessities: *Kimball v. Bumgardner*, 16 O. C. C. 587, 9 O. C. D. 409.

but the buyer's title is in trust: *Lockwood v.*

The liability of a husband for necessities or care furnished to his wife is not affected

by the fact that he is insane or mentally incompetent to transact business, and an action for recovery for services or necessities so furnished may be maintained against the administrator of such husband notwithstanding the indebtedness was incurred during the lifetime of the husband and was not approved by his guardian: *Badger v. Orr*, 1 O. C. C. A. 49.

III. WILLS.

Capacity to revoke a will must be equal to the capacity to make a will no more complicated than a descent if intestate: *In re Jones' Will*, 2 O. N. P. 209, 2 O. D. (N.P.) 409.

A delusion will not be ground to avoid a will unless its connection with the will influenced its provisions. The burden to show this is on the contestants: *Edwards v. Davis*, 11 Dec. Rep. 876, 30 Bull. 283.

Although a testatrix's lack of capacity is due to the severity of the last illness, during which the will was signed, yet mental disturbance a month before may be shown, there being also intervening symptoms: *Brewing Co. v. Opp*, 17 O. C. C. 465, 9 O. C. D. 516.

The cocaine habit producing hallucinations not of a kind appearing to influence disposition of property, may yet involve such unsoundness of mind and impairment of faculties as to be fatal to testamentary capacity: *In re Underhill*, 10 Dec. Rep. 487, 21 Bull. 279, Goebel, 196.

Delusions not affecting those excluded from or embraced in the will are not inconsistent with testamentary capacity: *Church v. Crocker*, 7 O. C. C. 327, 4 O. C. D. 619.

A false conviction founded on the suggestion of others, and the comparison of evidence, though flimsy, is not an insane delusion: *Church v. Crocker*, 7 O. C. C. 327, 4 O. C. D. 619.

A will made by the ward shortly afterwards and during the guardianship is not necessarily void: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

A delusion on the part of a testator does not constitute mental incapacity unless it is an insane delusion, and in determining whether a testator was suffering from such delusion at the time he made his will, the testimony offered on the subject should be considered by the jury, that of experts not being allowed to outweigh absolutely that of laymen who had known the testator for years, and had business transactions with him and frequently met and conversed with him: *Moore v. Caldwell*, 6 O. C. C. 484, 17 O. C. D. 449.

Where in a case of contest of will there is no evidence of the testator's insanity,

evidence of the insanity of any of testator's relatives is irrelevant: *Whitney v. Roth*, 45 Bull. 374.

A non-expert witness can not give an opinion on testamentary capacity of a person until he testifies to facts forming a basis therefor: *Roush v. Wensel*, 15 O. C. C. 133, 8 O. C. D. 141. See also EVIDENCE.

A finding of lunacy of the testatrix by the probate court is admissible in evidence, although admitted in the pleadings, if the inquest was held on the complaint of the principal legatee, and the physician knew nothing of the cause, as to being temporary or not, for these facts are best proved by the record: *Snyder v. Ream*, 1 Dayton Term Rep. (Iddings) 167. See also WILLS, LEGACIES AND DEVISES.

Facts, such as a total change of disposition after a previous insanity, and permitting the one who became her principal legatee to manage her property as if it were his own, without objection, scrutiny or profit to the testatrix can not be ignored: *Snyder v. Ream*, 1 Dayton Term Rep. (Iddings) 167.

Where a will has been lost or destroyed before the death of the testator, the law presumes that he revoked it; and where he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became "incapable by reason of insanity to make a will": *Cale v. McClure*, 88 O. S. 1.

IV. DESIGNATION OF HEIR.

Limiting the number of witnesses to six on a side as to the mental condition of decedent when he declared a certain person his heir and refusing to hear cumulative testimony by thirteen others is within the court's discretion, and abuse must appear affirmatively: *Bird v. Young*, 56 O. S. 210, IV Longsdorf's Notes, 688. See also TRIAL.

V. TORTS.

An action against an insane defendant to recover damages for wrongful death may be brought in the county where the insane defendant has his legal residence; and his legally appointed guardian may be joined with him as a party defendant. Where the guardian waived the issue and service of process and entered his appearance, and summons was issued to another county for the insane defendant and the same was personally served upon him by the sheriff of such county, and subsequently the plaintiff dismissed the action as to the guardian only, it is error for the court to quash the service on the insane defendant and to dismiss the

action for want of jurisdiction over his person: *Stuard v. Porter*, 70 O. S. 1, IV Longsdorf's Notes, 1043.

VI. JUDGMENT AGAINST.

A judgment against an imbecile and his guardian is not a lien on his land, and can not be recognized as such by his administrator to pay debts: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

A judgment against an adjudged imbecile is binding, and can not be collaterally impeached: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

A judgment rendered against an insane person, without the intervention of a trustee or guardian, and in favor of one having knowledge of the insanity, is not void; such judgment can not be impeached by the guardian of the judgment debtor without showing some fraud or unfairness on the part of the creditor in obtaining the judgment: *Johnson v. Pomeroy*, 31 O. S. 247, III Longsdorf's Notes, 578; *Rine v. Hodgson*, 9 Dec. Rep. 104, 11 Bull. 10.

VII. MARRIAGE AND DIVORCE.

Marriage of a person adjudged to be insane, after which he obtained a finding of the probate court that he was restored to sanity and ratified the marriage, will be held void at suit of the guardian where it appears to the court that at no time was he of sufficient mental capacity to ratify the contract: *Goodhart v. Ransley*, 18 O. C. C. 679, 7 O. C. D. 47 [for opinion in lower case, *Goodheart v. Ransley*, 11 Dec. Rep. 655, 28 Bull. 227]. See also MARRIAGE.

The marriage contract of one affected with congenital imbecility of mind to a degree rendering him incapable of consent is void contract: *Goodhart v. Speer*, 18 O. C. C. III Longsdorf's Notes, 73.

The marriage of an insane person may be annulled: *Goodheart v. Ransley*, 11 Dec. Rep. 655, 28 Bull. 227.

When a man marries, after being adjudged insane and while under guardianship, the woman knowing his mental condition, such marriage, though he was afterwards for a few weeks adjudged to be sane, but was not really so, and the parties had lived together during the supposed lucid interval, will be annulled at the suit of the guardian appointed under the second adjudication, the decree is *prima facie* evidence of insanity and the ratification is not sufficient: *Goodheart v. Ransley*, 11 Dec. Rep. 655, 28 Bull. 227. See also MARRIAGE.

Property rights of parties to a divorce proceeding may be adjudicated, notwithstanding the defendant is insane. Whether present

insanity is a bar to divorce is not decided: *Kerlick v. Kerlick*, 10 O. C. C. (N.S.) 524, 20 O. C. D. 274.

The insanity of the defendant deprives the court of jurisdiction to grant a divorce: *Clowry v. Clowry*, 16 O. C. C. 302, 8 O. C. D. 652.

The lunacy of the adverse party declared before commencement of the suit prevents valid service of summons or jurisdiction, and the suit must abate: *Rhude v. Rhude*, 8 O. D. (N.P.) 684, 33 Bull. 273. See also DIVORCE, ALIMONY AND CUSTODY OF CHILDREN.

No other parties are necessary but the next relatives of the wife, who would be her heirs if she died unmarried to set aside a decree of divorce granted in favor of an imbecile, who was dead at the time of this action: *Rine v. Hodgson*, 9 Dec. Rep. 275, 12 Bull. 33.

The appointment of a trustee for an insane defendant in a divorce proceeding is proper: *Kerlick v. Kerlick*, 10 O. C. C. (N.S.) 524, 21 O. C. D. 274.

The appointment of a trustee representing the interests of the defendant is a valid exercise of power by the court and will therefore be recognized: *Lewis v. Lewis*, 6 O. N. P. (N.S.) 242, 18 O. D. (N.P.) 408.

Appeal, but not error, lies to an order vacating the appointment of a trustee for an insane defendant in a divorce proceeding and dismissing, without hearing on the merits, a petition which charges statutory grounds for divorce which accrued prior to the adjudging of the defendant as insane: *Wolcott v. Wolcott*, 14 O. C. C. (N.S.) 437, 22 O. C. D. 587.

The common pleas court has jurisdiction of a divorce proceeding against an insane person, where the aggressions occurred prior to the insanity, notwithstanding the fact that, at the time of the decree, the defendant is insane. A suit for divorce is a civil proceeding founded upon the tortious conduct of the defendant while sane, and is no exception to the established practice under our civil procedure for maintaining suits against insane persons: *Lewis v. Lewis*, 6 O. N. P. (N.S.) 242, 18 O. D. (N.P.) 408.

VIII. CRIMES.

A. GENERAL PRESUMPTION.

The law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469; *State v. Strong*, 12 O. D. (N.P.) 701; *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472; *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 553; *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

The law presumes every person who has arrived at the age of discretion to be of sufficient capacity to form a criminal purpose, to deliberate and premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

The law presumes every person sane until the contrary is shown, and in a criminal case this presumption serves the state as the full equivalent of express proof until it is made to appear by a preponderance of the evidence that the defendant was insane at the time of committing the alleged crime: *State v. Austin*, 71 O. S. 317, IV Longsdorf's Notes, 983.

In cases where chronic and permanent insanity, for instance, from senile dementia and congenital idiocy, is once proven, its continuance may be inferred or presumed, but such presumption is one of fact and not of law: *State v. Austin*, 71 O. S. 317, IV Longsdorf's Notes, 983.

The law presumes every person to be sane until he is proven to be insane: *State v. Terwiliger*, 6 O. L. R. 588, 54 Bull. 205.

B. KINDS OF INSANITY.

A defense of temporary insanity, that the accused did the killing in a sudden fit of homicidal and uncontrollable frenzy resulting from epilepsy is governed by the same rules as other forms of insanity: *State v. Leuth*, 5 O. C. C. 94, 3 O. C. D. 48.

Partial insanity, or an intellect so weak as to leave the accused without the power to deliberate and premeditate, is sufficient to reduce the grade of the offense to murder in the second degree. A much less degree of insanity will excuse the elements of deliberation and premeditation in the charge of murder in the first degree than would excuse from the entire criminal act: *Cottell v. State*, 12 O. C. C. 468, 5 O. C. D. 472.

Where on a trial of one charged with arson, the evidence plainly shows that the defendant is an idiot, a verdict of not guilty will be directed: *State v. Hutchens*, Dayton, 354.

Delirium tremens, although the result or consequence of continued drunkenness, is insanity, or a diseased state of the mind, and affects responsibility for crime in the same way as insanity produced by any other cause: *Maconnehey v. State*, 5 O. S. 77, II Longsdorf's Notes, 161; *Davis v. State*, 25 O. S. 369, III Longsdorf's Notes, 241.

To constitute a complete defense, insanity, if partial, as monomania must rest in such a degree as to so far deprive the accused of the guide of reason in regard to the act with which he is charged as that he is unable to distinguish right from wrong, in reference to the particular act, or understand his relation to the parties thereto: *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

The moral depravity, or moral insanity of the accused, is no excuse for crime, nor is the tendency to commit crime an excuse, unless the mind of the accused has been so impaired by disease as to render him unable to distinguish between right and wrong, or unless his will power is so impaired by disease as to leave him unable to refrain from doing wrong when the alternative is presented to him: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Mere moral insanity is not a defense: *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021.

An irresistible impulse, is a valid defense only when the party offering it is mentally deranged, and it may be defined to be a special propensity impelling to a particular bad act, and it is not moral insanity, supposing this latter term to be a supposed insanity of the moral system, co-existing with mental sanity: *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

An irresistible impulse of insanity is no defense to crime if the accused knew the act was morally wrong and could will to choose between right and wrong, and was conscious of the legal consequence, and his motive was to destroy evidence of another crime: *State v. Bowsher*, 7 Dec. Rep. 442, 3 Bull. 187.

Irresistible impulse, if the defendant knew the consequences of his act, and that it was wrong, is not a form of insanity known to the law: *State v. Cole*, 3 Dec. Rep. 537, Ohio L. J. 537.

C. TESTS OF INSANITY.

The tests of insanity in Ohio were put first in the form of three questions by Judge Birchard: Was the accused a free agent in forming the purpose to kill? Was he at the time the act was committed, capable of judging whether that act was right or wrong? Did he know at the time that it was an offense against the laws of God and man? *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616.

The power of self-control, that is, freedom of will to avoid a wrong, is an essential to criminal accountability no less than the

power to distinguish between right and wrong: *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021.

In *Farrer v. State*, 2 O. S. 70, I Longsdorf's Notes, 1021, the power of self-control—"free agency"—was said to be quite as essential to criminal accountability as the power to distinguish between right and wrong; but the questions given to the jury in *Clark v. State*, *supra*, were held to include this, and were approved without modification in *Blackburn v. State*, 23 O. S. 146, III Longsdorf's Notes, 117.

As relates to criminal proceedings, a sane man is one who has sufficient judgment, intelligence, reason and mental power to observe and know the difference between right and wrong, or one who, having such, has sufficient will power to refrain from doing the wrong: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

The accused in a criminal case is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature of his act and his relation to the party injured: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469.

If the accused was laboring under such an estrangement of the mind as left him without discretion to discern between good and evil, or unconscious he was doing wrong, he should be acquitted: *State v. Thompson*, W. 617, I Longsdorf's Notes, 48.

Where one charged with crime was at the time of its commission without the capacity to distinguish between right and wrong as applied to the particular act, there is no legal responsibility: *State v. Strong*, 12 O. D. (N.P.) 701.

Where there was such a capacity, a defendant is nevertheless not legally responsible if, by reason of the dures of mental disease, he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; and, at the same time, the alleged crime was so connected with such mental disease in the relation of cause and effect, as to have been the product or offspring of it solely: *State v. Strong*, 12 O. D. (N.P.) 701.

Insanity is no defense to homicide if there was sufficient capacity to distinguish between right and wrong, and an understanding of the nature of the act and his relations to the person killed. To determine the responsibility for crime committed while

under a partial delusion the accused must be considered in the same situation as if the imagined facts actually existed: *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

If a man's mind and reason is so deranged and unbalanced at the time of trial that he is unable to realize and understand his relations to his counsel, or has not sufficient reason to comprehend the details of the evidence, or to advise his counsel of the facts in the case of which he may have knowledge, or aid as an ordinary man might in the selection of a jury, it is a good defense of insanity to an indictment of shooting with intent to kill: *State v. Rieber*, 51 Bull. 208.

D. ORDER OF TRIAL.

In the trial of an indictment for murder, the defense of insanity, under the plea of not guilty, does not change the nature of the issue so as to give the affirmative to the defendant, and entitle the defendant to the opening and closing argument to the jury: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469. See also TRIAL.

E. BURDEN AND DEGREE OF PROOF.

The burden of establishing insanity rests upon the defendant. Insanity need not, however, be established beyond a reasonable doubt, but it is sufficient to prove it by preponderance of the evidence: *Loeffner v. State*, 10 O. S. 598, II Longsdorf's Notes, 469; *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616; *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021; *Bond v. State*, 23 O. S. 349, III Longsdorf's Notes, 128; *Bergin v. State*, 31 O. S. 111, III Longsdorf's Notes, 565; *State v. Austin*, 71 O. S. 317, IV Longsdorf's Notes, 983; *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 553; *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38; *Cottell v. State*, 12 O. C. C. 467, 5 O. C. D. 472; *State v. Cole*, 3 Dec. Rep. 537, Ohio L. J. 537; *State v. Strong*, 12 O. D. (N.P.) 701; *State v. Rieber*, 51 Bull. 208; *State v. Terwilliger*, 6 O. L. R. 588, 54 Bull. 205; *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

The defense of insanity interposed in a criminal prosecution need only be established by a bare preponderance of the evidence. The proof will be deemed to preponderate in favor of such defense whenever its existence is made probable upon a fair consideration of all the evidence adduced for and against it: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Where the defense of insanity interposed in a criminal prosecution fails of proof, it does not have the effect of operating as an acknowledgment of defendant's guilt: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571; and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Evidence is deemed to preponderate in favor of insanity whenever its existence is made probable upon full and fair consideration of all the evidence adduced for and against it; and instructions that the evidence introduced to establish insanity is not "sufficient if it merely shows it to have been probable. The proof must be such as to overcome the legal presumption of insanity; it must satisfy you he is insane," and requires of the defendant more than a preponderance of the evidence: *Kelch v. State*, 55 O. S. 146, IV Longsdorf's Notes, 655.

It is not sufficient if the proof barely shows that insanity was possible; nor is it sufficient if it merely shows it to have been probable: *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616.

It is error to charge that a mere probability of insanity does not make out the defense: *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

Where the evidence shows that prior to the commission of the homicide the accused had been twice adjudged insane and committed to an asylum, but had been discharged therefrom two years previous to the homicide, it is proper to refuse to charge that "proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval": *State v. Austin*, 71 O. S. 317, IV Longsdorf's Notes, 983.

The same degree of insanity which will excuse a man from his contracts is a defense to crime: *State v. Gardiner*, W. 392, I Longsdorf's Notes, 32.

A reasonable doubt is not created unless the insanity is shown by a preponderance: *Farrer v. State*, 2 O. S. 54, I Longsdorf's Notes, 1021.

The accused having previously been adjudged insane on an inquest of lunacy while under indictment for another crime, the burden is on the state to show beyond a reasonable doubt a restoration to reason prior to the commission of the second crime: *State v. Bowsher*, 7 Dec. Rep. 442, 3 Bull. 187.

F. EVIDENCE.

A physician, having testified that in his opinion the prisoner was insane, may be asked on cross examination whether the

accused knew right from wrong: *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616.

A nonprofessional witness's opinion as to the prisoner's sanity, when he is ready to give the facts on which it is based, is properly admitted. Professional opinion, without the facts, is entitled to but little weight. On this subject physicians know no more than others, but are merely more astute observers: *Clark v. State*, 12 O. 483, I Longsdorf's Notes, 616.

A hypothetical question on insanity, as a defense in a murder case, which assumes material facts, not based on evidence, as that an ugly feeling existed, and that the accused wished to have control of deceased's property, is irrelevant. The court alone is to determine whether evidence tends to prove a fact. A reversal is not necessarily required by irrelevant evidence, but if there is excitement and the accused was prejudiced, a reversal would be granted. If the question omits material facts proved, the opinion is also worthless: *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

Specific facts of sickness or peculiarities of members of the accused's family can not be proved by reputation: *State v. Leuth*, 5 O. C. C. 94, 3 O. C. D. 48 [petition in error refused, *Leuth v. State*, 23 Bull. 465]. See also EVIDENCE.

The good character of the defendant may be shown to make it appear that he would not have committed the crime if he had been sane: *State v. Adin*, 7 Dec. Rep. 25, 1 Bull. 38.

The defendant can not ask his own witness what his opinion may be of the defendant's sanity if he should hear that the defendant had committed a murder: *Thurman v. State*, 4 O. C. C. 141, 2 O. C. D. 466.

A jury is not bound by the opinion of any witnesses in a case as to the accused's mental condition: *State v. Rieber*, 51 Bull. 208.

The record of a probate court showing that four years previous to the commission of a crime the accused was adjudged insane and confined in an asylum is admissible: *Wheeler v. State*, 34 O. S. 394, III Longsdorf's Notes, 724.

G. CHARGE OF COURT.

If the court refuses to order a special jury to try the question of the sanity of the accused at the time of trial, such error is not cured by the following instruction: "If you think that you have not heard all of the truth in the case, because of the defendant's mental condition and that you believe you are not satisfied with that fact in finding him guilty, you may acquit him": *State*

v. Roselot, 69 O. S. 91, IV Longsdorf's Notes, 953.

Where a simulation of insanity is not suggested by the evidence, instructing the jury not to be misled by an ingenious counterfeit is erroneous: *Sharkey v. State*, 4 O. C. C. 101, 2 O. C. D. 443.

A charge that if insanity is merely shown to be probable it is not enough, or that the proof must "satisfy" the jury of insanity requires more than a preponderance, and is error: *Kelch v. State*, 55 O. S. 146, IV Longsdorf's Notes, 655.

It is not error in a proper case to charge the jury to receive expert evidence of insanity, in a homicide case, with caution: *State v. Miller*, 13 O. C. C. 67, 7 O. C. D. 552 [affirmed, without opinion, *Miller v. State*, 55 O. S. 685; affirming *State v. Miller*, 7 O. N. P. 458, 5 O. D. (N.P.) 703].

Where in the trial of an indictment for murder, the defense being insanity, the court before the argument to the jury, gave several instructions, at defendant's request, upon the questions of reasonable doubt of insanity, and a definition in the language of the statute defining the crime of murder in the first degree, in the second degree, and manslaughter, and again in his general charge defined these crimes, it is not error to refuse a further request of defendant defining manslaughter made after argument, such request being a correct abstract proposition of law, but being inapplicable to the defense of insanity or to the facts of the case: *Reighard v. State*, 22 O. C. C. 340; 12 O. C. D. 382.

H. TRIAL OF PRESENT INSANITY.

One accused of a crime in order to be put upon his trial must possess that mental capacity which will enable him to assist in the impaneling of the jury, to testify as a witness in his own behalf, to comprehend his position, the enormity of the crime and the relation he sustains to it, and to consult and advise with his counsel relating and explaining facts and circumstances connected with the alleged crime: *State v. Terwilliger*, 6 O. L. R. 588, 54 Bull. 205.

The insanity of a person under indictment can not be investigated by the probate court; the common pleas alone has jurisdiction: *State v. South*, 7 O. N. P. 442, 5 O. D. (N.P.) 588.

The trial provided by G. C., § 13608, has nothing to do with determining the sanity of the accused at the time he committed the offense: *State v. O'Grady*, 3 O. N. P. 279, 5 O. D. (N.P.) 654; *State v. Kirves*, 1 Dayton Term Rep. (Iddings) 8.

In a proceeding under G. C., § 13608, the accused has the affirmative, and he must show by fair preponderance of the evidence that he is not sane: *State v. Myers*, 7 O. N. P. 288, 8 O. D. (N.P.) 679.

The provisions of G. C., §§ 13608, 13609, are mandatory; and the mode therein prescribed for a trial of the question of the present insanity of a person under indictment is peremptory and exclusive: *State v. Roselot*, 69 O. S. 91, IV Longsdorf's Notes, 953.

When, at any time before sentence, the insanity of a defendant under indictment is suggested and brought to the attention of the court in which such indictment is pending in the manner provided in G. C., §§ 13608, 13609, it is the imperative duty of the court to order a jury to be impaneled to try such question, and such jury when so impaneled, shall be specially sworn to try the question whether the defendant is or is not then sane: *State v. Roselot*, 69 O. S. 91, IV Longsdorf's Notes, 953.

The burden is on the accused to prove insanity by a preponderance in an inquiry under G. C., § 13608. The test in such inquiry is not knowledge of right or wrong, but capacity to realize the case he is called on to defend, and his relations to his counsel, and to comprehend the details of the evidence, and advise his counsel as to facts proper for a defense or to aid in selecting a jury: *State v. Myers*, 7 O. N. P. 288, 638, 8 O. D. (N.P.) 679; *State v. Kirves*, 1 Dayton Term Rep. (Iddings) 8.

A question for the jury is whether the accused has sufficient mental power to observe and know the difference between right and wrong, or having such mental power he had sufficient will power to refrain from doing the wrong: *State v. Tyler*, 7 O. N. P. 443, 5 O. D. (N.P.) 588; *State v. Kalb*, 7 O. N. P. 547, 5 O. D. (N.P.) 738.

On inquiry into the sanity of a person indicted for first degree murder, he is entitled to but two peremptory challenges of the jury the same as the state, and not to sixteen challenges as allowed on his murder trial: *State v. Kirves*, 1 Dayton Term Rep. (Iddings) 8.

The provisions of G. C., § 13608, are mandatory and the mode prescribed for determining insanity is peremptory and exclusive. When, therefore, the counsel for the defendant during the progress of a trial suggests to the court that the defendant is not then sane and presents the certificate of a "respectable" physician to that effect, it is error for the court to refuse to impanel a special jury to pass upon the insanity of the accused. Such error is not cured by a general charge to the jury as follows: "If

you think that you have not heard all of the truth in the case, because of defendant's mental condition and that you believe you are not justified because of that fact in finding him guilty, you may acquit him": *State v. Roselot*, 69 O. S. 91, IV Longsdorf's Notes, 953.

Before one has been found insane and committed pursuant to G. C., §§ 13608, *et seq.*, can properly be convicted, the record should show a compliance with G. C., § 13613; and an affidavit of the superintendent of an insane asylum that the accused was not insane, made after the person has been tried and convicted, is not a compliance with G. C., § 13613: *Brock v. State*, 22 O. C. C. 364, 12 O. C. D. 467.

IX. CAPACITY TO VOTE.

One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum or in appointing a guardian for him were proper application made, comes well within the class of persons who under the term idiot or insane are prohibited from voting by the constitution: *In re Election Contest*, 3 O. N. P. (N.S.) 373, 50 Bull. 173.

X. INQUISITION.

A. JURISDICTION.

The jurisdiction acquired by the probate court in an inquisition of lunacy, under our statutes, continues until the discharge of the patient: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

The insanity of a person under indictment can not be investigated by the probate court; the common pleas alone has jurisdiction: *State v. South*, 7 O. N. P. 442, 5 O. D. (N.P.) 588.

B. NOTICE.

G. C., § 2020, together with G. C., §§ 2021 and 2022, contemplate an adversary proceeding in which the person who is claimed to be insane has the right to be present and to contest such charge: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443.

Appearance of an imbecile in court has been held to be equivalent to notice of the proceedings: *Jordan v. Dickson*, 10 Dec. Rep. 332, 20 Bull. 360.

C. PROCEDURE.

Chancery will direct an issue to a jury to try questions of sanity where the evidence is voluminous, and allow the parties to compel the personal attendance of the

witnesses: *Wallace v. Bevard*, W. 114, I Longsdorf's Notes, 9.

Evidence by inspection may be considered on trial of an application to appoint a guardian, and it being impossible to put such evidence in the bill of exceptions, and the judge certifying that it was impossible to report the lunatic's answers to questions, the weight of the evidence can not be reviewed on error, for it is not all in the bill: *Davison v. Tipton*, 9 Dec. Rep. 60, 10 Bull. 321.

D. FINDING.

Where a verdict is rendered finding a prisoner to be sane, error will not lie to review the proceedings previous to the prisoner's conviction of the crime charged: *Inskip v. State*, 35 O. S. 482, III Longsdorf's Notes, 801.

If three-fourths of the jury find the prisoner insane it is sufficient to authorize a verdict: *State v. O'Grady*, 3 O. N. P. 279, 5 O. D. (N.P.) 654.

The statute, G. C., § 13609, that three-fourths of the jury may find the verdict is constitutional: *State v. Kirves*, 1 Dayton Term Rep. (Iddings) 8.

Where the record of the proceeding fails to show that a person committed to Longview asylum was present or that she was deprived of her rights, it should be presumed that she was so present and had a fair trial: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443.

E. CONFINEMENT IN INFIRMARY.

Under a former statute, since repealed (Bates 707, 708), for analogous section, see G. C., § 1959, the probate judge can send an insane person to the county infirmary, only when he is awaiting admission to the insane asylum, or is dangerous: *Brown v. Infirmary Directors*, 49 O. S. 578, IV Longsdorf's Notes, 471.

Where a guardian of an insane person, not dangerous and having abundant means, consents to his remaining in a county infirmary, whither he had been sent by the probate judge, she impliedly contracts to pay to the infirmary what his support is reasonably worth, for her duty is being performed by the infirmary, and he was not entitled to be there except as a pay patient: *Directors v. Merkle*, 3 O. N. P. 169, 4 O. D. (N.P.) 190.

If the infirmary is full, the probate court can not contract with the sheriff for the support of an insane person, as if he were not a public officer: *Commissioners v. Lodwick*, 9 Dec. Rep. 567, 15 Bull. 126.

F. REMOVAL OF PATIENT.

A probate judge has no power to remove an insane person to the county infirmary from an insane asylum: *Brown v. Infirmary Directors*, 49 O. S. 578, IV Longsdorf's Notes, 471.

An insane person removed to a state hospital in another county than that of his residence, continues a legal resident of his home county: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

The superintendent, acting in good faith, with the assent of the trustees, and solely with reference to the welfare of a patient, may permit such patient to be removed to and remain temporarily at the residence of a near relative, although beyond the limits of the state: *Rutter v. State*, 38 O. S. 496, III Longsdorf's Notes, 988.

G. DISCHARGE FROM HOSPITAL FOR INSANE.

A probate judge who is notified of the order for the discharge of a patient from the hospital for the insane, under G. C., § 1966, has no judicial discretion in issuing a warrant for the removal of the patient. The officers of the asylum have full power and ample discretion in determining whether a patient should be discharged or not; and if they discharge a patient and notice is given, as provided by G. C., § 1966, the duty of the probate judge to issue the warrant is ministerial; and if he refuses to issue the warrant he may be compelled by mandamus so to do: *State, ex rel., v. Burgoyne*, 7 O. S. 153, II Longsdorf's Notes, 285.

An insane person, a non-resident of the state, who has been sent from a given county to the penitentiary, and has thence been transferred to the hospital for the insane, is not to be re-transferred to the state from which he was sent to the penitentiary: *State, ex rel., v. Jones*, 17 O. S. 148, II Longsdorf's Notes, 823.

H. FEES AND COMPENSATION.

In the matter of inquests of lunacy, a probate judge is entitled only to such fees as are provided for by G. C., § 1981. For such services, the provisions of G. C., § 1603, are not applicable: *Millard v. Commissioners*, 5 O. C. C. (N.S.) 145, 16 O. C. D. 445.

The certificate of the medical witness is a part of the record in the proceeding, and under G. C., §§ 1601 and 1602, the probate judge is not entitled to thirty-five cents for each certificate under the seal of the court to the copies of the certificate of the medical witness, as required by G. C., § 1977: *State, ex rel., v. Adams*, 8 O. C. C. (N.S.) 513, 18 O. C. D. 643.

Under a former statute, no allowance under G. C., § 1982, could be made to the sheriff for a conveyance to the state hospital for the insane, except in Cuyahoga County: *Tuall v. Commissioners*, 3 O. N. P. 112, 4 O. D. (N.P.) 318.

The appointment of a person to act as escort to a patient, the issue of a warrant to such person (as provided in G. C., § 1966), the execution of such warrant and the return thereof, are preliminaries necessary to the right to claim compensation: *State, ex rel., v. High*, 7 O. C. C. 128, 3 O. C. D. 694.

Railroad fare, carriage hire and incidentals in conveying a lunatic to the asylum are not in addition to the compensation under G. C., § 1981. The words "and nothing more" are not confined to the compensation of his assistants: *Commissioners v. Lodwick*, 9 Dec. Rep. 567, 15 Bull. 126. See also **SHERIFF**.

A certificate which shows that a certain named person is entitled to a certain sum does not comply with G. C., § 1967, for it fails to show that the probate judge has ascertained the amount, and it fails to show that the probate judge has declared and ordered said amount fixed: *State, ex rel., v. High*, 7 O. C. C. 128, 3 O. C. D. 694.

The certificate of a medical witness and his findings are a part of the record, and the probate judge is not entitled to be paid for such certificate, in addition to the fee provided in G. C., §§ 1601 and 1602: *State, ex rel., v. Adams*, 8 O. C. C. (N.S.) 513, 18 O. C. D. 643.

A sheriff's compensation for taking an insane person to and from a state insane asylum is governed by G. C., § 1981, and as amended in 1892 this does not allow any extra compensation for an assistant accompanying the sheriff, although the probate judge directed that an assistant should accompany the sheriff: *Ward v. Russell*, 57 O. S. 144, IV Longsdorf's Notes, 710.

I. HABEAS CORPUS.

An insane person in any asylum is entitled to *habeas corpus* under G. C., § 1976, to test the question of sanity, and the court must allow the writ to issue, and hear the question thereon, and should not hear it upon the application for the writ: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443.

The question of the sanity or insanity of the person who is confined as insane, can not be determined upon the application for the writ of *habeas corpus*; but such writ must issue and the question of sanity or insanity must be determined on the issue made by the return thereto: *In re Gunning*,

14 O. C. C. 507, 7 O. C. D. 443. See also **HABEAS CORPUS**.

XI. GUARDIAN.

A. APPOINTMENT.

1. Jurisdiction.

The idiot must have resided within the county continuously for a period of at least twelve months, or come into the county with his father or some one having legal control over him with the intention of making this his residence before a guardian can be appointed for him by the probate court: *In re Canady*, 4 O. N. P. 403, 7 O. D. (N.P.) 285.

Where an idiot has voluntarily moved into another county and has not been there twelve months, he has not acquired a residence or legal settlement there under G. C., § 10989, and the probate court, therefor, has no jurisdiction to appoint a guardian for him: *In re Canady*, 4 O. N. P. 403, 7 O. D. (N.P.) 285. See also **GUARDIAN AND WARD**.

An appeal under G. C., § 10989, to the court of common pleas from the judgment and order of the probate court refusing to appoint a guardian for one alleged to be an imbecile and dismissing the application for such appointment, transfers to the court of common pleas the entire case, and empowers that court, upon finding the person an imbecile and that a guardian is needed, to appoint a guardian: *In re Oliver*, 77 O. S. 474, IV Longsdorf's Notes, 1034.

The appointment may be made either for person or estate: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

2. Grounds for Appointment.

Under the present statutes two things are requisite for the appointment of a guardian, namely is he an idiot, lunatic or imbecile, and is he a resident of the county: *In re Tempest*, 10 Dec. Rep. 502, 21 Bull. 301.

Before the probate court can appoint guardians for imbeciles, the judge must be satisfied that the subject is an imbecile and a resident of this county: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

A person may be an imbecile, though able to govern himself so as not to need a guardian for his person. Therefore, where a person has become so infirm mentally that he can not manage his affairs with sufficient capacity to preserve his property, a guardian may be appointed: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

Mere fact that an aged woman shows infirmities of age, or peculiar conduct is not

sufficient to authorize the appointment of a guardian: *In re Emswiler*, 8 O. N. P. 132, 11 O. D. (N.P.) 10.

The fact that a person made an unwise conveyance of all her property to her daughter-in-law, conveying about \$7,000 worth of property "in consideration of \$1.00 and other good and valuable consideration," referring to agreement for support, and that, subsequently becoming dissatisfied on account of the treatment received, she began a suit to set aside the conveyance, but sought to abandon it when she found it would become a matter of public talk, in addition to facts referred to in preceding paragraph, is not sufficient to establish imbecility: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

The mere fact that a person shows some of the infirmities of age, such as forgetfulness and unusual susceptibility to influences of her children, or peculiar conduct, such as greeting acquaintances on the street in an extremely friendly and caressing manner, are not sufficient to authorize the appointment of a guardian: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

Infirmary directors are not guardians of insane pauper patients, and where an insane patient falls heir to property, whatever rights the board of directors has thereto under G. C., §§ 2548, *et seq.*, do not supersede the mandatory requirements of G. C., § 10989, that the court "shall" appoint a guardian: *Kissell v. Gram*, 4 O. N. P. 333, 7 O. D. (N.P.) 233. See also GUARDIAN AND WARD.

3. Effect.

The finding of the court that the person assuming to act as guardian in partition proceedings under the act of 1820, is such guardian, imports absolute verity, and is sufficient, *prima facie*, to show that the court had obtained jurisdiction over the ward: *Merritt v. Horne*, 5 O. S. 307, II Longsdorf's Notes, 188.

By the proviso of the act of 1872 (69 v. 174), the appointment of a guardian for an imbecile is to be regarded only as *prima facie* evidence of imbecility. The fact as to such imbecility may be inquired into by the alleged imbecile in an action brought by him, to enjoin the guardian from interfering with the control and management of his property. In the revision of this statute (75 v. 927, § 49), this provision was omitted. It was held that the omission did not give an appointment made under the original act a more conclusive effect than it had under the original act: *Messenger v. Bliss*, 35 O. S. 587, III Longsdorf's Notes, 811.

While the guardianship is unrevoked, it is conclusive of subsequent incapacity to contract or convey. It is only *prima facie* evidence as to making a will, marrying, or committing a crime, for these acts are not done by nor interfere with the control of the guardian. Any other rule would force the guardian to prove continuance of imbecility on each suit. Hence, in the guardian's action to set aside a conveyance, an answer denying imbecility and not ratifying it, is bad: *Jordan v. Dickson*, 10 Dec. Rep. 147, 19 Bull. 64.

Action to recover property must be by guardian and not by next friend: *Row v. Row*, 53 O. S. 249, IV Longsdorf's Notes, 598.

The guardian of a lunatic, unlike the guardian of a minor, properly sues in his own name: *Wageman v. Brown*, 1 Dec. Rep. 69, 1 W. L. J. 454.

A party to the suit is incompetent to testify as a witness when the opposite party is the guardian of an imbecile: *Ross v. Todd*, 4 O. C. C. 1, 2 O. C. D. 385.

The filing of an amended answer and cross-petition by the guardian of an imbecile is a legal and sufficient entry of appearance for such imbecile in a partition proceeding: *Foddy v. Miller*, 10 O. N. P. (N.S.) 76.

G. C., § 11008, seems to preclude the idea that there could be any preference among creditors of the idiot, imbecile or lunatic, at least after the appointment of his guardian: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

Execution can not be had against the property of a person under guardianship as *non compos mentis*; it is in a certain sense in *custodia legis*. A judgment is not a lien, unless capable of collection by execution. Accordingly a judgment against an imbecile and his guardian is not a lien on his land, and can not be recognized as such by his administrator selling to pay debts: *Heff v. Cox*, 5 O. N. P. 413, 5 O. D. (N.P.) 377.

4. Procedure.

Upon the appointment of a guardian for an imbecile upon an appeal to the court of common pleas under G. C., § 10989, it is the duty of the clerk of the court of common pleas to certify, by a duly authenticated transcript, the order, judgment and proceedings to the probate court: *In re Oliver*, 77 O. S. 474, IV Longsdorf's Notes, 1034.

Physicians who are given a fair understanding of the testimony in support of the application of a guardian of a person alleged to be an imbecile, and who heard much of the testimony of the defense, and especially that of the defendant, and who

personally consulted with her, are competent medical witnesses: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

The burden of proof in the case of an application for the appointment of a guardian for a person alleged to be an imbecile is upon the person making the application: *In re Shelleig*, 8 O. N. P. 399, 11 O. D. (N.P.) 81.

5. Notice.

Before the amendment of 1889, a guardian for an insane wife could be appointed at any time without notice to the husband: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

Before the amendment to G. C., § 10989, no notice was required on the application for the appointment of a guardian for an imbecile: *In re Dickson*, 10 Dec. Rep. 6, 18 Bull. 37.

Notice to one previously declared a lunatic is not necessary to the validity of an appointment of guardian for the estate: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

Notice to the lunatic of the application to appoint a guardian is not required: *Davison v. Tipton*, 9 Dec. Rep. 60, 10 Bull. 321; *Contra*, *Cox v. Cox*, 2 Dec. Rep. 20, 1 W. L. M. 96.

Jurisdictional facts may be supplied by *nunc pro tunc* entries as well as judgments, as in appointing a guardian for A, an imbecile, to show that A appeared in open court and was examined, but the decree did not show that he had notice of the application: *In re Dickson*, 10 Dec. Rep. 6, 18 Bull. 37, Goebel, 118. See also JUDGMENT.

B. BONDS.

An appointment of a guardian for an infant lunatic not stating the ground, is presumed to be both for infancy and lunacy. Where the court continued to recognize the guardianship after the ward came of age, but continued of unsound mind, and the taking of a new bond after the ward came of age was authorized, and the sureties on it are liable: *King v. Bell*, 36 O. S. 460, III Longsdorf's Notes, 870.

A substituted surety is liable for the proceeds of real estate sold by the guardian before the new bond was given: *Tuttle v. Northrop*, 44 O. S. 178, IV Longsdorf's Notes, 202.

C. POWERS.

1. Management of Estate.

A guardian of an imbecile has no lawful right to make disbursements of the funds

of his ward to prospective heirs of the ward, nor to make loans of the funds of his ward to said prospective heirs without mortgage security on real estate, as provided by statute: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

When it is shown by the evidence that the guardian of an imbecile treated the property of his ward as his own, placed the funds of the ward in bank in his individual name, paid his own debts with said funds and used them in speculation in land, taking the title thereto in his own name and keeping no account of the trust property as trust property, such guardian will, on accounting in the probate court, be charged with the lawful rate of interest on all the funds which came in his hands from the date of the reception of such funds by said guardian to the date of his accounting: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

The guardian of an imbecile has no lawful right to pay a fee to an attorney for what the evidence shows to have been fomented litigation relative to the assets of his ward's estate, or to pay any claim for attorney fees against his ward barred by the statute of limitations; any and all such amounts so paid by said guardian are not proper credits, and should and will be charged against the guardian on accounting to the probate court: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

2. Sale.

A guardian of an imbecile appointed by an Ohio court, who sells real estate of his ward located in the state of Arkansas, without the order of the probate court of Ohio to whom such guardian must in law account, and without proceedings and an order of sale of the proper court of the state in which such real estate is situated, will be charged on accounting in the probate court of Ohio with what the evidence shows to be the fair market value of such lands at the time of sale, even if said amount so found by the court be more or greater than the amount received by the guardian, and no subsequent, irregular, defective or invalid proceedings and order by the laws of the foreign state, approving said sale, will cure said unauthorized sale or prevent such charge on accounting of such guardian in the probate court: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O.

D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

In an action by an administrator to sell real estate to pay debts, the heirs, who are idiots become parties to the record by the filing of an answer and cross petition by their guardian: *Segal v. Building Co.*, 11 O. C. C. (N.S.) 481, 21 O. C. D. 519.

3. Accounts.

A guardian of an imbecile must list and value in his inventory of his ward's estate, every item of personal property, including doubtful judgments, claims, notes and accounts, and each parcel of real estate belonging to his said ward; anything less is subject to exception: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

A receipt or voucher signed by a minor can be received in settlement of his guardian's accounts, but it is otherwise as to a lunatic or idiot by reason of G. C., § 10992: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

After the account of a guardian of an imbecile has been duly passed upon, the court has no power later, upon mere motion or request of the heirs, to open up the account and make the guardian establish by evidence every item of debt contained therein. This can only be done where mistake or fraud is shown: *Millen v. Young*, 18 O. C. C. 571, 8 O. C. D. 391.

Where the answer of the guardian admits the bill to be true, the complainant must prove its allegations with the same strictness as if the answer had interposed a direct and positive denial: *Long v. Mulford*, 17 O. S. 484, II Longsdorf's Notes, 845; *Massie v. Donaldson*, 8 O. 377, I Longsdorf's Notes, 443.

A guardian of an imbecile, in an accounting before the probate court, is an incompetent witness to prove an alleged claim for services rendered by said guardian to and for said ward prior to the date of his appointment as guardian: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

4. Prosecution and Defense of Suits.

An administrator or guardian appointed in one state can not sue in the courts of another state without authority from the latter: *Smith v. Madden*, 9 O. F. D. 320.

It is the duty of a guardian for a lunatic to appear and defend, or cause to be defended, all suits against his ward (G. C.,

§§ 10991, 10993): *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

The answer of the guardian *ad litem*, alleging his ignorance of the matters contained in the petition, and praying that the rights of his wards may be protected, has the effect of a general denial, and requires proof of all the material averments of the petition: *Wood v. Butler*, 23 O. S. 520, III Longsdorf's Notes, 138.

The joinder of a guardian and ward, as defendants is authorized in an action against an insane defendant for damages for wrongful death: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

Where the guardian of an insane ward entered his appearance and was subsequently dismissed, it is error to quash the service and dismiss the ward for want of jurisdiction of person: *Stuard v. Porter*, 79 O. S. 1, IV Longsdorf's Notes, 1043.

The filing of an amended answer and cross-petition by the guardian of an imbecile is a legal and sufficient entry of appearance for such imbecile in a partition proceeding: *Foddy v. Miller*, 10 O. N. P. (N.S.) 76.

D. REIMBURSEMENT.

A guardian having incurred a debt for the support of a lunatic ward, and his successor having received sufficient assets to pay it, but instead of doing so, incurred new debts, the court approved an account and found that the ward owed her more than the remaining assets, and an order being afterwards made requiring payment of the debt incurred by the predecessor as a preferred debt, and the ward dying pending an appeal therefrom, it was held: (1) The probate court had power under G. C., § 10939, to make the order. (2) The approval of the guardian's account and the finding was no bar to the application for such order. (3) The death of the ward did not take away the creditor's right to such order: *Loudon v. Patterson*, 41 O. S. 206, IV Longsdorf's Notes, 58. See also COURTS.

E. REMOVAL.

Removal of the guardian will not be granted merely because his ward, an imbecile, has taken a dislike to and will not deal with him: *Frantz v. Frantz*, 4 O. N. P. 278, 6 O. D. (N.P.) 555.

One, who, after attending school for a number of years, can not tell how much ten times twelve is or six per cent. on \$100, or how he would invest \$400 except that he would put it in the bank, although he may be careful and stingy in small dealings, is not entitled to have a guardianship terminated:

Frantz v. Frantz, 4 O. N. P. 278, 6 O. D. (N.P.) 555.

A person will be considered not fit, suitable or competent to represent an estate in a fiduciary capacity, when, on hearing exceptions to his inventory and account as guardian of an imbecile, it appears that he has mixed and mingled the funds of said estate with his own, has paid claims without question or investigation, has converted his ward's funds to his own use by buying real estate and taking the title in his own name, etc.: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

Under the statutes of this state, any person interested, though a stranger and neither a creditor nor relative, has large capacity, on proper grounds, as next friend of an imbecile under guardianship in the probate court to bring and prosecute an action for the removal of such guardian, or to file and maintain exceptions to an inventory and an account made or rendered by such guardian in the probate court, and especially so, when the imbecile has no next of kin resident of the state, or none willing or sufficiently interested in his person or estate to undertake such action, a bond for costs being a sufficient safeguard against meddling or usurpation: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

In a proceeding to terminate a guardianship over an imbecile, the sole question is whether the ward was properly declared to be an imbecile at the time the appointment was made, or whether since the making of the appointment he has been restored to reason: *In re Kramer*, 8 O. N. P. (N.S.) 217, 19 O. D. (N.P.) 444.

While the order of termination *ipso facto* disposes of the guardian, it is not an order based upon the qualification of the guardian, as in the case of the guardian of a minor ward, but of capacity of ward: *In re Kramer*, 8 O. N. P. (N.S.) 217, 19 O. D. (N.P.) 444.

An appeal will lie from an order of a probate court overruling a motion of an imbecile ward to terminate the guardianship upon the grounds (1) the letters of guardianship were in the first instance improperly issued, and (2) that if he was an imbecile at the time such letters were issued he has since been fully restored to reason: *Hiett v. Nebergall*, 45 O. S. 702, IV Longsdorf's Notes, 305.

An appeal may be taken by the guardian of an imbecile in the interest of the trust from an order of the probate court, made

upon application of the alleged imbecile himself, terminating the guardianship: *In re Kramer*, 8 O. N. P. (N.S.) 217, 19 O. D. (N.P.) 444.

There is no appeal from the overruling, by the probate court, of a motion made by a lunatic to have his guardian's letters revoked, on the ground that they had been improperly issued: *Messenger v. Bliss*, 35 O. S. 587, III Longsdorf's Notes, 811.

Where a court has heard exceptions to an inventory and to an account of the guardian of an imbecile, and has received evidence on grounds for removal of the guardian and the presentation of evidence on the three matters consolidated has fully closed after three days of hearing, and the imbecile ward dies within a few days thereafter and before the opinion of the court was announced or a judgment ordered, the cause of action does not thereby abate, and there is no necessity of the revival of the action in the name of the representatives of the deceased imbecile, and the trial court thereafter can render judgment as of the date when the evidence was closed as a sort of a *nunc pro tunc* order: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64 [affirmed by circuit court; dismissed by supreme court, *In re Oliver*, 55 Bull. 336].

F. COLLATERAL ATTACK.

An order of the probate court appointing a guardian for a lunatic can not be collaterally impeached: *Heckman v. Adams*, 50 O. S. 305, IV Longsdorf's Notes, 499.

In the hearing of an application for the appointment of a guardian, the failure to give notice to the alleged imbecile, can be complained of only in a direct proceeding to set aside the appointment in the probate court or to reverse it on error: *Jordan v. Dickson*, 10 Dec. Rep. 332, 20 Bull. 360.

G. CLAIM FOR SERVICES.

If a guardian has rendered services to an imbecile ward, allowance for services and compensation is by G. C., § 10953, to be determined by the court settling the guardian's account, and, it not being a personal claim against the ward, it need not in case of his decease, be presented to his personal representatives: *Scattergood v. Ingram*, 86 O. S. 76.

The doctrine that where two persons sustain to each other a family relation, one can not recover against the personal representatives of the other on account of services rendered in that relation except on proof of a contract to make compensation therefor, does not apply to a claim by a

guardian for services rendered to an imbecile ward: *Scattergood v. Ingram*, 86 O. S. 76.

XII. SUPPORT.

A. STATE.

Under G. C., § 1950, amended 99 v. 325, prior to its amendment March 18, 1881, patients after their admission into the asylums of the state for the insane, were clothed at the expense of the state: *State v. Kieseewetter*, 37 O. S. 546, III Longsdorf's Notes, 935.

B. COUNTY.

The county was not chargeable with the maintenance of an insane person under the act of 1824 until after a guardian has been appointed: *Trustees v. Commissioners*, 10 O. 283, I Longsdorf's Notes, 511.

The burden of caring for insane persons in needy circumstances, who can not be admitted to an asylum, rests upon the county in which they have their legal settlement: *Commissioners v. Cleveland*, 63 O. S. 335, IV Longsdorf's Notes, 858 [affirming *Cleveland v. Commissioners*, 19 O. C. C. 663, 10 O. C. D. 749].

An action may be maintained by the directors of a county infirmary against the commissioners of another county, for the maintenance of a lunatic pauper, whose legal settlement is within a township of such other county, after returning the pauper to the commissioners thereof, and requesting them to accept and take care of her: *Commissioners v. Directors*, 7 O. S. 65, II Longsdorf's Notes, 269.

Under a former statute (R. S., § 707, repealed 93 v. 271, for present statute see G. C., § 1952), which provided for the care of insane persons when they could not be admitted to the hospital for the insane, it was held that the county must pay the expenses of all insane persons having a settlement in said county who could not be received into the hospital for the insane: *Commissioners v. Cleveland*, 63 O. S. 335, IV Longsdorf's Notes, 858 [affirming *Cleveland v. Commissioners*, 19 O. C. C. 663, 10 O. C. D. 749].

A city is entitled to be reimbursed by the county for the care of insane persons. The statute as to the support of paupers does not apply: *Cleveland v. Commissioners*, 19 O. C. C. 663, 10 O. C. D. 749 [affirmed, *Commissioners v. Cleveland*, 63 O. S. 335, IV Longsdorf's Notes, 858].

C. TOWNSHIP.

A, a lunatic, residing in Polk township and having a legal settlement there, was

removed by her guardian to his home in Jackson township. Her means of support having become exhausted in the hands of her guardian she was supported by the trustees of Jackson township; in an action brought by the said trustees against the trustees of Polk township, to recover for the relief thus afforded to the lunatic, it was held that she was a resident of Jackson township and had no legal settlement in Polk township, and that the latter township was not liable for her support: *Trustees v. Trustees*, 19 O. S. 28, II Longsdorf's Notes, 924.

For the liability, under earlier statutes, as between a county and township for the support of an insane person, see *Trustees v. Commissioners*, 10 O. 283, I Longsdorf's Notes, 511.

D. ESTATE OF INSANE.

Under G. C., § 1950, in connection with G. C., § 1815, the expense of furnishing clothing is chargeable on the estates of the patients, or on those who would be legally bound to furnish clothing, if they were not in a hospital for the insane: *State v. Kieseewetter*, 37 O. S. 546, III Longsdorf's Notes, 935.

Under a former statute, since repealed, (R. S., § 971, which corresponds to G. C., § 1815-1), there is said to be an implied contract on the part of the guardian to pay what the support and maintenance of the ward is reasonably worth, if he has sufficient funds of such ward in his hands: *Directors v. Merkle*, 3 O. N. P. 169, 4 O. D. (N.P.) 190.

XIII. SUPERINTENDENT OF HOSPITAL FOR INSANE.

The superintendent of the hospital for the insane must be an elector: *State, ex rel., v. Wilson*, 29 O. S. 347, III Longsdorf's Notes, 472. [This case involved the superintendent of the Athens hospital for the insane.]

XIV. LONGVIEW HOSPITAL.

It was held that G. C., § 1954, probably does not apply to the commitment of a person to the Longview hospital: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443.

This chapter (G. C., §§ 2004 to 2034), does not amount to a contract between the state of Ohio and Hamilton county. Accordingly, an appropriation of money for such asylum is valid; and does not fall within Art. II, § 29, of the Ohio constitution, which requires a vote of two-thirds of the members elected to each branch of the general assembly for the payment of a

claim not provided for by pre-existing law. Such appropriation is not the payment of a claim, but is a provision for the support of a public institution for which the constitution makes express provision in Art. VII, § 1: *State, ex rel., v. Oglevee*, 36 O. S. 211, III Longsdorf's Notes, 841.

Longview asylum, though a public institution, is not a state institution, within the meaning of Art. VII, § 2, of the constitution, which requires the trustees of such institutions to be appointed by the governor; and this section, by providing for the appointment of directors of the asylum otherwise than by the governor, is not in conflict with the above provision of the constitution: *Chalfant v. State, ex rel.*, 37 O. S. 60, III Longsdorf's Notes, 893.

A pauper can not be discharged from Longview, and the duty of his support cast upon the county, without the certificate required by statute: *State v. Ritt*, 6 Dec. Rep. 940, 8 Am. L. Rec. 750.

An adversary proceeding is contemplated by G. C., § 2020, regulating commitment to Longview asylum, with the right of the patient to be present and contest the question of his insanity: *In re Gunning*, 14 O. C. C. 507, 7 O. C. D. 443.

The commissioners of Hamilton county are not liable for the salary of the superintendent of Longview asylum, G. C., § 2460 excludes such liability. Nor is it to be paid out of the \$2,000 which the steward draws for current expenses. When the directors have fixed the salary with the approval of the commissioners he can obtain a warrant from the auditor: *Bunker v. Ficke*, 6 Dec. Rep. 978, 9 Am. L. Rec. 371.

The court has discretion as to whether it will adjourn or not; and it may commit a person to Longview hospital, although such person is arrested and the case is heard on the same day. The warrant need not be served until the day before the return or until the day of the return: *Jordan v. Dickson*, 10 Dec. Rep. 332, 20 Bull. 360.

XV. INSTITUTION FOR FEEBLE-MINDED YOUTH.

G. C., §§ 1807, *et seq.*, apply to the institution for feeble-minded youth; and under these provisions, a steward as well as a superintendent, must be appointed: *State, ex rel., v. Oglevee*, 37 O. S. 142, III Longsdorf's Notes, 901.

G. C., § 1891, leaves with the trustees the authority to determine the method whereby they shall determine whether an applicant is within the class named in G. C., § 1891: *Doren v. Fleming*, 6 O. C. C. (N.S.) 81, 17 O. C. D. 737.

INSECURE BUILDINGS.

For a discussion of insecure buildings, see BUILDINGS AND BUILDING REGULATIONS.

INSECURITY CLAUSE.

See CHATTEL MORTGAGES.

INSOLVENCY.

For insolvency, see also BANKRUPTCY; ASSIGNMENTS FOR BENEFIT OF CREDITORS.

For insolvency of corporations, see CORPORATIONS.

Court of insolvency, see COURTS.

For conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.

Insolvency is defined as one's affairs becoming so deranged that he is unable to pay his debts as they fall due, though some turn of luck may leave him a fragment of his broken fortune: *Mitchell v. Gazzam*, 12 O. 315, I Longsdorf's Notes, 611.

A charge that insolvency means inability to pay debts in the usual course of business is not made erroneous by refusal to add that it is not necessary that assets should be less than liabilities; for this negative is included by implication in the charge given: *Hosiery Co. v. Baker*, 18 O. C. C. 604, 10 O. C. D. 219.

An averment that a decedent's estate is wholly insolvent is not a conclusion of law but a statement of fact, and a motion to require facts or proceedings declaring the same will be overruled: *Smuck v. Crumsefton Co.*, 1 Dayton Term Rep. (Iddings) 149.

Insolvency in a person or corporation is inability to pay its debts in ordinary course. That it might ultimately pay them does not distinguish the case: *Remington v. Press Association*, 3 O. N. P. 258, 4 O. D. (N.P.) 337.

For the purpose of authorizing stockholders to bring suit against directors for wasting the assets of a bank, a bank is to be regarded as insolvent when it is unable to pay its debts and to pay its stockholders par upon their stock: *Glass v. Courtright*, 23 O. D. (N.P.) 253.

Even if the sureties are not bound for a debt due to the deceased from the administrator, if the latter is insolvent, yet an active business man in good credit and of large property, is not insolvent in a legal sense although it develops later that his liabilities exceed his assets: *Perkins v. Scott*, 9 O. C. C. 207, 6 O. C. D. 226. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

It is no defense to a stockholder in an action by the creditors of a corporation

against the stockholders thereof to enforce their liability, that such stockholder is insolvent: *Marriott v. Railroad Co.*, 16 O. D. (N.P.) 135. See also CORPORATIONS.

The insolvency laws of Ohio are abrogated and superseded by the bankruptcy laws of the United States only in case of an application of the insolvent debtor for a discharge in bankruptcy; otherwise they remain in force: *Berk v. Hirsch*, 8 O. N. P. 459, 11 O. D. (N.P.) 768. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

A tender by the lessee of rent covering the entire term is not a pre-requisite to a demand for an accounting as to the equity of lessee in improvements erected under a provision for their purchase at the end of the term where the lease has been forfeited for defaults of lessee and his insolvency is not a fact which the lessor can avail himself of as a defense against the hardship of being compelled to enter upon litigation and submit to an accounting when the result will be to show a balance in his favor: *Lent v. Curtis*, 2 O. C. C. (N.S.) 558, 14 O. C. D. 592. See also LANDLORD AND TENANT.

Suspicion of insolvency is not sufficient to constitute "reasonable ground for belief of insolvency"; knowledge of facts such as to induce a reasonable belief of insolvency is necessary: *Chapman v. Bank*, 4 O. L. R. 395, 51 Bull. 614. See also BANKRUPTCY.

The purchase by an insolvent buyer, who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, but a purchase under like circumstances, save that such intent is absent, is not in law fraudulent. The simple failure to disclose a condition of insolvency does not imply a purpose to defraud: *Lithographing Co. v. Belford Co.*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford Co. v. Lithographing Co.*, 52 O. S. 668]. See also SALES.

A purchase made in good faith and for fair value from an insolvent debtor, while G. C., § 11102, as amended, 93 v. 290, was in force, must be held valid as to such purchaser, even though the seller may have made the sale in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion of others, or with intent to hinder, delay or defraud his creditors, and even though a deed of assignment made by such debtor, was filed within ninety days after such sale: *Bobilya v. Priddy*, 68 O. S. 373, IV Longsdorf's Notes, 945.

G. C., §§ 11102, *et seq.*, when so construed as to protect *bona fide* purchasers, is a valid enactment: *Bobilya v. Priddy*, 68 O. S. 373, IV Longsdorf's Notes, 945.

In arriving at the amount of assets or determining whether a corporation is in-

solvent, the amount of capital stock is of no weight, but the market value of the stock is often a reliable criterion, and, multiplied by the number of shares, shows the business world's estimate of the value of the assets; *Robinson v. Railway Co.*, 5 O. N. P. 293, 7 O. D. (N.P.) 312. See also EVIDENCE.

Alleging no goods or property subject to levy is not a sufficient averment of insolvency of a corporation to warrant a receiver, for it may have equitable rights sufficient to satisfy all debts: *Paper Co. v. Paper Co.*, 8 O. D. (N.P.) 671, 36 Bull. 329. See also RECEIVERS.

Fraud or fraudulent intent will not be presumed; it must be pleaded and proved as a fact. In cases of fraudulent conveyances an intent may be held to exist by force of circumstances, where perhaps no conscious purpose existed, under the rule that a man must be held to intend the natural and inevitable consequences of his acts: *Bank v. Scott*, 13 O. D. (N.P.) 600. See also FRAUDULENT CONVEYANCES.

A stockholder in a savings and loan association organized under the laws of this state, is entitled, when the association becomes insolvent, to set off, as against its assignee for the benefit of creditors, a claim for money which he has on deposit with the association, against his liability for the unpaid part of his stock subscription: *Niles v. Olzak*, 87 O. S. 229.

A bank is charged with knowledge of a debtor's insolvency, where it appears that its cashier, without making inquiry as to encumbrances accepted from the said debtor deeds conveying different tracts of land, wherein the consideration was so apportioned as to cover the present indebtedness to the bank although in excess of the real value of the land, and the cashier knew that the visible resources of the debtor were thereby exhausted, and also that there were other matters outstanding as to which liability to the bank might result: *Ragan v. Donovan*, 10 O. L. R. 353.

INSOLVENCY COURT.

For insolvency court, see COURTS.

INSOLVENT COMMISSIONER.

See INSOLVENT LAWS.

INSOLVENT CORPORATION.

For insolvent corporation, see CORPORATIONS.

INSOLVENT DEBTORS.

For insolvent debtors, see DEBTOR AND CREDITOR.

INSOLVENT ESTATES.

See EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

INSOLVENT LAWS.

Scope Note.—Includes rights, liabilities and duties of commissioner; necessity, contents and breach of bond; support of insolvent; discharge of insolvent; pleadings, procedure and remedies. Excludes bankruptcy; assignments for benefit of creditors; fraudulent conveyances; and nature of insolvency.

Cross References.

For definitions of insolvency, see INSOLVENCY.

For questions of bankruptcy, see BANKRUPTCY.

For assignments for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

For conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.

For receiverships, see RECEIVERS.

ANALYTICAL OUTLINE.

- I. Rights, Liabilities and Duties of Commissioner.
- II. Bond of Insolvent.
 - A. Necessity.
 - B. Contents and form.
 - C. Performance and breach.
 - D. Excuses.
- III. Support of Insolvent.
- IV. Discharge of Insolvent.
 - A. Validity of statutory provisions.
 - B. Who may give discharge.
 - C. When discharge to be given.
 - D. Effect of discharge.
- V. Pleading and Procedure.
- VI. Remedies.

I. RIGHTS, LIABILITIES AND DUTIES OF COMMISSIONER.

Under the act of February, 1824, the assignment of insolvent's choses in action vests the legal interest in the commissioner and he alone can maintain an action thereon: *Johns v. Johns*, 6 O. 271, 1 Longsdorf's Notes, 337 [affirming *John v. John*, W. 584, 1 Longsdorf's Notes, 46].

A law requiring a public officer to sue for the use of others does not require the use to be expressed in the suit. If the commissioner of insolvents sue for the use of a named creditor it will not be deemed there are others and, hence, demurrer will not lie: *Mason v. Montgomery*, W. 722, 1 Longsdorf's Notes, 56.

Suit may be maintained against commissioner of insolvents and his securities, without the creditor's establishing his debt by

judgment before bringing such suit: *State v. Sherman*, 3 O. 507, 1 Longsdorf's Notes, 188.

It is the duty of the commissioner of insolvents to cause the advertisement of notice of the intention to make application for the benefit of the law, to be published: *Commissioner v. Way*, 3 O. 103, 1 Longsdorf's Notes, 151.

The commissioner takes the property as the debtor had it: *Ives v. Commissioners of Insolvents*, W. 626, 1 Longsdorf's Notes, 48.

It is a breach of his bond for the commissioner of insolvents to neglect the statutory duty to call a meeting of creditors immediately after sale of assets to adjust their claims: *State v. Sherman*, 3 O. 507, 1 Longsdorf's Notes, 188.

Money compelled to be paid under the bastardy act is not as a debt, but as a moral duty. The order to pay is not discharged by bankruptcy of the putative father. If the

commissioner of insolvents has the property of the father at the time he went into bankruptcy, the money must be applied to the order in bastardy in preference to the assignment in bankruptcy: *Haues v. Cooksey*, 13 O. 242, I Longsdorf's Notes, 638. See also BASTARDY.

II. BOND OF INSOLVENT.

A. NECESSITY.

If the applicant has no property the commissioner can require bond or omit it. The bond must not exceed \$200. If he has property he must give bond: *Collier v. Johnson*, 7 O. (pt. 1) 235, I Longsdorf's Notes, 377.

B. CONTENTS AND FORM.

An insolvent's bond is valid, though the condition does not, in terms, follow the statute: *Commissioner v. Way*, 3 O. 103, I Longsdorf's Notes, 151.

If the condition of the bond is substantially as required by law, and not more onerous in its conditions, it will be sufficient. Therefore if the condition of the bond is that the debtor should appear on a certain fixed day, and that is the day on which the commissioner should report to the court, it is good; and so, if the condition be that the applicant should then and there file his petition, make application for a final certificate, obtain the same, pay the costs of the application, etc., the bond will be valid, for these terms set forth the legal effect of the condition of the bond, as specified by general terms in the statute. So if to the conditions are superadded a further one not implied or required by statute, which renders the condition of the bond more favorable to the obligors thereto than it would be without it, it will still be valid: *Collier v. Johnson*, 7 O. (pt. 1) 235, I Longsdorf's Notes, 377; *Commissioner v. Way*, 3 O. 103, I Longsdorf's Notes, 151; *Pollard v. Collier*, 8 O. 43, I Longsdorf's Notes, 412.

C. PERFORMANCE AND BREACH.

Where the commissioner fails to advertise, and the party appears at a subsequent term, in good faith, and obtains a discharge, the condition of the bond is saved, though a specified term be named therein: *Commissioner v. Way*, 3 O. 103, I Longsdorf's Notes, 151.

If a person who is arrested applies for the benefit of the insolvent act, and gives bond for making a schedule, and there has been a breach of the conditions of such bond, the sureties are liable for the whole debt; and

the fact that the person who gave the bond had no property, can not be shown in mitigation: *Loines v. Phillips*, 4 O. 172, I Longsdorf's Notes, 214.

If the bond of the insolvent was for his appearance at the May term, and the commissioner did not publish a notice of the application until the September term, and the insolvent appeared only at the latter term, it is not a breach of the bond. His appearance at the May term would have been of no effect, and his sureties should not be punished for the neglect of a public officer: *Commissioner v. Way*, 3 O. 103, I Longsdorf's Notes, 151.

Where a debtor is discharged from custody on giving bond to assign his property for benefit of creditors the bond is liable, although on final hearing his application is dismissed for want of the necessary residence in the state for two years: *Loines v. Philips*, 2 O. 313, I Longsdorf's Notes, 129.

A prison bounds bond conditioned that the debtor shall remain in bounds until legally discharged, is released upon a certificate in insolvency being given, though the proceedings are dismissed by the common pleas: *Young v. Whitton*, 9 O. 100, I Longsdorf's Notes, 465.

D. EXCUSES.

A bond of a person applying for a discharge in insolvency in order to obtain release from arrest for debt which bond is conditioned to deliver up all his property, binds the surety to pay the whole debt, though there was no property to assign: *Loines v. Phillips*, 4 O. 172, I Longsdorf's Notes, 214.

In an action on the bond of an insolvent, where he failed to prosecute his application to a final discharge, the sureties can not show, in mitigation of damages, that the person who gave the bond was wholly insolvent, and had no property to assign: *Loines v. Phillips*, 4 O. 172, I Longsdorf's Notes, 214.

III. SUPPORT OF INSOLVENT.

A debtor in jail must support himself or go without or become a township charge. He is not a county charge and the sheriff can not support him and recover of the county: *Wadsworth v. Wetmore*, 6 O. 438, I Longsdorf's Notes, 349.

IV. DISCHARGE OF INSOLVENT.

A. VALIDITY OF STATUTORY PROVISIONS.

A state insolvent or bankrupt law discharging insolvents from debts, if not conflicting with any bankruptcy law of congress, is valid between citizens of the same state as to debts contracted subsequent to the law.

The law is part of the contract and the discharge is a good defense in other states. Such law could not legally retroact: *Smith v. Parsons*, 1 O. 236, I Longsdorf's Notes, 74; *Bank v. Card*, 7 O. (pt. 2) 170, I Longsdorf's Notes, 398; *Anonymous*, 1 Dec. Rep. 360, 8 W. L. J. 267.

State insolvent laws, discharging debtors from the debt upon surrendering up all their properties, are valid as to contracts made between parties of the same state, within its jurisdiction, after the law was enacted and in force: *Smith v. Parsons*, 1 O. 236, I Longsdorf's Notes, 74.

The grant of power to discharge parties imprisoned for the non-payment of fines, under the insolvent debtor's law, to officers other than the governor of the state (see G. C., § 11148), is not an attempt to invest with authority to exercise the pardoning power, but merely a modification of penalties prescribed for certain offenses, and is not in conflict with the constitution: *In re Scott*, 19 O. S. 581, II Longsdorf's Notes, 972.

B. WHO MAY GIVE DISCHARGE.

The officer making the discharge under insolvency laws must possess qualifications required by the law of the state where it is made: *Bank v. Card*, 7 O. (pt. 1) 170, I Longsdorf's Notes, 398.

A New York discharge, under their insolvent laws, is void, unless the judge was of the degree of counselor-at-law: *Bank v. Card*, 8 O. 519, I Longsdorf's Notes, 451.

C. WHEN DISCHARGE TO BE GIVEN.

A certificate given by commissioner of insolvents to a debtor, who has given bond for the prison limits, discharges the security on the bond, although the proceedings are afterwards dismissed by the court: *Young v. Whitton*, 9 O. 100, I Longsdorf's Notes, 465.

G. C., § 2576, makes the county auditor a commissioner of insolvents to hear applications for discharge preferred by insolvent convicts. Under this section the auditor exercises his discretion and acts upon his own ideas of propriety; and upon his own knowledge, derived from personal inquiry, common rumor or otherwise. He must be clearly convinced that the public can gain nothing by prolonging the imprisonment. The convict can not insist upon a hearing before the auditor or compel him to investigate the question of present or prospective insolvency and the action of the auditor can not be judicially reviewed: *In re McAdams*, 21 O. C. C. 450, 11 O. C. D. 780. See also SENTENCE.

The legislature have the right to extend the insolvent laws to persons committed for

bastardy: *State v. Heathman*, W. 690, I Longsdorf's Notes, 53.

D. EFFECT OF DISCHARGE.

A rule of a federal court that no one is to be kept imprisoned if he has been released under the insolvent law of the state from the demand for which he has been arrested, is a part of a recognizance of bail to secure the release of such person; and in an action of debt upon such recognizance such discharge of such debtor is a good defense to the sureties: *Beers v. Haughton*, 34 U. S. (9 Peters) 329, 1 O. F. D. 490 [affirming *Beers v. Haughton*, 1 McLean, 226, Fed. cases 1230, 1 O. F. D. 481].

A discharge under the insolvent law, on process from a state court, discharges from imprisonment on process from the United States circuit court: *Wood v. Funk*, 7 O. (pt. 1) 196, I Longsdorf's Notes, 370.

A nonresident creditor voluntarily becoming a party to insolvency proceedings in another state where the law discharges the debtor, wholly abandons his extraterritorial immunity and is bound by the discharge: *Anonymous*, 1 Dec. Rep. 360, 8 W. L. J. 267.

Where a contract is made in another state, between two citizens of that state, and a discharge had under the insolvent laws of that state, such discharge is valid, and it is a complete bar to proceedings in this state: *Smith v. Parsons*, 1 O. 236, I Longsdorf's Notes, 74; *Bank v. Card*, 7 O. (pt. 2) 170, I Longsdorf's Notes, 398.

V. PLEADING AND PROCEDURE.

After a judgment is rendered against principal and sureties on a bond under the insolvent law, and a creditor of the insolvent would proceed upon such judgment by a *scire facias*, he must set forth and establish his debt. It is error to award execution in his favor if this is not done: *Wolf v. Pounsford*, 4 O. 397, I Longsdorf's Notes, 231.

In a suit on a recognizance, notice under the general issue that defendant was discharged in due course of law is a legal conclusion and will not admit proof of release under the insolvent laws: *State v. Heathman*, W. 690, I Longsdorf's Notes, 53.

VI. REMEDIES.

When a person in charge of a prisoner refuses, on request, to take him before the commissioner of insolvents to procure his discharge, the more convenient and appropriate remedy is by *mandamus*, and not by *habeas corpus*, and therefore, the former should be resorted to: *In re Scott*, 19 O. S. 581, II Longsdorf's Notes, 972.

INSOLVENTS.

See INSOLVENT LAWS.

INSPECTION.

For the inspection of public improvements, see PUBLIC CONTRACTS.

The lessee of a storeroom on the third floor of a building, having the use of an elevator, is liable as an employer for injuries sustained by an employe in the performance of his duties, by reason of defects in the cable of the elevator, where it appears that no inspection of such elevator was made by the employer, and that had a reasonable inspection been made the defect would have been discovered: *Frolich v. Cranker*, 21 O. C. C. 615, 11 O. C. D. 592.

Such employer can not avoid his duty and responsibility to his employes, and refuse to inspect or neglect to make examination of the condition of the machinery of an elevator of which he has the use, and which he requires or permits employes to use, by the claim, that he did not lease the elevator and did not control that portion of the building where the propelling power was located: *Frolich v. Cranker*, 21 O. C. C. 615, 11 O. C. D. 592. See also MASTER AND SERVANT.

Where it appears that a car was inspected and found to be defective in one respect, a failure to observe that a grab-iron or handhold was not fastened except by being placed behind a certain plate bolted to the car, indicates a failure to inspect thoroughly, and the operation of such a car constitutes *prima facie* negligence under G. C., § 9015: *Railway Co. v. Butler*, 3 O. C. C. (N.S.) 449, 13 O. C. D. 459.

Where a chalk mark, three X's, generally used to indicate that a car is defective, was made on one end of a car, but was not readily observable, a brakeman, operating the car in the yards at night, is not chargeable with notice of its defective condition; nor is the fact that the car was being set in on a repair track notice of defects where the track is also used for the loading and unloading of car wheels, etc.: *Railway Co. v. Butler*, 3 O. C. C. (N.S.) 449, 13 O. C. D. 459.

If a brakeman is chargeable with notice of defects in a car by reason of customary though not readily observable chalk marks on its side or end, such notice would only relate to the defects discovered by the car inspector and for which the car was then marked; the notice would not go beyond the information which the employe might obtain if he went to the car inspector; as to other defects it would not impose assumption of risk upon the employe or overcome the neg-

ligence imputed *prima facie* by G. C., § 9015, because of the use of defective cars: *Railway Co. v. Butler*, 3 O. C. C. (N.S.) 449, 13 O. C. D. 459.

It is the duty of an employer to make a proper inspection of his appliances at reasonable times, and in case of injury to an employe from defects therein, the employer is chargeable with knowledge of such defects: *Endres v. Marshall*, 3 O. L. R. 358, 16 O. D. (N.P.) 790 [affirmed, without opinion, *Endres v. Marshall*, 74 O. S. 436].

In an action for wrongful death caused by a defective brake chain on a work car where plaintiff's evidence and the link of the chain as an exhibit show that the defect was open and visible for some time prior to the accident, and was discoverable by inspection which it was decedent's duty to make, the court may direct a verdict for defendant: *Speller v. Brewing Co.*, 5 O. N. P. (N.S.) 561, 16 O. D. (N.P.) 520, 1 *Hosea*, 400 [affirming *Speller v. Brewing Co.*, 16 O. D. (N.P.) 281, 3 O. L. R. 378].

A person is not required to inspect the devices and appliances of third parties; all that is required so far as concerns the knowledge of dangerous conditions not caused or maintained by him is such knowledge as was actually possessed or as ordinarily prudent men would have obtained by their faculties of observation reasonably exercised: *Marsh v. Railway*, 3 O. L. R. 635, 50 Bull. 189 [affirmed, *Marsh v. Railway*, 7 O. C. C. (N.S.) 405, 18 O. C. D. 9]. See also NEGLIGENCE.

Persons selling milk will be presumed to comply with the law and sell pure milk. Therefore, an ordinance requiring inspection of milk, milch cows, stables where kept, etc., for the purpose of securing the sale of pure milk, is not burdensome to the producer, and is not inimical to any provisions of the constitution: *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547. See also CONSTITUTIONAL LAW.

The mere fact that a fee of one dollar is charged and a tag attached to each wagon used in selling milk before a permit will be granted under an ordinance to compel the sale of pure milk, etc., does not constitute the permit a license in violation of G. C., § 3672, exempting vendors of their own products from payment of a license, but is a mere step to secure enforcement of the object in view in passing the ordinance and to enable the purchaser to rely upon the fact that the action of the board of health has been complied with: *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547.

G. C., § 3672, providing that nothing in that statute contained shall be construed to limit the powers conferred upon cities under

R. S., § 1692 (repealed, 96 v. 96, for analogous section, see G. C., § 3652), among which are those relating to boards of health, renders the former section inapplicable to an ordinance providing for sale of pure milk and imposing a fee of one dollar upon each wagon, whether such fee be denominated a license or not: *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547. See also **LICENSES FROM STATE**.

An ordinance providing that no person shall sell milk in a city without a permit from the board of health, and authorizing examination and inspection of the milk sold, the places where produced and the cattle producing it, and prescribing regulations regarding the health of employes, etc., is a health ordinance exclusively and within the provisions of R. S., § 1692, paragraph 24 (repealed, 96 v. 96, for analogous section, see G. C., § 3652): *Walton v. Toledo*, 3 O. C. C. (N.S.) 295, 13 O. C. D. 547. See also **MUNICIPAL CORPORATIONS**.

An inspection of timber in the rough through which unmerchantable as readily as merchantable timber would pass, ought not to be accorded that probative effect which is given to mechanical processes. Hence the fact that one lot of barrels proved sound and good would not be evidence to prove that a second lot of barrels were equally good because the timber therein had passed in the rough the same inspection that the good barrel timber had passed: *Cooperage Co. v. Thompson*, 8 O. N. P. 347, 11 O. D. (N.P.) 487 [affirmed, *Cooperage Co. v. Thompson*, 45 Bull. 319]. See also **EVIDENCE**.

The Association of the Tobacco Trade of Cincinnati, incorporated under the act of 1866, is, since the repeal of that act by G. C., § 8731, required to be governed by the provisions of G. C., §§ 10144, *et seq.* Under G. C., § 10144, the association can appoint an inspector of leaf tobacco, and his performance of his duties is not a usurpation of the duties of inspectors appointed under the act of 1881, for the latter inspect

only such tobacco as they may be "called on to view, weigh and inspect": *State, ex rel., v. Casey*, 38 O. S. 555, III Longsdorf's Notes, 993. See also **TOBACCO ASSOCIATIONS**.

Control by municipalities of electric wiring and the proper inspection thereof is within the police power and may be provided by the ordinance: *Toledo v. Winters*, 10 O. N. P. (N.S.) 661, 21 O. D. (N.P.) 171.

The provisions that the electrical inspector shall adopt and promulgate proper rules and requirements for the installation of electrical wiring and appurtenances, and that all such construction and the material used therein shall be in accordance with the requirements of the national electric code, is not such a delegation of legislative power as to render it void: *Toledo v. Winters*, 10 O. N. P. (N.S.) 661, 21 O. D. (N.P.) 171.

In an action for damage resulting from the collapse of an old wooden bridge and the precipitating of a team and its driver into the stream, a finding by a jury that the defects resulting from time and weather were not so latent that a competent inspector would not have discovered them will not be disturbed: *Armstrong v. Cincinnati*, 8 O. L. R. 224.

INSPECTION AND ADMINISTRATION OF DOCUMENTS.

See **EVIDENCE; INSPECTION OF BOOKS, ETC.**

INSPECTION AND PHYSICAL EXAMINATION.

See **EVIDENCE**.

INSPECTION AND SUPERVISION OF PUBLIC OFFICES.

See **OFFICE**.

INSPECTION LAWS.

Scope Note.—Includes in general the laws relating to the examination of merchandise, etc., by public authorities; the place of inspection, condemnation, etc. Excludes the inspection of books, papers, etc.; adulteration; building inspection.

Cross References.

For the liability for injuries caused by failure to inspect machinery, appliances, etc., see **MASTER AND SERVANT; NEGLIGENCE**.

For the inspection of books, papers, etc., see **EVIDENCE; INSPECTION OF BOOKS, ETC.**

For the inspection of foods, see **FOODS AND DRUGS**.

For the inspection of buildings, see **BUILDINGS AND BUILDING REGULATIONS; MUNICIPAL CORPORATIONS**.

ANALYTICAL OUTLINE.

- I. Constitutionality of statutory provisions.
- II. Application and Construction of Statutory Provisions.
- III. Place of Inspection.
- IV. Failure to Appoint Inspector.
- V. Condemnation.
- VI. Fraud.
- VII. Tobacco Inspection.
- VIII. Inspection of Gasoline.
- IX. Pleading.

I. CONSTITUTIONALITY OF STATUTORY PROVISIONS.

The legislature has power to pass inspection laws and require the inspector's compensation to be paid by the inspected occupations. This does not violate the requirements to tax all property uniformly; hence, the act for the inspection of gas meters at the expense of the gas companies, in proportion to their valuation, is valid: *Gas Light & Coke Co. v. State*, 18 O. S. 237, II Longsdorf's Notes, 885.

The act of 1889 (R. S., § 251a), levying a fee of one dollar upon every mile of railroad track in the state, to be paid to the commissioner of railroads, to be paid by him into the state treasury, is not the exercise of police powers or an inspection law; but, as the fund can be used by the state for any purpose, it is a tax, just as a tax of a dollar an acre on a farm would be, and therefore void for want of uniformity. It is not an assessment, because an arbitrary sum, regardless of benefits: *Railway Co. v. State*, 49 O. S. 189, IV Longsdorf's Notes, 448 [reversing *State v. Railway Co.*, 11 Dec. Rep. 11, 24 Bull. 107].

A statute similar to G. C., § 1031, made applicable to cities of the first grade of the first class, was held not to be invalid as depriving the owner of the use of the property without the intervention of a jury or as depriving him of due process of law, but was held to be invalid as not of uniform operation throughout the state: *Cincinnati v. Steinkamp*, 54 O. S. 284, IV Longsdorf's Notes, 635 [affirming *Cincinnati v. Steinkamp*, 9 O. C. C. 178, 6 O. C. D. 85].

The specification of such appliances, additions or alterations as are necessary for the proper protection of school children from fire and other dangers, and the requirement that such appliances be installed, is not a provision for the taking of property without due process of law, but is a mere requirement that such property be used in a

lawful way, and such a provision is a constitutional and valid enactment. Closing school and other buildings pending the installation of such appliances is within the police power of the state, and the duty of determining what appliances shall be installed may properly be delegated as in this act, leaving the details to be worked out by the officers so delegated. A board of education, however, would have capacity to enjoin oppressive and arbitrary acts whereby schoolhouses are closed and children deprived of the advantages of the public schools: *Akron Board of Education v. Sawyer*, 7 O. N. P. (N.S.) 401, 19 O. D. (N.P.) 1.

An act for the appointment of a building inspector in cities of the first grade, first class (R. S., § 2575-53, repealed, 96 v. 96), is void, as a law of a general nature without uniform operation. The office could be sustained under the general powers given by R. S., § 1692 (repealed, 96 v. 96), had that been pleaded: *State, ex rel., v. Tooker*, 16 O. C. C. 647, 8 O. C. D. 656. See also CONSTITUTIONAL LAW.

An ordinance which authorizes the electrical inspector to grant or refuse certificates according as the applicants are, in his judgment, competent or incompetent, is in conflict with the common welfare clause of the constitution and also with the guaranty in the Bill of Rights of equal protection and benefit to all: *Toledo v. Winters*, 10 O. N. P. (N.S.) 661, 21 O. D. (N.P.) 171.

Control by municipalities of electric wiring and the proper inspection thereof is within the police power and may be provided for by ordinance: *Toledo v. Winters*, 10 O. N. P. (N.S.) 661, 21 O. D. (N.P.) 171.

An applicant to whom a certificate of registration was granted by the electrical inspector will be held to have waived the invalid feature of the ordinance under which the certificate was issued, and an action will lie against him for the amount due to the city for permits issued to him for electrical

wiring: *Toledo v. Winters*, 10 O. N. P. (N.S.) 661, 21 O. D. (N.P.) 171.

An ordinance which requires the city sealer's seal to be upon measures used in exposing commodities for sale conforms to G. C., § 3651, and is constitutional and valid: *Gates v. Cleveland*, 21 O. D. (N.P.) 141, 56 Bull. 93.

While the legislature has power to fix standards of weights and measures, it can not make it unlawful to use any measure other than the standard half bushel furnished to the state of Ohio by the United States, when purchasing or receiving wheat from the original producer: *Yeazill v. State*, 20 O. C. C. 646, 10 O. C. D. 794.

In view of the difficult and serious questions involved in enforcing G. C., § 1139, and the following sections, and in view of the doubt as to the constitutionality of these sections, an injunction should lie against proceedings under G. C., § 1139, until these questions are determined: *Chemical Co. v. Calvert*, 8 O. N. P. (N.S.) 361, 19 O. D. (N.P.) 571 [affirmed, without opinion, *State, ex rel., v. Chemical Co.*, 80 O. S. 754].

II. APPLICATION AND CONSTRUCTION OF STATUTORY PROVISIONS.

Whether the statute which provided for the new board of agriculture made the original fertilizer statute applicable to the secretary of such board, such statute as originally enacted being applicable solely to the secretary of the former board was a question which was raised but not decided in *Chemical Co. v. Calvert*, 8 O. N. P. (N.S.) 361, 19 O. D. (N.P.) 571 [affirmed, without report, *State, ex rel., v. Chemical Co.*, 80 O. S. 754].

As formerly organized, the state board of agriculture was not a public corporation, nor a state agency, nor a department of the state. It was a private corporation, and, accordingly, its secretary was not a public officer and could not be given authority to enforce the statutes with reference to the inspection analysis of fertilizer. Accordingly, injunction would lie to prevent him from publishing a result of such analysis where it was claimed that such published report would be a libel: *Chemical Co. v. Calvert*, 7 O. N. P. (N.S.) 103, 18 O. D. (N.P.) 583.

Under the general law relating to weights and measures, and the city charter of March 1, 1834, the city council of Cincinnati had the power to appoint an inspector or sealer of weights and measures, and to enforce by fine the use of weights and measures sealed by such inspector: *Huddleson v. Ruffin*, 6 O. S. 604, II Longsdorf's Notes, 261.

An association formed under G. C., §§ 10144, *et seq.*, may appoint an inspector to perform such duties as will promote the objects for which such association was incorporated: *State, ex rel., v. Casey*, 38 O. S. 555, III Longsdorf's Notes, 993.

Under statutory authority to provide for weighing and measuring articles for sale, a municipal corporation can not enact an ordinance which provides that hay which has been sold outside of the municipal corporation can not be delivered in the municipal corporation unless it is weighed by the city weigher: *Heminger v. Cleveland*, 3 W. L. M. 46, 2 Dec. Rep. 428.

General Code, §§ 946 and 947 (original numbering) were penal and to be construed strictly: *State, ex rel., v. Gas Co.*, 18 O. C. C. 751, 4 O. C. D. 158 [reversed, *State, ex rel., v. Gas Co.*, 53 O. S. 347, IV Longsdorf's Notes, 604].

An inspector employed by the food commissioner can not have injunction to compel a dealer in an article to furnish him a sample as required by G. C., § 12758. The remedy for refusal is prosecution under succeeding sections, and is exclusive. It is not a case of preventing interference with an officer, for the inspector is a mere employee: *State v. Dairy Co.*, 62 O. S. 123, IV Longsdorf's Notes, 826. See also *FOODS AND DRUGS*.

III. PLACE OF INSPECTION.

A single inspection is all that is required; and it is immaterial in what county such inspection is made: *Woodworth v. State*, 4 O. S. 487, II Longsdorf's Notes, 123.

IV. FAILURE TO APPOINT INSPECTOR.

If no inspector has been appointed, as required by statute, the fact that whisky is sold without first being inspected does not prevent the vendor from recovering the purchase price therefor; and such vendor does not incur the penalties provided for by statute by reason of such sale: *Smith v. Kibbee*, 9 O. S. 563, II Longsdorf's Notes, 399.

V. CONDEMNATION.

The word "condemned" in G. C., § 5990 means that such property has been by official action declared to be unfit for use: *Bauer v. Casey*, 6 O. C. C. (N.S.) 69, 16 O. C. D. 598.

VI. FRAUD.

The fact that the manufacturer of an article prevents an inspection thereof is said not to make out a *prima facie* case of fraud

in *Chemical Co. v. Calvert*, 8 O. N. P. (N. S.) 361, 19 O. D. (N.P.) 571.

VII. TOBACCO INSPECTION.

Tobacco inspectors are required to inspect only such tobacco as they are called on to view, weigh and inspect; and it is not an unlawful usurpation for the members of a tobacco association to appoint an inspector of their own: *State, ex rel., v. Casey*, 38 O. S. 555, III Longsdorf's Notes, 993.

Under G. C., § 10147, an association of the tobacco trade may appoint an inspector of leaf tobacco; and the performance by him of his duties does not amount to usurpation of the duties of the inspectors provided for in G. C., §§ 6041, *et seq.* The tobacco which such last inspectors are required to inspect is as provided for in G. C., § 6053, the tobacco which they are "called on to inspect and weigh": *State v. Casey*, 38 O. S. 555, III Longsdorf's Notes, 993.

VIII. INSPECTION OF GASOLINE.

Neither the Ohio nor Indiana acts required inspection of gasoline unless it was to be sold for illuminating: *Van Camp v. Aldrich*, 5 Dec. Rep. 92, 2 Am. L. Rec. 454.

A person here who ships to Indiana a barrel of gasoline and has it delivered there to a buyer without being inspected, both states having nearly identical laws requiring inspection, and an explosion kills one of the buyer's family, it was held that there could be no recovery. The Indiana act could not be enforced extraterritorially. And the Ohio act did not apply where the act causing the death occurred outside the state: *Van Camp v. Aldrich*, 5 Dec. Rep. 92, 2 Am. L. Rec. 454. See also DEATH BY WRONGFUL ACT.

IX. PLEADING.

As some evidence must be given to support the negative averments, therefore on trial for selling liquors not inspected, it is error to charge that the state need not prove noninspection, and that on its proving a sale the defendant must prove an inspection: *Cheadle v. State*, 4 O. S. 477, II Longsdorf's Notes, 120. See also FOODS AND DRUGS.

The act against the adulteration of liquors—requiring inspection of liquors made or brought into the county not having the inspector's brand of some other county—did not compel a second inspection when the bulk was broken. Hence, an information under the act should aver generally that the liquor was not inspected, and not simply that it was not inspected in the county where sold, and had no brand of any other county, for it may have been branded in another county

and then put into a different cask, hence, the averment, being consistent with innocence, is bad: *Woodworth v. State*, 4 O. S. 487, II Longsdorf's Notes, 123.

A petition for damages averring that an inspector willfully and maliciously condemned good fruit and had it destroyed, is not demurrable as founded on a judicial act, for the allegation of willful and malicious amounts to an averment of bad faith: *Pretekin v. Olt*, 1 Dayton Term Rep. (Iddings) 143. See also OFFICERS.

An indictment which charges that a manufacturer has failed to comply with the order of the "inspector of high explosives" is not sufficient, since no such officer is known to the laws of Ohio: *Corthell v. State*, 18 O. C. C. 598, 8 O. C. D. 49.

Under G. C., § 992, an averment in an indictment to the effect that an explosive was in close proximity to a public highway or to a schoolhouse is not sufficient: *Corthell v. State*, 11 O. C. C. 570, 5 O. C. D. 123.

The superintendent of insurance is not authorized to require compensation for valuation of life policies of a foreign company, the valuation of which is certified by the proper officer of the company's state, according to the standard of G. C., § 639. That the company has paid a like charge during former years, and has furnished the data for such valuation, at request does not estop it to dispute the charge: *State, ex rel., v. Reinmund*, 45 O. S. 214, IV Longsdorf's Notes, 269.

INSPECTION OF BOOKS, ETC.

For the inspection of books, papers, etc., of a corporation, by a stockholder, see CORPORATIONS.

For the admission and inspection of documents, see EVIDENCE.

A stockholder has the right to inspect the books of the corporation and to make copies thereof, regardless of his motive in so doing: *Caldwell v. Hill Co.*, 17 O. D. (N.P.) 801, 2 O. L. R. 294. See also CORPORATIONS.

The proceedings of the tax commission of Ohio constitute a public record, and subject to proper regulations these records are open to inspection by any and all persons who choose to examine them, regardless of their interest or lack of interest in the subject-matter: *State, ex rel., v. Tax Commission*, 12 O. N. P. (N.S.) 319.

At any time after the making of an order of inspection under G. C., § 11552, directing defendants to allow plaintiffs to inspect their books, plaintiffs may make such demand and ask that they have the examination, and on refusal may make an application to the court

for proceedings as for contempt, and the filing of a petition in error or other pleadings in the supreme court should not delay them in such proceedings, unless stayed by *superseas* from the proper court: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

The circuit court has, independent of statute, the right to punish for contempt for disobedience by parties of an order, under G. C., § 11552, directing a party to an action to allow an inspection of books, papers and documents by the adverse party: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

G. C., § 11552, will not be so construed as to impute to the general assembly an intention to abridge the power of a court created by the constitution to punish contempt summarily, such power being inherent and necessary to the exercise of judicial functions: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

The secretary of a corporation whose principal directors are not residents of and not within the state, but who is in possession of its books and acting as general manager, will be held for contempt of court for refusal to comply with an order of court to submit the books of the corporation to the inspection of the adverse party, although in doing so he is acting under the orders of his superior officers and the directors of the corporation: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

When in such case such application for proceedings as for contempt has been made, and a motion is made in the supreme court for an order superseding the order of the circuit, in regard to the examination of the books, the plaintiffs may file their motion in the circuit court, to have the party show cause, and have it stand pending the decision of the supreme court and call it up, upon a decision of the supreme court denying the *superseas*: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

Where the demand for such an order is too general in its nature, it is within the discretion of the court to make the order in such a manner or form as will be compatible with the purpose for which the evidence is to be produced—and the demand should be granted according to the exigencies of the case: *Arbuckle v. Spice Co.*, 21 O. C. C. 347, 11 O. C. D. 743.

The right of either party to an action under G. C., § 11552, to an inspection and copy of the books, papers and documents in possession or control of the adverse party containing evidence relating to the merits of the action or defense, is not confined to any court or to any class of cases, and is applicable to cases tried by the court: *Ar-*

buckle v. Spice Co., 21 O. C. C. 356, 11 O. C. D. 726.

It is no objection to such an order that the party can obtain the production of the books by a subpoena *duces tecum*. Under the statute parties have the right to obtain all necessary evidence relevant to the issues, even to examining the books of the adverse party, for evidence before the trial of the case: *Arbuckle v. Spice Co.*, 21 O. C. C. 347, 11 O. C. D. 743.

The circuit court has power to make and enforce an order under G. C., § 11552, granting to the plaintiffs in an action the right to examine the books of a defendant corporation, so far as will enable plaintiffs to obtain the facts and evidence of facts, necessary to enable the court to pass upon questions raised in the pleadings: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

The right of a party to apply for and of the court to make such an order under G. C., § 11552, is not limited to cases triable to a jury, but applies to other cases also, and the statement in the latter part of the statute as to what order the court may make in a jury case, does not limit the general right of the court to make the order: *Arbuckle v. Spice Co.*, 21 O. C. C. 347, 11 O. C. D. 743.

In such case, if there is any question in regard to any book or paper as to whether it is proper for plaintiffs to see or inspect it the matter should be brought before the court granting the order, by the party who made the objection to the examination: *Arbuckle v. Spice Co.*, 21 O. C. C. 356, 11 O. C. D. 726.

Under G. C., § 11552, the court may order the adverse party to give to the other or his attorney an inspection and copy, or permission to take a copy of such books, papers and documents as it is made to appear contain the evidence which will enable him to establish his case, and this notwithstanding the fact that petitioners are rivals in business: *Arbuckle v. Spice Co.*, 21 O. C. C. 347, 11 O. C. D. 743.

A person charged with crime is not entitled before or at the time of trial to the minutes of the evidence taken before the grand jury on which the indictment was found against him, nor to an inspection of a transcript of such evidence, and it is error for the court to order the prosecuting attorney to deliver said minutes or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecuting attorney to permit either of them to make an inspection thereof: *State v. Rhoads*, 81 O. S. 397 [reversing *State v. Rhoads*, 7 O. L. R. 305]. See also GRAND JURY.

Where a person conducts a private interview with one who afterwards is called and

examined as a witness before the grand jury which found an indictment against the defendant concerning some matters disclosed in said interview, which interview was stenographically taken, written out, and subsequently delivered to the prosecuting attorney for his use, and on the trial the person interviewed is called and testified for the state in support of the indictment, it is error for the court, on request of defendant, to order the prosecuting attorney to deliver the transcript of said interview to defendant or his counsel, or to order the prosecuting attorney to allow either of them an inspection of the same: *State v. Rhoads*, 81 O. S. 397 [reversing, *State v. Rhoads*, 7 O. L. R. 305]. See also PROSECUTING ATTORNEY.

Mandamus lies to compel the tax commission of Ohio to permit an examination of the records and reports of corporations made thereto: *State, ex rel., v. Tax Commission*, 12 O. N. P. (N.S.) 319.

The right to inspect books and records given by G. C., § 8672, is properly enforceable by injunction, and not by mandamus, being a right incident to ownership: *Volksblatt Co., v. Hoffmeister*, 62 O. S. 189, IV Longsdorf's Notes, 829 [affirming, *Hoffmeister v. Volksblatt Co.*, 5 O. N. P. 71, 8 O. D. (N.P.) 463].

The right to inspect does not depend on the stockholder's motive or purpose, hence he need not aver it. It is sufficient to aver a request for inspection and for the fixing of a reasonable time for it, and a refusal: *Volksblatt Co. v. Hoffmeister*, 62 O. S. 189, IV Longsdorf's Notes, 829.

As incident to the right is the right to inspect by proper agent and to take copies, and the right is not limited to one inspection: *Volksblatt Co. v. Hoffmeister*, 62 O. S. 189, IV Longsdorf's Notes, 829. See also CORPORATIONS.

INSPECTION OF DOCUMENTS.

See EVIDENCE.

INSPECTION OF PUBLIC OFFICERS.

See OFFICE.

INSPECTOR OF BUILDINGS.

See BUILDINGS AND BUILDING REGULATIONS.

INSPECTOR OF ELECTIONS.

See ELECTIONS, POLITICAL.

INSPECTOR OF FOOD.

See FOODS AND DRUGS.

INSPECTOR OF GAS-METERS.

See GAS COMPANIES.

INSPECTOR OF HEALTH.

See HEALTH.

INSTALLMENTS.

For sales on installments, see CONDITIONAL SALES; SALES.

For breach of contracts to be performed in installments, see CONTRACTS.

INSTIGATION.

See AIDERS, ABETTERS AND ACCOMPLICES.

INSTITUTES, TEACHERS.

See SCHOOLS, PUBLIC.

INSTITUTION FOR FEEBLE-MINDED YOUTH.

For institution for feeble-minded youth, see also INSANE, IMBECILES, AND IDIOTS.

Title V, Division I, Chapters 1 and 2, apply to the institution for feeble-minded youth; and under these provisions, a steward as well as a superintendent must be appointed: *State ex rel., v. Oglevee*, 37 O. S. 142, III Longsdorf's Notes, 901.

G. C., §§ 1891, *et seq.*, left with the trustees the authority to determine the method whereby they should determine whether an applicant was within the class named in this section: *Doren v. Fleming*, 6 O. C. C. (N.S.) 81, 17 O. C. D. 737.

The rules of the Institution for the Feeble-minded called in question in the present case are not unreasonable or subversive of the purposes for which the institution was founded, and the manner in which the plaintiff below was committed to and retained in the Institution for the Education of Feeble-minded Youth creates no liability for damages to him on the part of those participating therein: *Doren v. Fleming*, 6 O. C. C.

(N.S.) 81, 17 O. C. D. 737. See also CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

INSTITUTIONS, CORRECTIONAL.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS.

INSTITUTIONS OF LEARNING.

For institutions of learning, see EDUCATIONAL INSTITUTIONS; SCHOOLS, PUBLIC.

INSTITUTIONS, PENAL.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS; PENITENTIARIES, and cross-references thereunder.

INSTITUTIONS, REFORMATORY.

See CHARITABLE, BENEVOLENT, PENAL AND REFORMATORY INSTITUTIONS; BOYS' INDUSTRIAL SCHOOL; GIRLS' INDUSTRIAL HOME.

INSTRUCTING JURY.

See CHARGE OF COURT.

INSTRUCTING SERVANT.

See MASTER AND SERVANT.

INSTRUCTIONS.

For instructions to agent, see AGENCY.

For instructions to servant, see MASTER AND SERVANT.

For instructions to jury, see CHARGE OF COURT.

Where a bill of exceptions merely shows that a request for special instructions was made in writing before argument, there is a failure to show compliance with the statutory requirement that the instructions asked for should be in writing and that the request to give them before argument be made: *Railway Co. v. James*, 1 O. C. C. A. 257.

INSTRUCTORS.

See SCHOOLS, PUBLIC.

INSTRUMENTS FOR COUNTERFEITING.

See COUNTERFEITING.

INSTRUMENTS FOR MONEY.

For instruments for money, see MONEY; NEGOTIABLE INSTRUMENTS.

INSTRUMENTS IN WRITING.

Scope Note.—Includes nature of instruments in writing in general and construction thereof; the effect of fraud and mistake; and execution. Excludes specific classes of instruments in writing, as bills, notes and checks, contracts, deeds, mortgages, leases, etc.

Cross References.

For instruments in writing, see also CONTRACTS; DEEDS; MORTGAGES; NEGOTIABLE INSTRUMENTS; LEASE; ETC.

For writing, etc., to fraudulently obtain money, see FALSE CLAIM.

ANALYTICAL OUTLINE.

- I. Definition.
- II. Execution.
- III. Construction.
- IV. Pleading.
- V. Evidence.

I. DEFINITION.

The word "instrument" has been defined as "the formal expression in writing of some agreement or obligation, or of some act upon which the rights of parties are dependent": *Bank v. Insurance Co.*, 12 O. C.

C. (N.S.) 401, 21 O. C. D. 524 [reversing, *Bank v. Insurance Co.*, 19 O. D. (N.P.) 507, 54 Bull. 147].

G. C., § 10213, provides that in the interpretation of part third, unless the context shows that another sense was intended, the word "writing" includes printing.

An instrument, say Burwell and Webster, is a writing, or the means of giving formal expression to some act. The term writing includes printing: *State v. Granville*, 9 Dec. Rep. 798, 17 Bull. 253 [case reversed, on other grounds, *State v. Granville*, 45 O. S. 264, IV Longsdorf's Notes, 274].

II. EXECUTION.

A signature affixed to any part of the instrument with intent to authenticate it, is sufficient: *Bank v. Manufacturing Co.*, 9 Dec. Rep. 550, 15 Bull. 8, 6 Dec. Rep. 1237, 14 Am. L. Rec. 425 [reversed, *Rouse v. Bank*, 46 O. S. 493, IV Longsdorf's Notes, 341].

Where an error occurs in the name of a party to a written instrument, apparent upon its face, and, from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument: *Dodd v. Bartholomew*, 44 O. S. 171, IV Longsdorf's Notes, 202.

A signature to a written instrument obtained by such fraudulent representations as to facts as overcome the will of the signer, is void as against him: *Burke v. Insurance Co.*, 12 O. D. (N.P.) 37.

A party may sign a deed elsewhere than in the place provided for that purpose; and if in other respects regular, and the signature is properly identified, the fact that one of the grantors signed on an opposite page from the place for the signature does not render the deed invalid: *Graham v. Burgraff*, 10 O. C. C. (N.S.) 594, 12 O. C. D. 747 [affirmed, without opinion, *Graham v. Burgraff*, 59 O. S. 603]. See also DEEDS.

In a suit upon a specialty, evidence of uniform custom of transacting business with the public with reference to the matter in dispute, is admissible when introduced for the purpose of showing an agent's authority to make the contract in question on behalf of his principal: *Pullman Co. v. Willett*, 7 O. C. C. (N.S.) 173, 17 O. C. D. 649 [affirmed, without opinion, *Pullman Co. v. Willett*, 72 O. S. 690]. See also AGENCY.

The words "trustees, etc.," are only descriptive and the signers of a note in that way are individually liable according to its terms: *Reiff v. Mullholland*, 65 O. S. 178, IV Longsdorf's Notes, 883 [following, *Titus v. Kyle*, 10 O. S. 444, II Longsdorf's Notes, 451; *Bank v. Cook*, 38 O. S. 442, III Longsdorf's Notes, 982]. See also NEGOTIABLE INSTRUMENTS.

Where the defense to an action for personal injuries is a release, which plaintiff in ignorance that she had sustained bodily injury testified that she was told it was for injury to her dress, and she did not read it,

it is not error to arrest her case from the jury: *De Garmo v. Traction Co.* The circuit court in *De Garmo v. Traction Co.*, 12 O. C. C. (N.S.) 373, 22 O. C. D. 484, had reversed the above ruling by the common pleas, and this was reversed and the common pleas affirmed on the authority of *Perry v. O'Neil & Co.*, 78 O. S. 200, IV Longsdorf's Notes, 1040, without report, in *Traction Co. v. DeGarmo*, 85 O. S. 447. See also ACCORD AND SATISFACTION.

III. CONSTRUCTION.

In construing a written instrument, effect should be given to all of its words, if this can be done by any reasonable interpretation: *Coal Co. v. Mining Co.*, 40 O. S. 559, IV Longsdorf's Notes, 42.

It is a rule of construction that an interest, estate or benefit given in one part of any written instrument, by clear and unambiguous terms, which, standing alone, are free from doubt, can not be defeated by construction given to another part, unless the latter is equally decisive and clear: *Strong v. Lehmer*, 10 O. S. 93, II Longsdorf's Notes, 414.

That which is made certain in one part of a written instrument can not be overcome or changed by words in another part, unless such other words are of equal or greater certainty: *Brown v. Fowler*, 65 O. S. 507, IV Longsdorf's Notes, 890; *Stewart v. Herron*, 77 O. S. 130, IV Longsdorf's Notes, 1031 [affirming *Herron v. Stewart*, 10 O. C. C. (N.S.) 355, 20 O. C. D. 662].

The use of technical words and phrases in a written instrument, such as "devise," "release," "mine-let," and "royalty," will not be allowed to defeat the manifest intention of the parties as otherwise expressed in the instrument, or to modify the agreement that parties have by the words used actually made: *Trust Co. v. Coal & Iron Co.*, 3 O. N. P. (N.S.) 424, 17 O. D. (N.P.) 509.

A contract and bond to secure the execution of such contract executed contemporaneously, are parts of the same transaction and must be construed together as one instrument: *Brewing Co. v. Schultz*, 68 O. S. 407, IV Longsdorf's Notes, 946.

Where a person executes and delivers a promissory note to his creditor, who in turn, and as a part of the same transaction, enters into a written contract whereby he agrees to employ the maker until the note becomes due and to extend the same and continue the maker in employment for a further period of six months if the note is not paid at maturity, the two papers, read together, amount to a contract that the maker of the note should be employed a sufficient length

of time to enable him to pay the note with his wages, and that his wages as earned should be applied by the payee towards its payment, and not that the maker was entitled to draw his wages from time to time and pay the note when it became due: *Minzey v. Manufacturing Co.*, 6 O. C. C. (N.S.) 593, 15 O. C. D. 593.

Two or more writings may be construed together for the purpose of ascertaining the terms of a trust: *Smith v. Turpin*, 20 O. S. 478, II Longsdorf's Notes, 1012; *Thayer v. Luoe*, 22 O. S. 62, III Longsdorf's Notes, 57; *Railroad v. Railroad*, 44 O. S. 287, IV Longsdorf's Notes, 212; *Brockway v. Warren*, 11 O. N. P. (N.S.) 228.

A bond is simply a contract of suretyship, and the same rules apply in its construction that apply to contracts generally, except that the letter of the contract should be more strictly construed: *Fancher v. Kaneen*, 5 O. N. P. (N.S.) 614, 18 O. D. (N.P.) 834. See also BONDS, SURETY.

Where authority is given to perform specific acts and general words are also employed, such general words are limited to the specific acts authorized: *Bank v. Moore*, 6 O. N. P. (N.S.) 425, 15 O. D. (N.P.) 404 [affirmed, without opinion, *Bank v. Moore*, 6 O. N. P. (N.S.) 425, 15 O. D. (N.P.) 404]. See also ATTORNEY AND CLIENT.

W bought realty, and at the same time the deed was made he made a perpetual lease back to the grantor, with a privilege of purchase after a short term of years for the same sum. The transaction is a conditional sale, and not a mortgage: *Gibson v. Kraay*, 17 O. D. (N.P.) 218, 3 O. L. R. 671 [affirming *Kraay v. Gibson*, 2 O. N. P. (N.S.) 537, 15 O. D. (N.P.) 323]. See also MORTGAGES.

Where by deed an estate in fee simple is granted, the same can not be reduced to a life estate by another instrument executed concurrently with such deed, purporting to reserve a fee to the grantor in the deed or to convey a fee to another to vest upon the death of the grantor in the deed, unless such other instrument shall contain appropriate operative words of conveyance of such remainder or reversion: *Lee v. Scott*, 5 O. C. C. (N.S.) 369, 16 O. C. D. 799. See also DEEDS.

IV. PLEADING.

An insurance policy is a written instrument within the meaning of G. C., § 11333, and when sued upon, a copy thereof should be attached to the petition; and if a copy of the application for insurance constitutes a part of the policy, it should be also attached; otherwise it is not required: *Lauer*

v. Society, 8 O. N. P. 117, 10 O. D. (N.P.) 397. See also INSURANCE.

A written instrument as evidence of indebtedness, under G. C., § 11333, comprises any instrument in writing which witnesses a promise, whether conditional or unconditional, on the part of the maker, to pay a certain fixed, liquidated sum of money; when sued upon, a copy of such instrument must be attached to the petition: *Lauer v. Society*, 8 O. N. P. 117, 10 O. D. (N.P.) 397. See also PLEADINGS.

V. EVIDENCE.

Where the suit is on a promissory note set forth in the petition, and the averments of the answer if sustained by evidence would only tend to contradict and destroy the written contract therein embodied, an objection to the introduction of any evidence by the defendant under the pleadings should be sustained: *Hicks v. Hicks*, 4 O. N. P. (N.S.) 25, 16 O. D. (N.P.) 509. See also NEGOTIABLE INSTRUMENTS.

Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered, absolute on its face, was conditional and was not intended to take effect until another event should take place: *Metzger v. Roberts*, 5 O. C. C. (N.S.) 344, 16 O. C. D. 675 [affirmed, without opinion, *Metzger v. Roberts*, 74 O. S. 484].

Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered or forged, and its issue in connection with other instruments forged by the defendant: *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800 [affirmed, without opinion, *State v. Lingafelter*, 73 O. S. 336; affirmed, *State v. Lingafelter*, 77 O. S. 523]. See also EVIDENCE.

INSTRUMENTS, NEGOTIABLE.

See NEGOTIABLE INSTRUMENTS.

INSULTING LANGUAGE.

See ASSAULT AND BATTERY; BREACH OF THE PEACE.

INSURABLE INTEREST.

For insurable interest, see also INSURANCE. The term insurable interest is such an interest in some specified insurable property,

that its owner would suffer a loss by the destruction of the property specified: *Henderson v. Insurance Co.*, 2 O. N. P. 17, 2 O. D. (N.P.) 189.

The interest need not be personal, it may be as agent or trustee, but it must exist in some form or other: *Graham v. Insurance Co.*, 13 Dec. Rep. 157, 2 D. 255.

The ownership of an equitable interest in real estate is sufficient to confer an insur-

able interest in the building standing on said property, notwithstanding the policy issued thereon contained the condition that "this policy shall be void if the interest of the insured in the premises be other than sole and unconditional," and "this policy shall be void if the building insured stands upon ground not owned by the insured in fee simple": *Little v. Insurance Co.*, 9 O. N. P. (N.S.) 377, 20 O. D. (N.P.) 315.

INSURANCE.

Scope Note.—Includes legal reserve life insurance, rights of foreign insurance companies, mutual protective life insurance, fraternal benefit societies, general powers of insurance companies other than life, fire insurance, marine insurance, liability insurance, accident and health insurance, burial associations, fidelity insurance, mutual insurance companies other than life, credit guaranty insurance, mutual protective associations, live stock insurance, remedies, powers of the superintendent of insurance, distribution of proceeds and criminal liability. Excludes formation of corporations in general, taxation and state liability insurance.

Cross References.

For fidelity and guaranty bonds, see also BONDS, SURETY.

That a railroad relief department is not an organization for the purpose of effecting insurance, see also RAILROADS; RELIEF ASSOCIATION.

For exemption of insurance from liability for the debts of the insured, see also EXECUTION.

For the taxation of the property of an insurance company, see also TAXATION.

For the organization and management of corporations in general, see also CORPORATIONS.

For the effect of an indemnity insurance for the benefit of employer, see also MASTER AND SERVANT; NEGLIGENCE.

For questions of contract law in general, see CONTRACTS.

For questions of pleadings in general, see PLEADINGS.

For questions arising on trial, see also TRIAL.

For the effect of covenants to keep property insured, see LANDLORD AND TENANT; MORTGAGES; VENDOR AND PURCHASER.

For the distribution of the proceeds of insurance, see also DESCENT AND DISTRIBUTION.

For questions of evidence, see also EVIDENCE.

For questions of interpleader, see also INTERPLEADER.

For monopolistic contracts by insurance companies, see MONOPOLIES AND UNLAWFUL COMBINATIONS.

For the effect and validity of the Employers' Liability Insurance Act (G. C., §§ 1465-37, *et seq.*, 102 v. 524), see MASTER AND SERVANT; STATE LIABILITY BOARD OF AWARDS.

ANALYTICAL OUTLINE.

I. Definition and Nature, 9099.

II. Classes, 9102

III. Legal Reserve Life Insurance, 9103.

A. Corporation, 9103.

1. Formation, 9103.
2. Nature, 9103.
3. Franchise, 9104.
4. Powers and liabilities, 9105.
5. Capital and investments, 9107.
6. Dividends, 9111.
7. Annual statement and taxation, 9112.

B. Application, 9113.**1. Misrepresentation, 9113.**

- a. Constitutionality of statutory provisions, 9113.
- b. Scope and effect of statutory provisions, 9113.
- c. What insurance is within statute, 9113.
- d. Covenant waiving statute, 9114.
- e. Effect of misrepresentation, 9114.
 - aa. Before statute, 9114.
 - bb. After statute, 9116.
 - aaa. What constitutes misrepresentation, 9116.
 - bbb. Effect on recovery of premiums, 9119.
 - ccc. Burden of proof, 9120.

2. Application of statute to warranty, 9121.**3. Application of statute to conditions and covenants, 9122.****4. Fraud of insurance agent, 9123.****5. Knowledge of insurance agent, 9124.****6. Mistake of agent, 9126.****7. Estoppel as to certain defenses, 9126.****8. Right of policy-holder to copy of application, 9128.****C. Policy, 9128.****1. Form, 9128.****2. Terms, 9130.****3. Construction, 9131.****4. Conditions, 9132.****D. Premiums, 9134.****1. Payment of premiums, 9134.****a. Necessity, 9134.****b. By premium notes, 9135.****c. In installments, 9136.****d. By beneficiary, 9136.****2. Forfeiture for non-payment of premiums, 9137.****3. Waiver of right of forfeiture, 9138.****4. Right to paid-up policy after default, 9139.****5. Revivor after non-payment of premiums, 9141.****6. Recovery of premiums, 9141.****7. Customs of agents with reference to premiums, 9144.****E. Discrimination and rebates, 9146.****F. Insurable interest, 9147.****1. In general, 9147.****2. Corporation in lives of directors and employees, 9149.****3. Widows and children, 9150.****4. Wife insuring life of husband, 9151.****G. Assignment, 9152.****H. Beneficiary, 9154.****1. In general, 9154.****2. Beneficiary in event of death of wife, 9155.****3. Affected by acts of assured, 9157.****4. Meaning of legal representatives, 9159.****I. Exemption from claims of creditor, 9159.****1. Policy, 9159.****2. Premiums paid in fraud, 9162.****J. Agents, 9162.****K. Defenses, 9164.**

IV. Foreign Insurance Company, 9167.

- A. *What is foreign insurance company*, 9167.
- B. *What is doing business*, 9168.
- C. *Method of securing license*, 9168.
- D. *Duration of license*, 9169.
- E. *Service of summons*, 9169.
- F. *Certificate of authority to act as agent*, 9170.
- G. *Effect of policy in violation of statute*, 9170.
- H. *Removal of causes to federal court*, 9171.
- I. *Ouster by quo warranto*, 9172.

V. Mutual Protective Life, 9172.

- A. *Scope and effect of statutory provisions*, 9172.
- B. *Corporations*, 9174.
 - 1. *Organization*, 9174.
 - 2. *Nature*, 9174.
 - 3. *Powers*, 9174.
 - 4. *Object*, 9177.
 - 5. *Membership*, 9177.
- C. *By-laws*, 9177.
- D. *Insurance for fixed amount*, 9179.
- E. *Beneficiary*, 9180.
 - 1. *Who may be*, 9180.
 - 2. *Power of insured to change*, 9182.
 - 3. *Interest of beneficiary*, 9184.
- F. *Assessments*, 9185.
- G. *Trustees*, 9186.
- H. *Rights and liabilities of members*, 9188.
- I. *Remedies of members and beneficiaries*, 9189.
- J. *Construction of certificates*, 9190.
- K. *Defenses*, 9191.
- L. *Annual statement*, 9192.
- M. *Foreign corporations*, 9193.
 - 1. *Admission*, 9193.
 - 2. *Retaliation*, 9195.
 - 3. *Certificate*, 9196.
 - 4. *Effect of failure to comply with statutory provisions*, 9196.

VI. Fraternal Benefit Societies, 9198.

- A. *Definition and nature*, 9198.
- B. *Scope and effect of statutory provisions*, 9198.
- C. *Organization and powers*, 9199.
- D. *Funds*, 9200.
- E. *Report*, 9202.
- F. *Beneficiaries*, 9203.
 - 1. *Who may be*, 9203.
 - 2. *Power of insured to change*, 9204.
 - 3. *Interest of beneficiary*, 9205.
- G. *Liability of society*, 9206.
- H. *Contract of membership*, 9207.
 - 1. *What constitutes*, 9207.
 - 2. *Fraud and misrepresentation*, 9209.
 - 3. *Construction*, 9210.
 - 4. *Waiver*, 9211.
 - 5. *Amendment of by-laws*, 9212.

- 6. Failure to pay assessments, 9213.
 - a. Right to decline delinquent assessments, 9213.
 - b. Notice of assessments, 9215.
 - c. Waiver of irregularities in payment of assessments, 9216.
- 7. Assignment, 9217.
- 8. Amount payable, 9218.
- I. *Members*, 9218.
 - 1. Who may be, 9218.
 - 2. Expulsion, 9218.
 - 3. Waiver of rights, 9220.
- J. *Demand*, 9220.
- K. *Remedies*, 9221.
 - 1. Appeals to tribunals of order, 9221.
 - 2. Injunction, 9224.
 - 3. Mandamus, 9224.
- L. *Foreign society*, 9224.
- VII. **General Provisions Regulating Insurance Other Than Life**, 9225.
 - A. *Power of legislature to regulate*, 9225.
 - B. *Scope and effect of statutory provisions*, 9226.
 - C. *Corporation*, 9226.
 - 1. Formation of corporation, 9226.
 - 2. Investment of capital, 9226.
 - 3. Report, 9227.
 - D. *Agent*, 9228.
 - 1. Who is agent, 9228.
 - 2. Authority of agent, 9229.
 - 3. Preliminary contract with agent, 9236.
 - 4. Compensation of agent, 9237.
 - 5. Purchase of agency, 9238.
 - E. *Policy*, 9239.
 - 1. Form, 9239.
 - a. Oral contracts, 9239.
 - b. Preliminary oral modifications, 9241.
 - 2. Delivery of policy, 9242.
 - 3. Cancellation, 9243.
 - F. *Contribution between insurers*, 9246.
 - G. *Subrogation*, 9248.
 - H. *Covenants and contracts to insure*, 9251.
 - I. *Monopoly*, 9251.
 - J. *Payment of loss*, 9252.
- VIII. **Fire Insurance**, 9252.
 - A. *Insurable interest*, 9252.
 - B. *Application*, 9256.
 - C. *Misrepresentation and fraud*, 9257.
 - D. *Warranties*, 9258.
 - E. *Premiums*, 9259.
 - F. *Conditions*, 9260.
 - 1. Construction and waiver, 9260.
 - 2. As to location, 9263.
 - 3. Vacancy, 9265.
 - 4. Against alienation, 9267.
 - 5. Against incumbrances, 9271.
 - 6. Other insurance, 9276.
 - 7. As to title, 9279.
 - 8. Iron safe clause, 9283.

- 9. Appraisement, 9284.
 - a. Necessity, 9284.
 - b. Award binding on mortgagee, 9286.
 - c. Total loss, 9287.
 - d. Residence of arbitrators, 9288.
 - e. Duty of arbitrators to hear evidence, 9288.
 - f. Actions on awards, 9289.
 - g. Effect of valuation in policy, 9290.
 - h. Demand, 9291.
 - i. Waiver, 9292.
- 10. Examination under oath, 9293.
- 11. Proof of loss, 9294.
- 12. Time of bringing suit, 9301.
- G. *Excepted risks*, 9304.
- H. *Amount and extent of liability*, 9307.
 - 1. What is structure, 9307.
 - 2. Examination by agent, 9307.
 - 3. What is total loss, 9308.
 - 4. Increase of risk, 9309.
 - 5. Fraud, 9312.
 - 6. Amount recoverable in case of total loss, 9313.
 - 7. Covenant limiting liability, 9315.
 - 8. Estoppel, 9318.
 - 9. Compromise, 9318.
- I. *Time of taking effect*, 9319.
- IX. **Marine Insurance**, 9319.
 - A. *Construction*, 9319.
 - B. *Risks included in policy*, 9324.
 - C. *Trial and evidence*, 9327.
 - D. *Insurable interest*, 9329.
- X. **Liability Insurance**, 9330.
 - A. *Misrepresentation*, 9330.
 - B. *Nature of contract*, 9330.
 - C. *Construction*, 9331.
 - D. *Subrogation of employe*, 9332.
- XI. **Accident Insurance**, 9333.
 - A. *Powers of corporation*, 9333.
 - B. *Premium*, 9333.
 - C. *Risk*, 9333.
 - D. *Negligence of insured*, 9337.
 - E. *Notice*, 9338.
- XII. **Health Insurance**, 9340.
- XIII. **Fidelity Insurance**, 9340.
 - A. *What constitutes contract*, 9340.
 - B. *Power of legislature to regulate*, 9341.
 - C. *Agents*, 9341.
 - D. *Misrepresentation*, 9341.
 - E. *Risks included in policy*, 9342.
- XIV. **Mutual Insurance Companies Other Than Life**, 9343.
 - A. *Liability of members*, 9343.
 - B. *Amendment*, 9346.
 - C. *Assessments*, 9346.
 - D. *Report*, 9348.
 - E. *Policy*, 9349.
 - F. *Lien*, 9350.

- XV. Burial Association, 9350.**
- XVI. Credit Guaranty Insurance, 9351.**
- XVII. Mutual Protective Association, 9351.**
 - A. *Nature, 9351.*
 - B. *Powers, 9351.*
 - C. *Constitution and by-laws, 9352.*
 - D. *Membership, 9353.*
 - E. *Directors and trustees, 9354.*
 - F. *Liability of members and of association, 9354.*
 - G. *Reports, 9356.*
 - H. *Dissolution, 9357.*
- XVIII. Live Stock Insurance, 9357.**
- XIX. Foreign Insurance Companies Other Than Life, 9357.**
 - A. *What constitutes corporation, 9357..*
 - B. *What constitutes insurance, 9358.*
 - C. *Admission to do business, 9358.*
 - D. *Ouster by quo warranto, 9359.*
 - E. *Service of summons, 9361.*
- XX. Remedies, 9361.**
- XXI. Time of Bringing Action, 9363.**
 - A. *Special covenant in contract, 9363.*
 - B. *Rejection of claim, 9364.*
 - C. *Limitation, 9364.*
- XXII. Parties, 9364.**
- XXIII. Pleading, 9366.**
- XXIV. Evidence, 9373.**
 - A. *Presumptions and burden of proof, 9373.*
 - B. *Judicial notice, 9375.*
 - C. *Parol evidence, 9376.*
 - D. *Admissions and declarations, 9376.*
 - E. *Opinions, 9377.*
 - F. *Coroner's inquest and physician's statements, 9378.*
 - G. *Rules and records of company, 9378.*
 - H. *Other matters, 9379.*
- XXV. Charge, 9381.**
- XXVI. Judgment, 9383.**
- XXVII. Superintendent of Insurance, 9384.**
 - A. *Powers in general, 9384.*
 - B. *Powers over foreign insurance companies, 9385.*
- XXVIII. Application of Proceeds of Insurance, 9385.**
- XXIX. Criminal Liability, 9387.**
 - A. *Fire insurance, 9387.*
 - B. *Life, 9388.*

I. DEFINITION AND NATURE.

A contract of insurance is a contract whereby one party agrees for valuable consideration to indemnify the other against loss of certain kinds; or in life and accident insurance, to pay a certain sum of money upon the happening of a certain event:

State v. Laylin, 73 O. S. 90, IV Longsdorf's Notes, 999 [affirming *State v. Laylin*, 3 O. N. P. (N.S.) 185, 15 O. D. (N.P.) 360].

Insurance business may be defined as a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified

perils. See also for other definitions, *State v. Railway Co.*, 68 O. S. 9, IV Longsdorf's Notes, 937.

A foreign corporation, the sole business of which as authorized by its charter, is that of defending physicians and surgeons against civil prosecution for malpractice, and which issues and sells a contract undertaking and agreeing to defend the holder against any such suit until a specified term, but does not assume to pay any judgment that shall be rendered, is not engaged in the business of insurance, nor is the contract so issued an insurance contract: *State v. Laylin*, 73 O. S. 90, IV Longsdorf's Notes, 999 [affirming *State, ex rel., v. Laylin*, 3 O. N. P. (N.S.) 185, 15 O. D. (N.P.) 360].

A life insurance policy is not merely a contract of indemnity. It is a contract to pay to the beneficiary a sum certain in the event of death; and if the contract was valid in its inception and so continues until its maturity, the beneficiary is entitled to the whole of the stipulated sum: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 665, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 676].

An association established by a railway company, composed of some or all of its employees and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employees who apply for membership in said fund and are admitted, the railway company to take charge of and be responsible for the funds, make up deficiencies in the same, supply facilities for conducting the business and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company, is not an insurance company or association; and in agreeing to perform, and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business: *State, ex rel., v. Railway*, 68 O. S. 9, IV Longsdorf's Notes, 937.

The business of insurance is, principally, contracting. Strictly speaking, it is not insuring property. No precaution need be taken to secure or preserve the thing said to be insured. The business is contracting with a party to indemnify him in case of loss of a particular thing; the contract is a personal contract of indemnity and is not incidental to or transferable with the thing insured: *State v. Insurance Co.*, 1 O. C. C. (N.S.) 4, 14 O. C. D. 387.

Insurance is a branch of the law merchant, and its nature and principles spring from commercial usage, to which we are to look for the forms and mode in which it is reduced to practical action in cases not determined by positive decisions or the rules of municipal law. The form of giving effect to the indemnity is by a written instrument, containing the consideration, terms and stipulations of the contract of indemnity between the underwriter and the insured, called a policy: *Cockerill v. Insurance Co.*, 16 O. 148, I Longsdorf's Notes, 757.

II. CLASSES.

Our statutes divide life companies other than fraternal into two classes, viz., those having a capital and those not having a capital. The former may be on the stock plan or on the mutual plan, and may insure anybody; the latter is on the assessment plan and insures only members: *State v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

A company of another state organized for "insuring lives on the plan of assessment upon surviving members," without limitation, does not come within the class of companies provided for in G. C., §§ 9427, *et seq.* That section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs; *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

Corporations formed under G. C., §§ 9427, *et seq.*, though not subject to the provisions of Title IX, Division III, Chapter I, of the General Code relating to life insurance companies, on the mutual or stock plan, are subject to all the general provisions of Title IX, Division I, Chapter I, of the General Code, which apply to corporations formed for purposes other than profit: *State v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

Corporations organized under the laws of Ohio are of two classes: 1. Those organized for profit, which must have a capital stock owned by stockholders. 2. Those organized for purposes other than for profit consisting of members associated together for a lawful purpose. To the second class belong corporations formed under the provisions of G. C., §§ 9427, *et seq.*, for the mutual protection and relief of its members and for the payment of stipulated sums of money to the family or heirs of deceased members: *State v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

III. LEGAL RESERVE LIFE INSURANCE.

A. CORPORATION.

1. Formation.

The subscribers to the stock of an insurance company organized under a special charter granted prior to the adoption of the present constitution, gave to the corporation their secured promissory notes, payable on demand, for the amount of the stock by them respectively subscribed. It was held that the notes must be construed in connection with the nature of the business of the corporation, and in view of the object intended by the parties giving their notes. Thus construed, the notes were intended to be payable on the call of the directors; and the statute of limitations is no more available as a defense against the collection of the notes than it would have been against the collection of the subscriptions: *Kilbreath v. Gaylord*, 34 O. S. 305, III Longsdorf's Notes, 717.

Where a stockholder executed to the company his note and mortgage in payment of his stock subscription, the stock, under the statute, must be regarded as paid in, and the note and mortgage as given for money loaned or invested by the company. The liability of the stockholder on the note and mortgage is not less than that of any other borrower; nor do his rights as a stockholder stand on any better footing than those who paid for their stock, but borrowed nothing from the company: *Insurance Co. v. Curtis*, 35 O. S. 343, III Longsdorf's Notes, 788.

G. C., § 8623, does not provide for the incorporation of insurance companies; since their organization is especially provided for by Division 3 and Title 9 of the General Code: *State v. Live Stock Co.*, 38 O. S. 347, III Longsdorf's Notes, 974.

Although G. C., §§ 9339, *et seq.*, under which life insurance companies intended to transact business on the mutual or stock plan, are organized, require such companies to have capital stock and stockholders; and although when thus organized they have no authority to transact business on the assessment plan, the want of such authority is not a consequence of their having capital stock and stockholders, nor of want of power in the legislature to confer it, but results solely from an omission of the legislature to clothe them with such power: *State, ex rel., v. Matthews*, 58 O. S. 1, IV Longsdorf's Notes, 731.

2. Nature.

In 1834, the legislature of Ohio passed an act incorporating the Ohio Life Insurance and

Trust Company, with power, among other things, to issue bills and notes until 1843. One section of the charter provided that no higher taxes should be levied on the capital stock or dividends of the company than are or may be levied upon the capital stock or dividends of incorporated banking institutions of the state. In 1836, the legislature passed an act prohibiting the circulation of small bills. This act provides that if a bank surrender its right to issue such small notes, the treasurer should collect a tax of five per cent. on its dividends otherwise he should collect twenty per cent. The company surrendered its rights. Later an act was passed taxing banks the same as other property. It was held that there was nothing in the previous legislation to exempt the Life Insurance and Trust Company from the operation of this act: *Trust Company v. Debolt*, 57 U. S. (16 How.) 416, 3 O. F. D. 170.

After a company or association has been organized and incorporated, under G. C., §§ 9427, *et seq.*, the members thereof are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation are entitled to the mutual protection and relief provided, or whose families or heirs are, in case of death, entitled to the specific relief provided for them: *State v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

Where it is undisputed that a life insurance company is a stock company, the fact that the impression was conveyed by its agents that it was doing a mutual business, and that the policy-holders who elected to take participating contracts had written in their contracts that they should share in the profits "as apportioned by the company," does not transform the company into a mutual company, or make even the participating contracts mutual insurance contracts, or estop the company from treating the surplus fund as belonging to the stockholders: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

3. Franchise.

In an action brought by the state in *quocarranto* against an insurance company for alleged misuse of its franchise, a court can not concern itself with the rights of policy-holders or of stockholders, but can only consider whether some public mischief is being done or threatened: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

Resort can not be had to the doctrine of commingling of funds to show misuse of its charter privileges by a life insurance company, where neither contract, law nor usage has required the company to keep its funds separate: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

Where it is undisputed that a life insurance company is a stock company, the fact that the impression was conveyed by its agents that it was doing a mutual business, and that policy holders who elected to take participating contracts had written in their contracts that they should share in the profits "as apportioned by the company," does not transform the company into a mutual company, or make even the participating contracts mutual insurance contracts, or estop the company from treating the surplus fund as belonging to the stockholders: *State v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

4. Powers and Liabilities.

An insurance company may refuse to insure extra hazardous risks; and it is not a non-user of the franchise of the insurance company to refuse risks of such extra hazardous character: *State, ex rel., v. Insurance Co.*, 14 O. 6, I Longsdorf's Notes, 653.

An insurance company has no power to purchase at discount the notes of a policy holder who has suffered a loss which such an insurance company has refused to pay, in order that it may use such notes as a set-off against such policy holder; such note being purchased under an agreement that the insurance company may return such note to the transferor thereof if it is unable to use it as a set-off: *Straus v. Insurance Co.*, 5 O. S. 59, II Longsdorf's Notes, 157.

If, however, an insurance company sells its assets to another insurance company in good faith, the maker of the note which is thus sold can not set up the fact that such sale was unauthorized as a defense to such note in the hands of the corporation which had purchased it: *Ehrman v. Insurance Co.*, 35 O. S. 324, III Longsdorf's Notes, 787.

Under the charter of the Ohio Life Insurance and Trust Company, the discounting of a bill of exchange at a higher rate of interest than was allowed by the the charter, rendered such bill void in the hands of the company: *Kilbreth v. Bates*, 38 O. S. 187, III Longsdorf's Notes, 964 [following *Bank v. Swayne*, 8 O. 257, I Longsdorf's Notes, 432].

In the absence of any statute in Ohio prohibiting life insurance companies from doing an employers' liability insurance in this state, and the business itself being by statute expressly authorized; a life insurance company incorporated and organized under the laws of a sister state and empowered by its charter to engage in the business of employers' liability insurance, may, by the comity that prevails between the states, be licensed and permitted to transact such business in this state, although our statute has not in express terms conferred upon domestic life insurance companies authority to engage in or transact that particular kind of insurance: *State v. Insurance Co.*, 69 O. S. 317, IV Longsdorf's Notes, 958.

Although G. C., §§ 9339, *et seq.*, under which life insurance companies intended to transact business on the mutual or stock plan, are organized, require such companies to have capital stock and stockholders; and although when thus organized they have no authority to transact business on the assessment plan, the want of such authority is not a consequence of their having capital stock and stockholders, nor of want of power in the legislature to confer it, but results solely from an omission of the legislature to clothe them with such power. Notwithstanding the want of such authority in an Ohio corporation, created under those sections, yet, as the powers of a corporation depend on its charter and the laws of the state where it is organized, if the charter of an insurance company created in another state, together with the laws of such state, authorize it to transact business on the assessment plan, it should be admitted under G. C., §§ 9435, *et seq.*, to transact business on that plan within this state, upon its complying with G. C., § 9339 in other respects, although it may have capital stock and stockholders, for whose benefit it was created: *State, ex rel., v. Matthews*, 58 O. S. 1, IV Longsdorf's Notes, 731.

Only the company issuing a policy of life insurance can take advantage of the fact that the payee named in the policy is not within the class which by the constitution of the company is entitled to take the benefit; and where a policy of life insurance was valid at its inception and was procured in good faith, the beneficiary or an assignee may hold or enforce the policy, as against the claims of the executor, notwithstanding neither of them had any interest in the life of the insured: *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665.

When a member of a life insurance association ratifies a transfer of its assets and obligations to another company, he thereby

ceases to be a member of the retiring company: *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 16 O. C. D. 197.

A life insurance association can not affirm its policy in part and repudiate it in part, and thus confine the insured to one of the benefits provided for therein, when the policy makes provision for two benefits, and the insured has paid for the right to elect between them: *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 16 O. C. D. 197.

The trustees of a mutual life insurance company are not personally liable for a death loss upon a policy issued by the company while they were in office as trustees: *Kelley v. Bender*, 22 O. C. C. 144, 12 O. C. D. 181.

An insurance company may be held for libel in its corporate capacity: *Insurance Co. v. Insurance Co.*, 5 Dec. Rep. 521, 2 Bull. 269.

An insurance company must list for taxation all notes for unpaid balances on stock subscriptions: *Insurance Co. v. LaRue*, 22 O. S. 630, III Longsdorf's Notes, 107.

5. Capital and Investments.

An insurance company can not buy a note given by a policy holder whose loss it has refused to pay, in order to use such note as a set-off against the amount due on his policy; the note being purchased under an agreement that it is to be returned to the transferor if it can not be used as such set-off: *Straus v. Insurance Co.*, 5 O. S. 59, II Longsdorf's Notes, 157.

A life insurance corporation purchased the assets of another life insurance corporation and in consideration thereof agreed to assume its risks and pay its debts. Among the assets was a promissory note, which was indorsed by the selling to the purchasing company. It was held that in an action on the note by the purchasing company, it will be presumed, in the absence of any averment to the contrary, that the agreement between the companies has been performed, or at least that it has not been abandoned; and that where the validity of the note is admitted, the fact that the agreement between the companies is unauthorized by their charters is not a defense to the maker of the note. Where there appears to be no connection between the taking of stock by the defendant in the selling company and the giving of the note, the fact of his being such stockholder will not affect a recovery on the note, in the absence of any showing that the transfer of the note was to his injury or prejudice as a stockholder: *Ehrman v. Insurance Co.*, 35 O. S. 324, III Longsdorf's Notes, 787.

Although the charter of a life insurance company provided that its "capital stock and funds shall be invested either in loans upon bonds and mortgages upon real estate of double the value of the debt secured, or in loans upon or purchase of United States stocks and bonds, bank stocks, or stocks and bonds issued by any of the states of this union, or by municipal or other corporations," a mortgage to such company, upon land in Ohio, made, acknowledged, attested, delivered, and recorded, as required by the statutes of Ohio, securing a promissory note, given in consideration of a loan of its funds made by the company, is valid; and, after condition broken, it may be enforced at the suit of the company: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

The charter being silent as to the rate of interest to be charged by the company on its loans, a stipulation for a rate higher than the maximum fixed by the usury laws of this state does not invalidate the note. The principal and interest thereon, at the legal rate, may be collected: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

If a stockholder gives his note secured by mortgage for his stock subscription, the transaction must be regarded as a payment of the stock subscription and as a loan of such amount to the subscriber, secured by mortgage: *Insurance Co. v. Curtis*, 35 O. S. 343, III Longsdorf's Notes, 788.

Where a subscription to the stock of a corporation is paid by the note of the subscriber, money subsequently paid by the stockholder to the corporation for the purpose of repairing its capital stock, under an agreement that as between the corporation and its creditors the payment is a donation, but as between the stockholders a debt, and upon the further agreement that such payment is to be regarded as a satisfaction *pro tanto* of the individual liability of the stockholder to creditors, can not, after the corporation has become insolvent, be set off against the stock note: *Insurance Co. v. Jones*, 35 O. S. 351, III Longsdorf's Notes, 789.

A mortgage was given to an insurance company carrying on business under the act of April 16, 1867 (S. & S. 218). The condition of the mortgage provided for demand of payment of the note secured by the mortgage, by the auditor of state, for the company. It was not a condition to the taking effect or validity of the mortgage, that it should be deposited with the auditor, nor that, if it should be so deposited, it might not be surrendered to the company or its assigns, as provided for in the statute and was held that, construing the mortgage in connection with the statute, the demand

might be made by any party to whom the mortgage belonged, and who was entitled to collect the money it was given to secure; and that the provision requiring the demand to be made by the auditor was intended to be operative only in case the mortgage should be deposited with him, and remain under his control in accordance with the provisions of the statute: *Insurance Co. v. Curtis*, 35 O. S. 343, III Longsdorf's Notes, 788.

A deposit with the superintendent provided for in G. C., § 9346, is for the security of the policy holders only and not for the security of the general creditors of the insurance company: *Falkenbach v. Patterson*, 43 O. S. 359, IV Longsdorf's Notes, 171.

Where securities have been deposited with the superintendent of insurance, by an insurance company, to be held by such superintendent in trust for the benefit and protection of, and as security for, the policy holders of such company, the assignee of such company, under our insolvent laws, can not recover such securities from such superintendent without first showing that such company is no longer liable to any of its policy holders. It is the official duty of such superintendent, in the event that such company becomes insolvent, to act, and perform his trust, by distributing the funds so deposited with him, *pro rata* among the several policy holders and when their just claims shall be satisfied, to pay the balance, if any, to the company, or its assignee or other successor: *State, ex rel., v. Matthews*, 64 O. S. 419, IV Longsdorf's Notes, 874.

Stocks and bonds deposited under G. C., § 9346, are taxable in the same manner that other property is taxable: *Assurance Co. v. Halliday*, 126 Fed. 257, 61 C. C. A. 271, 14 O. F. D. 73, 1 O. L. R. 643.

The accumulated deferred dividends or undivided profits of a life insurance company form no part of the reserve fund of the company, and are not a debt of the company, but constitute one of the taxable assets of the company, and must be returned by it for taxation: *Insurance Co. v. Hynicka*, 5 O. N. P. (N.S.) 255, 18 O. D. (N.P.) 1.

Under the fourth sub-division of G. C., § 9357, a contract whereby the insurance company loans more than the reserve value of the policy upon such policy is invalid; and a provision therein that if such loan is not paid at maturity the policy upon which the loan is made shall lapse, is of no effect: *Hoover v. Insurance Co.*, 7 O. N. P. 369, 6 O. D. (N.P.) 432.

In the supreme court, however, the judgment was modified by deducting the sum borrowed with interest, from the amount of the policy: *Insurance Co. v. Hoover*, 61 O. S. 656.

Accumulated deferred dividends or undivided profits arising on life rate endowment policies of a life insurance company are not, under the Ohio statutes of taxation, to be considered as a "legal bona fide debt owing" by the insurance company, and can not therefore be legally deducted from the company's "credits" when its return for taxation is made up: *Hynicka v. Insurance Co.*, 4 O. N. P. (N.S.) 297, 17 O. D. (N.P.) 80.

The reserve fund of a life insurance company can not be considered a debt owing to the policy holders, in the sense that it may be deducted from the credits and thus escape taxation: *Hynicka v. Insurance Co.*, 4 O. N. P. (N.S.) 297, 17 O. D. (N.P.) 80.

If an insurance company has power to lend its surplus, it may purchase a bill of exchange: *Bank v. Insurance Co.*, 12 O. S. 601, II Longsdorf's Notes, 585.

It is not a violation of a charter, which contains a clause prohibiting the exercise of banking powers, to receive money on deposit: *State, ex rel., v. Insurance Co.*, 14 O. S. 6, I Longsdorf's Notes, 653.

A prohibition in the charter of an insurance company which forbids it to engage in the trade or business of exchange or of money brokers, does not prevent the purchase of a bill of exchange in good faith which is drawn on a third person and accepted by him: *Bank v. Insurance Co.*, 12 O. S. 601, II Longsdorf's Notes, 585.

The fact that an insurance company restricted its loans to its policy holders, and that the mortgagor contracted for a policy in order to obtain the loan, did not affect the validity of either note or mortgage: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

Participating policy holders in a life insurance company may maintain an action in equity to conserve for their benefit a surplus fund accumulated under the by-laws of the company for their benefit from earnings of participating policies: *Bell v. Insurance Co.*, 14 O. C. C. (N.S.) 385, 23 O. C. D. 69 [reversed, without opinion, *Insurance Co. v. Bell*, 87 O. S. 475].

A life insurance company which has a surplus derived from non-participating policies may capitalize such surplus and issue capital stock therefore, even if it has not kept any record of its receipts and losses as between participating and non-participating policies: *State, ex rel., v. Insurance Co.*, 84 O. S. 459.

Policy holders in an insolvent life company can resort to the deposit, though composed of accommodation securities, without first exhausting the stockholder's liability:

Falkenbach v. Patterson, 43 O. S. 359, IV Longsdorf's Notes, 171.

6. Dividends.

The fact that the directors are forbidden to declare dividends out of the reserve fund, can not of itself make it a debt due the policy holders: *Hynicka v. Insurance Co.*, 4 O. N. P. (N.S.) 297, 17 O. D. (N.P.) 80.

Participating policy holders in a life insurance company may maintain a class suit in equity, although they are not stockholders, and the right is contractual to compel the company to preserve a surplus fund accumulated for their benefit from earnings of participating policies, for it is not possible to estimate their money damages: *Bell v. Insurance Co.*, 14 O. C. C. (N.S.) 385, 23 O. C. D. 69 [reversed, without opinion, *Insurance Co. v. Bell*, 87 O. S. 475].

It is no defense to an action brought to conserve a surplus fund accumulated by an insurance company out of the earnings of participating policies, and brought by and on behalf of all of said participating shareholders that the supreme court in an action in *quo warranto* (*State, ex rel., v. Insurance Co.*, 84 O. S. 459 [reversed, without opinion, *Insurance Co. v. Bell*, 87 O. S. 475], brought by the attorney general against the corporation for the purpose of testing the right of the company to declare a dividend to its stockholders out of said surplus fund, has refused the relief prayed for, the participating policy holders not being parties to said action: *Bell v. Insurance Co.*, 14 O. C. C. (N.S.) 385, 23 O. C. D. 69.

A policy entitled to dividend credits, being converted into a paid-up policy after nine years, had been credited with dividends on the last five premiums. The assured claimed dividends on the first four. His only evidence for this was a circular of the secretary sent to a third person stating that yearly dividends, as heretofore, were abandoned, because impracticable. The charter showed that the directors were to regulate dividends. It was held that, the circular was not evidence that any dividend payable on this policy had been declared. The policy was entitled only to dividends declared by the directors as payable on it; no omission to declare a dividend to which the policy was entitled being averred: *Insurance Co. v. Hamilton*, 41 O. S. 274, IV Longsdorf's Notes, 61.

A policy stipulated that a due proportion of each year's surplus would be returned. It was forfeited for non-payment of premiums, and it is now claimed that if the company had not retained a large part of the surplus to create a fund to pay enormous

salaries the earnings would have paid the premiums. It was held that this constituted no ground to relieve against the forfeiture. If a policy holder can compel a fuller distribution by proper suit, he has no property in undivided surplus or dividends not declared; accordingly, the express contract to pay premiums is not affected. Therefore interrogatories as to surplus and salaries are demurrable: *Jones v. Insurance Co.*, 10 Dec. Rep. 631, 22 Bull. 318.

A jury having found that the policy holder did rely upon the representations so made to him as to profits, their finding will not be disturbed on the ground that the representations were so extravagant and the returns so large as to constitute notice to a reasonable person as to their falsity and negative any weight to rely thereon: *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. ...].

7. Annual Statement and Taxation.

If the secretary of an insurance company makes oath to a false statement, his criminal liability is not affected by the fact that president or vice-president did not swear thereto: *State v. Milford*, 12 O. D. (N.P.) 655.

If an insurance company in its tax rate places a certain amount under the heading "re-insurance fund and all other policy obligations" and a tax inquisitor furnishes the auditor with information showing that certain items thus included and subject to taxation, such information does not as a matter of law extend to other items also subject to taxation which the company had included under such heading; and if the tax inquisitor subsequently discovers such remaining items and causes them to be placed upon the tax duplicate and compensation for such services is paid to him it can not be recovered: *State, ex rel., v. Morganthaler*, 20 O. D. (N.P.) 76, 7 O. L. R. 105.

Taxes may be recovered by the state on premiums collected by a foreign insurance company from policy holders in Ohio, where the petition alleges that the said premiums were paid to the said company "in the state of Ohio by policy holders by depositing the same within the mails in the state of Ohio at its request, addressed to it at the home office in the state of New York, and which premiums were carried by the mails to the said home office of said company": *State v. Insurance Co.*, 13 O. C. C. (N.S.) 113, 22 O. C. D. 51.

Insurance companies are taxable on notes given for the unpaid balance due on stock subscriptions: *Insurance Co. v. La Rue*, 22

O. S. 630, III Longsdorf's Notes, 107 [affirming *Insurance Co. v. La Rue*, 13 Dec. Rep. 876, 2 C. S. C. R. 236].

Notes for subscription to four-fifths of the capital stock of insurance companies formed under the acts of 1856 and 1865 and payable only on calls, were not taxable as credits. They became taxable in 1869, but not to a company dissolved soon after without ever having done business on the basis of such notes. *Contra*, where a benefit has been realized from them since 1869: *Insurance Co. v. La Rue*, 13 Dec. Rep. 1029, 2 C. S. C. R. 493.

The reserve fund of a life insurance company can not be considered a debt owing to the policy holders, in the sense that it may be deducted from the credits and thus escape taxation: *Hynicka v. Insurance Co.*, 4 O. N. P. (N.S.) 297, 17 O. D. (N.P.) 80 [affirmed, without opinion, *Insurance Co. v. Hynicka*, 78 O. S. 432].

The accumulated deferred dividends or undivided profits of a life insurance company form no part of the reserve fund of the company, and are not a debt of the company, but constitute one of the taxable assets of the company, and must be returned by it for taxation: *Insurance Co. v. Hynicka*, 5 O. N. P. (N.S.) 255, 18 O. D. (N.P.) 1 [affirming *Hynicka v. Insurance Co.*, 4 O. N. P. (N.S.) 297, 17 O. D. (N.P.) 80; affirmed, without opinion, *Insurance Co. v. Hynicka*, 78 O. S. 432]. See also TAXATION.

B. APPLICATION.

1. Misrepresentation.

(a) Constitutionality of Statutory Provisions.

G. C., § 9391, providing that certain false answers in an application shall be immaterial, is valid and constitutional: *Insurance Co. v. Warren*, 59 O. S. 45, IV Longsdorf's Notes, 759 [affirmed, by the supreme court of the United States, in *Insurance Co. v. Warren*, 181 U. S. 73, 15 O. F. D. 856].

See to the same effect, *Insurance Co. v. Block*, 12 O. C. C. 224, 6 O. C. D. 166.

(b) Scope and Effect of Statutory Provisions.

G. C., § 9391, is to be regarded as a part of all policies of life insurance issued after its enactment: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594.

(c) What Insurance is Within Statute.

A company doing business of life and accident insurance, unless it is an assessment

company, comes within the purview of G. C., § 9391 and the following section, relating to answers made by the insured to questions submitted at the time of his application, and to the status of the policy after three annual premiums have been paid: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137, 1 Hosea, 289 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

Beneficial and fraternal organizations are not within the scope of G. C., § 9391: *Insurance Co. v. Bunkers*, 3 O. C. C. (N.S.) 256, 13 O. C. D. 487.

A foreign insurance company which issues a policy to a resident of Ohio is within the provisions of G. C., § 9391: *Insurance Co. v. Block*, 12 O. C. C. 224, 6 O. C. D. 166.

(d) Covenant Waiving Statute.

A covenant in a policy of life insurance which attempts to waive the provisions of G. C., § 9391, as by providing that the policy shall be governed by the laws of another state, is invalid: *Insurance Co. v. Block*, 12 O. C. C. 224, 6 O. C. D. 166.

(e) Effect of Misrepresentation.

(aa) Before Statute.

When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation, or concealment, "the policy shall be absolutely null and void," and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers, no contract of insurance is thereby made, and the policy does not attach, but it is void *ab initio*. When, for such a policy, premium has been paid by the applicant to the insurance company, such payment may be recovered back: *Insurance Co. v. Pyle*, 44 O. S. 19, IV Longsdorf's Notes, 191.

A representation that the father of the applicant died from drinking cold water when he was heated, when it was caused by typhoid pneumonia, caused so by using cold water, is not false: *Insurance Co. v. Reif*, 7 Dec. Rep. 200, 1 Bull. 290 [reversed on other grounds, *Insurance Co. v. Reif*, 36 O. S. 596, III Longsdorf's Notes, 877].

A denial of having had certain diseases is not a misrepresentation unless there were symptoms reasonably indicating them: *In-*

insurance Co. v. Reif, 7 Dec. Rep. 200, 1 Bull. 290.

Whether a representation that the applicant had no sickness or disease during the last seven years is false, when he was treated for a tumor for nine months, but it did not interfere with his business, and there is evidence both that it was cancerous, and innocent, is for the jury: *Insurance Co. v. Cheever*, 7 Dec. Rep. 254, 2 Bull. 19 [otherwise reversed, *Insurance Co. v. Cheever*, 36 O. S. 201, III Longsdorf's Notes, 840].

A question as to what sickness or diseases the applicant has had in the last seven years does not mean temporary or functional disorders, but those affecting general health and longevity or are constitutional: *Cheever v. Insurance Co.*, 8 Dec. Rep. 175, 6 Bull. 196.

A specific question about cancer being asked, a general question as to what diseases the applicant has had may be deemed by him to relate to those other than cancer: *Cheever v. Insurance Co.*, 8 Dec. Rep. 175, 6 Bull. 196.

Spreeing periodically and habitually, though with abstinence in the intervals, makes false a representation that assured is and always was temperate in the use of liquors, and by a clause in the policy avoids the insurance: *Insurance Co. v. Holterhoff*, 13 Dec. Rep. 961, 2 C. S. C. R. 379.

To a question and answer "where has the party resided, summer and winter, during the last ten years," an answer, "Cincinnati," is not false if his home was always there, though he served as a surgeon during the war, especially where the application also states that he had been a surgeon in the U. S. volunteers: *Bonner v. Insurance Co.*, 8 Dec. Rep. 697, 9 Bull. 219.

A question, have you had certain diseases, as far as you know, calls for knowledge and not fact. But have you had any disease in the past seven years, calls for fact, and an answer not substantially correct avoids the policy, though believed to be true: *Cheever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

If a question in the application enumerates many diseases, and the assured denies having had any of them, he is presumed to comprehend what he signed, but may show that the agent read them from a paper in his hands, and that assured did not know what diseases were named: *Cheever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

Answers to questions, if amounting only to representations, must be material as well as untrue to avoid the policy. But if the policy provides that it shall be null if the answers are untrue, they are made material

by contract, and the question of materiality is not to be left to the jury: *Holterhoff v. Insurance Co.*, 5 Dec. Rep. 141, 3 Am. L. Rec. 272.

(bb) After Statute.

(aaa) What Constitutes Misrepresentation.

To constitute the answer to an interrogatory in an application for a policy of life insurance a defense to a recovery on such policy, it must be clearly proved that such answer was willfully false, and was fraudulently made, that it is material, and induced the company to issue the policy upon it, that but for such answer the policy would not have been issued, and that the agent and company had no knowledge of the falsity or fraud of such answer: *Insurance Co. v. Howle*, 62 O. S. 204, IV Longsdorf's Notes, 831.

An answer setting up a defense of fraud on the part of the insured in the matter of his answers made at the time of filing his application, must allege willful falsity, fraud, materiality, want of knowledge on the part of the agent taking the insurance, and the issuance of the policy upon the faith of the answers so made: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

There is a failure to establish fraudulent intent by testimony which merely shows that one who was practically blind in one eye and the sight of the other eye was impaired, a defect which was apparent to all who met him, gave answers to the effect that he was in sound condition mentally and physically, and was not suffering from any bodily infirmity or disorder: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

Under the saving provisions of G. C., § 9391, an insurance company in order to avoid a policy, on the ground of false answers in the application, must establish clearly that the answers made by the insured were willfully false; that they were fraudulently made; that they were material; that they induced the company to issue the policy; that but for such answers the policy would not have been issued; and, that the agent of the company had no knowledge of the falsity or fraud of such answers: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594.

See to the same effect: *Life Association v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

False answers in the application are no defense without clear proof that they were willfully and fraudulently false, and were material, and that the policy would not have been made but for them, and that the company had no knowledge of the falsity. *G. C.*, § 9391 is constitutional, and the policy must be read as if it were copied therein: *Insurance Co. v. Warren*, 59 O. S. 45, IV Longsdorf's Notes, 759.

An assured, in making health certificates for reinstatement under a lapsed policy of life insurance, certified "I am now, to the best of my knowledge, in the same sound condition of health as when last examined by the physician of the Ohio Mutual Life Association. I have not now, and have not since said examination, any illness or injury, nor any medical treatment, or ailment affecting my health, so far as I know," was not required to set forth an illness or injury, a mere indisposition, for instance, which did not affect his sound health, as above defined; and the same rule is applicable to statements regarding medical attendance, which in order to be required to be set forth, must have been with respect to an illness, injury or ailment affecting sound health: *Draddy v. Life Association*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

Under foregoing rules, a failure, in making such certificates, to set forth the fact that assured had suffered from a stomach disorder, of a more or less serious nature, does not avoid the policy where the evidence fails to show that assured was told by any of his physicians that the malady was serious, or that he knew he was being treated for serious trouble, and it appears that he was not confined to his bed, but was able to pursue his ordinary vocations: *Life Association v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

In life insurance "sound health" means that state of health which is free from disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition: *Life Insurance v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591 [following *Insurance Co. v. Howle*, 62 O. S. 204, IV Longsdorf's Notes, 831].

A material fact, as applied to statements made by assured in his application for insurance is one which is substantial and which, if communicated to the insurer, would either induce him to decline the insurance altogether or not to accept it unless at a higher premium; or any fact the knowledge of which would naturally influence the insurer in making the contract or in estimat-

ing the degree or character of the risk or in fixing the rate of insurance: *Hammer v. Insurance Co.*, 49 Bull. 140; *Mierits v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N. P.) 759.

A false statement in an application for life insurance that the insured had no other insurance on his life will not defeat the policy unless the company was ignorant of the fact and unless it was willfully false and fraudulently made and was material and induced the company to issue the policy: *Mierits v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

The fact that, in an application for life insurance, parties falsely represented themselves as husband and wife will not defeat the policy, if at the time they, in good faith, believed themselves to be such: *Mierits v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N. P.) 759.

False statements as to the condition of health made by an insured to revive a lapsed policy will render the policy void if such statements were the inducement to such revival: *Baker v. Insurance Co.*, 5 O. N. P. (N.S.) 383, 18 O. D. (N.P.) 426.

In a suit upon a policy of life insurance, the defense of fraud in the procuring of the insurance must be regarded as sustained, where the insured, who died within a few months after the policy was issued from the effects of enlargement of his spleen to twenty-six times its normal size, failed to disclose his condition to the examining physician, although three physicians had told him of the bad condition of his health, one of whom had refused to pass him for life insurance, and one had told him he had heart disease, and one had discovered the enlargement; and this is true, notwithstanding the examining physician failed to discover his condition and numerous acquaintances testified to his apparent good health: *Insurance Co. v. Whittaker*, 7 O. C. C. (N. S.) 1, 18 O. C. D. 688.

Statements as to the following matters, in an application for insurance, are material, and false answers relative to same will avoid the policy: "Good health," "consulting physicians," "disease of genital organs or urinary organs," "fits, convulsions, headaches, severe or frequent," "loss of consciousness, tumors, etc.," "illness, ailment or injury not mentioned," "other insurance," "treatment in hospital," "anything in physical condition, family history or personal habits tending to shorten life": *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

Where the assured stated in his written application to the company for a policy of life insurance, that he did not use intoxicating liquors at all but was a total abstainer

from the same, which statements were untrue, such statements under G. C., § 9391, will not defeat the right to recover unless it be clearly proved that the statements were not only willfully false and fraudulently made, but that the same were material and induced the company to issue the policy: *Insurance Co. v. Risley*, 22 O. C. C. 160, 12 O. C. D. 186; following *Insurance Co. v. Warren*, 59 O. S. 45, IV Longsdorf's Notes, 759.

Where the assured answered in the application that he did not use intoxicating liquor at all, in any quantities or of any character, which answers were untrue, it was error for the court to charge the jury "that for a man to occasionally use intoxicating liquor or to use it in moderation and an occasional indulgence to excess does not render a person an intemperate man": *Insurance Co. v. Risley*, 22 O. C. C. 160, 12 O. C. D. 186.

Questions and answers, Has he ever been intemperate? no; is he now of temperate habits? yes, do not refer to occasional sprees on the one hand, nor are they confined on the other to daily indulgence: *Insurance Co. v. Reif*, 36 O. S. 596, III Longsdorf's Notes, 877.

A schedule of warranties attached to a policy of insurance, while no part of the contract of insurance, will nevertheless be regarded as counter agreements on the part of the insured made in consideration of the issuing of the policy; and such warranties are within the contemplation of G. C., § 9391, providing that no answer to an application for insurance shall bar recovery, unless it appear that it was willfully false, and but for such answer the policy would not have been issued: *Insurance Co. v. Barnes*, 15 O. C. C. (N.S.) 407.

(bbb) Effect on Recovery of Premiums.

If a married woman who obtains insurance on her husband's life, without his consent, conceals such fact from the insurance company knowing that his consent is necessary, she can not subsequently recover premiums paid thereon: *Marling v. Insurance Co.*, 6 O. L. R. 99.

To constitute a consideration for the payment of premiums on a policy of life insurance it is essential that the insurer incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy if the life insured should end: *Insurance Co. v. Felix*, 73 O. S. 46, IV Longsdorf's Notes, 998. Apparently *contra*, *Shaddinger v. Insurance Co.*, 2 O. D. (N.P.) 402, 30 Bull. 337.

A misstatement as to age was a defense by domestic companies sued for back premiums on refusal to continue the insurance. The act of 1872, as amended in 1873, modified the general act only by depriving foreign companies obtaining leave to do business in Ohio of the right to set up untrue statements as to age. (See now G. C., § 9392): *Lowe v. Insurance Co.*, 41 O. S. 273, IV Longsdorf's Notes, 61 [affirming *Lowe v. Insurance Co.*, 8 Dec. Rep. 1088, 10 Am. L. Rec. 313; *Lowe v. Insurance Co.*, 8 Dec. Rep. 247, 6 Bull. 666].

Age is only material as affecting the amount of premium, and if it is by mistake stated as 29 instead of 39 the beneficiary may collect a proportionate part of the policy, or could pay in the deficiency or abate it from the insurance and collect on the whole: *Insurance Co. v. Goodall*, 5 Dec. Rep. 160, 3 Am. L. Rec. 338.

(ccc) Burden of Proof.

In an action upon an accident policy in which the insurance company raises the defense that the answers were willfully false and fraudulently made, etc., the burden is upon the defendant to establish such allegations. The mere omission of statements, or a mere error in statements made, does not affect the validity of the policy: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594.

The burden of proof is upon the insurer to show that the father of assured was insane in order to defeat a recovery under a policy of insurance on the ground that the answer "no" made by the assured to the question, "Has either of your parents * * * been afflicted with * * * insanity * * * or any hereditary disease," in his application for insurance, was willfully false: *Hanner v. Insurance Co.*, 49 Bull. 140.

The question whether or not such answers were willfully false and fraudulently made, and were material, and induced the company to issue the policy, is a question of fact to be determined by the jury under proper instructions from the court: *Insurance Co. v. Risley*, 22 O. C. C. 160, 12 O. C. D. 186; [distinguishing *Insurance Co. v. Reif*, 36 O. S. 596, III Longsdorf's Notes, 877; *Insurance Co. v. Foley*, 105 U. S. 350].

Where a policy of life insurance contains a clause which provides that, if the insured at the time of making application for insurance, or at the time of delivery of the policy, was afflicted with any one of a number of diseases therein specified and failed to inform the company thereof, and subsequently died from one of said diseases, and the policy contained a further

clause providing that it shall be such subject to each and all of the conditions named therein, the burden is upon the insurance company to show by preponderance of the evidence that the insured was suffering from one of the said diseases at the time the policy was issued, and that the contract provided the policy should be void if such was the fact: *Melvin v. Insurance Co.*, 9 O. L. R. 361.

2. Application of Statute to Warranty.

G. C., § 9391, applies as well to statements which are warranted to be true as it does to mere representations: *Insurance Co. v. Warren*, 59 O. S. 45, IV Longsdorf's Notes, 759.

A policy making the statements of the application warranties, and to be void if any answer is untrue, and some of the answers as to material matters are untrue in fact, though without fraud, and under an innocent misapprehension of the purport of the questions and answers, is void *ab initio*. No contract was made and the policy did not attach: *Insurance Co. v. Pyle*, 44 O. S. 19, IV Longsdorf's Notes, 191.

The applicant's signing the name of the person whose life is to be insured by the agent's direction is not a warranty; and if a representation, it is not a material one in a policy, not larger than would cover funeral expenses; for there is no temptation: *Shad-dinger v. Insurance Co.*, 11 Dec. Rep. 892, 30 Bull. 337.

A warranty that the answers in the application are true makes them warranties only so far as material to the risk and known to the applicant. Thus, a statement that insured had not consulted a physician within ten years, forgetting that he had consulted one about a trivial throat trouble and an answer that he had not applied for insurance in any other company, when he had done so, and was then insured in another company but did not know it, will not warrant interference with a verdict: *Hunter v. Fraternal Alliance*, 5 O. N. P. 35, 7 O. D. (N.P.) 239.

A warranty avoiding the policy if death is caused by intoxicants, means voluntary use to a degree causing death, and does not apply to their administration by a physician, though for a sickness caused by their excessive use. *Contra*, if the voluntary use caused delirium tremens, and he died from neglect, or his own act, or his physician's want of skill: *Insurance Co. v. LaBoiteaux*, 5 Dec. Rep. 242, 4 Am. L. Rec. 1.

3. Application of Statute to Conditions and Covenants.

G. C., § 9391, applies to false answers to interrogatories in the application for a life insurance policy, but does not apply to conditions in the policy itself. Where a life insurance policy contains a condition to the effect that no obligation is assumed by the company, unless at the date of the policy the insured is alive and in sound health, there can be no recovery upon such policy if it is made to appear upon the trial that the insured was not in sound health at the date of the policy: *Insurance Co. v. Howle*, 62 O. S. 204, IV Longsdorf's Notes, 831.

If a policy of insurance against accident contains a stipulation that the insurer shall not be liable on account of the death of the assured if it results wholly or partly from infirmity or disease, the stipulation is available as a defense notwithstanding G. C., § 9391, and the following section, whose effect is limited to defenses founded on fraud or misstatement in the application: *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940.

Where a policy of life insurance contains a clause which provides that, if the insured at the time of making application for insurance, or at the time of delivery of the policy, was afflicted with any one of a number of diseases therein specified and failed to inform the company thereof, and subsequently died from one of said diseases, and the policy contained a further clause, providing that it shall be subject to each and all of the conditions named therein, no recovery can be had on said policy, notwithstanding the insured may not himself have been aware, at the time answer was made to the questions contained in the application, that he was suffering from any one of said diseases: *Melvin v. Insurance Co.*, 9 O. L. R. 361, 56 Bull. 377.

If the policy has a condition that the representations in the application are true, their materiality is agreed to and can not be left to the jury. But they are not warranties which must be strictly true, and substantial truth is sufficient: *O'heever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

An agreement in the policy against practicing "any vicious habit that tends to the shortening of life" is broken by the use of intoxicants to that extent. But occasional spreeing is not a habit, yet frequent spreeing, though with sober intervals, may be a habit: *Holterhoff v. Insurance Co.*, 5 Dec. Rep. 141, 3 Am. L. Rec. 272.

A clause excepting death by reason of intemperance requires it to be the controlling

cause of death. Sickness and delirium so caused, if not necessarily mortal, but becoming so by omission to take proper remedies, or by overdoses, or by exposure while intoxicated, violates the policy. But if the death is caused by excessive or dangerous doses prescribed by medical attendants, though the habit of intemperance invites disease and facilitates its ravages, the policy is not avoided: *Holterhoff v. Insurance Co.*, 5 Dec. Rep. 141, 3 Am. L. Rec. 272.

Intemperance under a clause, reading as follows: "If the insured shall become so far intemperate as to impair his health or induce delirium tremens," is not limited to the habit, but includes a single debauch if it impairs health, etc. Nor need the impaired health or delirium tremens have caused the death: *Insurance Co. v. Attee*, 3 O. C. C. 650, 2 O. C. D. 378.

Misrepresentation as to age, by understating in the application, which provides that any untrue statement avoids the certificate, is a defense: *National Union v. Rothert*, 39 Bull. 143 [without opinion in supreme court].

4. *Fraud of Insurance Agent.*

When an agent of a life insurance company, acting within the scope of his authority, to induce a person to apply for insurance in the company, fraudulently represents to him that, for a specified annual premium, a policy would be fully paid at a given period, and further entitle the holder to certain other specified benefits, and thereby induces such person to apply for a policy on his life, and to pay the premium therefor; if the policy issued to him is materially different from what it was represented to him it would be, he may rescind and recover back of the company the premium paid: *Insurance Co. v. Wright*, 33 O. S. 533, III Longsdorf's Notes, 687.

In an action on a policy of insurance issued by a life insurance company, upon a spurious application made and substituted by its agent for a genuine one made by the assured, the premium rates of the company when not put in issue in any way whatever, are not competent testimony to show complicity of the assured in the fraud; nor want of knowledge by the company when the spurious application reached the home office, that another and genuine application had been made by the assured, or that the contract was inequitable: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

In an action it is not competent to inquire of the president and examining surgeon of the company on the trial, whether, if the true

condition of the life insured as to health had been known to the company at the time the spurious application was received at the home office, the policy would have been issued. The opinion of the witness in such case is not competent testimony: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

A sub-agent of a life insurance company, appointed to represent it in a particular branch of its business, becomes, in reference thereto, the direct representative of the company, and notice of a fact to him will operate as notice to the company, and it will be bound by acts done by him in respect to that branch of its business intrusted to him: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

An action on a policy of life insurance can not be defeated by the company by showing that the agent of the company, taking the genuine application, imposed upon the company a spurious application, which the company believed to be genuine: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

The applicant is not responsible for a false certificate of the agent on a blank in the application that he had examined the life to be insured: *Shaddinger v. Insurance Co.*, 11 Dec. Rep. 892, 30 Bull. 337.

Where the agent represents that a life policy will be in force as soon as issued, and the policy provides that no benefits will be due if death occur within three months, the insured may have the policy reformed and enforced, and so though the application contained an agreement to be governed by the rules of the company: *Insurance Co. v. Wood*, 33 Bull. 346 [without opinion in supreme court].

Representations made to a prospective policy-holder as to profits accruing to the company, based upon past experience of the company, may have been intended, as more than mere opinion and have constituted a representation as to the present condition of the company and its earning capacity upon which the assured has a right to rely, and the question of fact as to the meaning of such representations and the intention with which they were made, unlike the construction of a contract, may properly be submitted to the jury under proper instruction: *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. —].

5. *Knowledge of Insurance Agent.*

Where a sub-agent appointed by a general agent whose territory covers several counties, and who has authority to appoint sub-agents,

solicits insurance, and fills in the application for a policy in the presence of the applicant, after a conversation with him disclosing all the facts bearing upon the statements to be made in the application, and the statements written in the application are the suggestion of said sub-agent, and there is reason to believe the facts were also all made known to the general agent, the knowledge of such sub-agent as to the extent the statements were false is the knowledge of the company: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594.

The fact that the agent of an insurance company has inserted false statements in the application by mistake does not prevent the insured from recovering upon the policy: *Mieritz v. Insurance Co.*, 8 O. N. P. 442, 11 O. D. (N.P.) 759.

The knowledge of the agent of the insurance company is imputed to the insurance company, even though there is a stipulation in the policy and application to the contrary effect: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594.

It has even been held that the knowledge of the agent is the knowledge of the insurance company, in case of collusion between the insured and the agent of the insurance company: *Insurance Co. v. Kilbane*, 15 O. C. C. 62, 8 O. C. D. 790.

Where an agent soliciting accident insurance, draws the application for a policy and issues it, having full knowledge that the applicant has other insurance, the fact that the application states that the applicant has no other insurance, will not be permitted to defeat a claim thereon: *Herbert v. Insurance Co.*, 3 O. C. C. (N.S.) 7, 13 O. C. D. 225.

If the company's general agent knows the facts and leads the applicant to believe that his answers will be deemed true notwithstanding, the company is estopped to claim they are false: *Cheever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

An insurance broker forwarding an application and receiving a policy containing a clause that it shall not be in force until countersigned by him as "agent," is the company's agent, and his knowledge or that of his employe acting for him of a mistake in the application estops the company: *Insurance Co. v. Goodall*, 5 Dec. Rep. 160, 3 Am. L. Rec. 338.

A false answer in an application for life insurance (denying that the applicant was in the liquor business) if known to be false to the agent taking the application is, by reason of G. C., § 9391, no defense, although inserted by collusion between the agent and the applicant: *Insurance Co. v. Kilbane*, 15 O. C. C. 62, 8 O. C. D. 790.

Notice to the agent is notice to the principal is a rule that may be abrogated by agreement. A stipulation that the company will be released if a statement is found to be false is valid if it does not appear that the applicant, with reason, believed it true. Accordingly, a denial of ever having been refused by another company known to be false by the insurance broker who is the applicant's agent, is a defense: *Peniston v. Insurance Co.*, 11 Bull. 216, 16 Bull. 179 [without opinion in supreme court] [affirmed, *Peniston v. Insurance Co.*, 6 Dec. Rep. 830, 8 Am. L. Rec. 361; *Peniston v. Insurance Co.*, 7 Dec. Rep. 678, 4 Bull. 935].

6. Mistake of Agent.

A life insurance agent soliciting and procuring for an insurance company risks, and applications upon which policies are to be issued, who fills up the application, is in so doing the agent of the insurance company and not of the insured or of the one making application for the insurance, and if the agent makes a mistake in preparing the application and stating the facts in it, the insurance company is bound by it and is responsible for such mistake: *Mieritz v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

7. Estoppel as to Certain Defenses.

If a policy of insurance against accident contains a stipulation that the insurer shall not be liable on account of the death of the assured if it results wholly or partly from infirmity or disease, the stipulation is available as a defense notwithstanding G. C., § 9392 and the preceding section, whose effect is limited to defenses founded on fraud or misstatement in the application: *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940.

An answer setting up a defense of fraud on the part of the insured in the matter of his answers made at the time of filing his application, must allege willful falsity, fraud, materiality, want of knowledge on the part of the agent taking the insurance, and the issuance of the policy upon the faith of the answers so made: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

There is a failure to establish fraudulent intent by testimony which merely shows that one who was practically blind in one eye and the sight of the other eye was impaired, a defect which was apparent to all who met him, gave answers to the effect that he was in sound condition mentally and

physically, and was not suffering from any bodily infirmity or disorder: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

Where insurance is renewed year after year without break, the making of the policy in terms annual does not relieve it from the operation of G. C., § 9392, rendering it, after three annual premiums have been paid, incontestable for errors, omissions or misstatements by the assured, except as to age. Such renewal policies are, in effect, and for the purposes of the statute, merely a renewal of the original agreement: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

The provision endorsed upon a policy of life insurance that "this policy shall be incontestable after two years, except for fraud or misstatement of age," is similar to the provision in G. C., § 9392, and relates entirely to what occurred at the time the policy was issued or the application made, and has no reference to default in the payment of premiums: *Insurance Co. v. Walton*, 4 O. C. C. (N.S.) 133, 15 O. C. D. 587 [affirmed, without opinion, *Walton v. Insurance Co.*, 72 O. S. 650].

G. C., § 9392 prevents an insurance company from making a defense on the ground of false statements in the application, except such as are fraudulent after premiums have been received for more than three years: *Insurance Co. v. Gilligan*, 7 O. C. C. (N.S.) 397, 18 O. C. D. 609.

G. C., § 9392 applies to policies issued by foreign insurance companies: *Insurance Co. v. Block*, 12 O. C. C. 224, 6 O. C. D. 166.

An express provision in a policy that the provision of G. C., § 9392 shall not apply is without legal effect, and is void: *Insurance Co. v. Block*, 12 O. C. C. 224, 6 O. C. D. 166.

A company doing a business of life and accident insurance, unless it is an assessment company, comes within the purview of G. C., § 9392 and the preceding section, relating to answers made by the insured to questions submitted at the time of his application, and to the status of the policy after three annual premiums have been paid: *Insurance Co. v. Saylor*, 2 O. N. P. (N.S.) 305, 15 O. D. (N.P.) 137 [affirming *Saylor v. Insurance Co.*, 1 O. N. P. (N.S.) 217, 14 O. D. (N.P.) 79].

A former statute (70 v. 99), deprived foreign companies of the right to set up an untrue statement as to age, but did not apply to Ohio companies: *Love v. Insurance Co.*, 41 O. S. 273, IV Longsdorf's Notes, 61.

8. Right of Policy-holder to Copy of Application.

G. C., § 9387, requires the delivery to the insured during his lifetime. Failure so to do can not be remedied by delivering such copies after the death of the insured to persons who are interested in the policy: *Dickmeier v. Insurance Co.*, 4 O. N. P. 13, 6 O. D. (N.P.) 161.

While failure to give a copy of an application prevents the insurance company from alleging that the statements in such application were false (see G. C., § 9389), the insured must specially plead the facts which preclude the company from taking advantage of the falsity of such statements: *Insurance Co. v. Howell*, 68 O. S. 614, IV Longsdorf's Notes, 949.

G. C., § 9389, clearly contemplates that there may be more than one application in connection with a policy of life insurance, and requires that a copy of the application be returned at the time of a renewal, as well as at the time of original issue: *Insurance Co. v. Gilligan*, 7 O. C. C. (N.S.) 397, 18 O. C. D. 609.

Where discrepancies appear between the original application for life insurance and the copy of the application which was returned with the policy, and these discrepancies are matters of substance, it is not error to exclude them as evidence, if the court finds that they were of such a character as to afford a reasonable ground for a defense: *Insurance Co. v. Hoffman*, 13 O. C. C. (N.S.) 127, 22 O. C. D. 656 [affirmed, without opinion, *Insurance Co. v. Hoffman*, 83 O. S. 477].

If the insured has not been provided with copies of his application, such applications can not be offered in evidence by the insurance company: *Andrews v. Insurance Co.*, 7 O. N. P. 322, 7 O. D. (N.P.) 307.

G. C., § 9387, does not apply to the Royal Arcanum; since that is a fraternal order and is controlled by G. C., §§ 9462, *et seq.*: *Gilligan v. Royal Arcanum*, 5 O. C. C. (N.S.) 471, 16 O. C. D. 42 [affirmed, without opinion, *Gilligan v. Royal Arcanum*, 72 O. S. 672].

C. POLICY.

1. Form.

A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect *in praesenti*: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

In the absence of such a stipulation in the application or policy as makes the actual

delivery of the policy a condition precedent to the consummation of the contract of insurance, the actual delivery or non-delivery of the policy is not of itself conclusive evidence of the completion of the contract of insurance; but the unconditional acceptance of the application by the insurer is a consummation of the contract: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

Where, there being no oral agreement for insurance to take effect prior to the issue of the policy, upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy and, without parting with the possession thereof, wrote to the applicant that he had "issued" a policy, but would hold the same until he should have time to hear from his company and the company thereafter rejected the risk and the agent forwarded the policy to the company, these facts constitute no proof of a consummated contract of insurance, although the applicant may not have received notice of the refusal of the risk: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

In an action to recover on a written contract for life insurance and upon an alleged subsequent verbal modification of the same, statements and representations made by the agent who solicited the policy, prior to and contemporaneous with the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

A change of a policy of a stock company by the holder inserting a clause that they should share in profits "as apportioned by the company," does not convert the policy into a mutual policy, although the change was made by consent, and at the instigation of the agent: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

The proceeds of a policy of life insurance are payable, to the extent of his claim, to an assignee of the policy without delivery, in preference to a subsequent assignee in whose possession the policy was placed: *Banking Co. v. Assurance Society*, 10 O. C. C. (N.S.) 396.

The policy is the sole contract and statements of the agent before it is issued as to the share the assured will receive of the reserve fund, or prospectuses of the company are not competent, no reformation being asked, that a share of such fund will be included in a paid-up policy if taken: *Odell*

v. Insurance Co., 9 Dec. Rep. 589, 15 Bull. 197.

2. Terms.

When a policy contains a stipulation that "no agent has authority to waive or alter anything in this policy contained," and the same is accepted by the insured, it is both notice to, and an agreement by, the insured that an agent has no authority to waive or alter anything contained in the policy: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832 [approved and followed, *Insurance Co. v. Meyers*, 62 O. S. 529, IV Longsdorf's Notes, 841].

When a policy provided that the contract of insurance is completely set forth in the policy and application and that none of its terms can be modified, except by an agreement in writing signed by the president, vice-president or secretary, and also that no agent has authority to extend or postpone the time of payment of any premium or note, the insured can not recover on a verbal modification of the terms of the policy made by an agent of the insurance company, extending the policy one year and waiving the payment of an annual premium, in the absence of such knowledge and acts by the insurance company as would estop it from alleging in defense the provisions of the policy: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

A by-law, adopted by a fraternal benefit association, which provides that a benefit certificate issued to a member shall be void and all benefits thereunder forfeited in case the insured shall die by suicide, felonious or otherwise, sane or insane, is consistent with the purposes of the association and with its corporate charter, and imposes a reasonable condition upon which the parties to the contract may agree: *Tisch v. Home Circle*, 72 O. S. 233, IV Longsdorf's Notes, 989.

Such a by-law, although adopted after the benefit certificate was issued to the insured and before the death of the insured by suicide, violates no vested right of the beneficiary: *Tisch v. Home Circle*, 72 O. S. 233, IV Longsdorf's Notes, 989.

Knowledge of the stipulations of a policy will be conclusively presumed of an insured who has for nine years been in possession of and paid premiums on the policy: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

A stipulation whereby an insurance company is exempted from liability in certain cases is definitive of the obligation assumed; being a contractual limitation, it is not obnoxious to criticism as an attempt to limit the evidence by which the beneficiary may establish the facts which bring his case

within the terms of his contract: *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940.

Conditions and agreements in the policy form the contract, and are not to be waived or controlled by subsequent course of dealing in the absence of bad faith: *Insurance Co. v. Buer*, 62 O. S. 385, IV Longsdorf's Notes, 837.

An agreement in a life policy to loan to the insured a certain proportion on the policy as collateral is not available after a default to pay premiums which forfeits the policy: *Insurance Co. v. Buer*, 62 O. S. 385, IV Longsdorf's Notes, 837.

3. Construction.

An insurance policy is to be construed in favor of the insured as far as forfeitures are concerned: *Smith v. Assurance Co.*, 12 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 763.

Policies should be construed like other contracts to effect the intention and language: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841 [approves *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341].

The words "legal representatives" in their strict technical sense, mean executors or administrators; but these words appearing in a life insurance policy may be shown, by the context and surrounding circumstances, to mean "heirs or next of kin": *Hague v. Hague*, 11 O. C. C. (N.S.) 406, 20 O. C. D. 628 [affirmed, without opinion, *Hague v. Hague*, 81 O. S. 488].

A policy payable to "heirs" on the life of one leaving a widow and one child, means those who would be distributees under G. C., § 8578, and the widow and child divide the fund not equally however, but in the proportion of descent of the estate: *Insurance Co. v. Pollard*, 3 O. C. C. 577, 2 O. C. D. 333.

Under a policy payable to "heirs" on the life of one dying childless, leaving a widow and brothers and sisters, the widow is the beneficiary: *Jamieson v. Knights Templar Association*, 9 Dec. Rep. 388, 12 Bull. 272.

When a "contracting carpenter" has taken a contract for the construction of a building and has sublet the brickwork to another person, and when a man, employed as a laborer by such "contracting carpenter," at the time of his injury is at work under the sole direction and control of the employer, on an apparatus used in hoisting materials for such building, and when such laborer's wages were included in the estimated wages set forth in the employer's application for an employer's liability insurance policy, and it is stated in the application that such hoist-

ing apparatus will be used in the employer's business, such laborer is an employee of the "contracting carpenter" within the meaning of such policy, although at the time of his injury, the materials of the sub-contractor were being hoisted: *Bright v. Insurance Co.*, 15 O. D. (N.P.) 124 [affirmed, *Insurance Co. v. Bright*, 1 O. C. C. (N.S.) 295, 14 O. C. D. 441; affirmed, without opinion, in *Insurance Co. v. Bright*, 70 O. S. 497].

It is the policy of the law to construe health certificates made to life insurance companies for reinstatement under lapsed policies, favorably to the assured, and where there is any doubt as to the proper construction that doubt should be resolved in favor of the applicant: *Insurance Co. v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

Ambiguities in life policies, as in other written contracts, are to be taken most strongly against the party making the provision, and in whose favor they are intended: *Holterhoff v. Mutual Benefit Life Co.*, 5 Dec. Rep. 141, 3 Am. L. Rec. 272.

Provisions of a life policy are like the terms of other contracts, and may make the policy void *ab initio*: *Insurance Co. v. Pyle*, 44 O. S. 19, IV Longsdorf's Notes, 191.

Where the right to a paid-up policy on non-payment of a premium (after three annual payments have been made in full) is restricted by ambiguous clauses which may be construed as requiring payment of premium notes, such construction will not be adopted where part of the premium had been paid in cash more than sufficient to carry the policy beyond the insured's death, and a complete default would not have worked such forfeiture (C. C. A.): *Kelsey v. Insurance Co.*, 10 O. L. R. 119 [denies *Insurance Co. v. Buer*, 62 O. S. 385, IV Longsdorf's Notes, 837].

A life insurance policy is not merely a contract of indemnity. It is a contract to pay to the beneficiary a sum certain in the event of death; and if the contract was valid in its inception and so continues until its maturity, the beneficiary is entitled to the whole of the stipulated sum: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240; 21 O. C. D. 665, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 676].

4. Conditions.

In a policy which insures against loss from liability to employees of the insured who may accidentally sustain bodily injury while in the employ of the insured, "under circumstances which shall impose upon the insured a common law or statutory liability to such employees by reason thereof," a stipu-

lation as follows: "Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor," is of the essence of the contract and can not be waived by an agent of the company without authority therefor: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841.

An accident policy contained this exception: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as motive power." The insured was walking along a railroad track, the ground being slippery and icy, when a freight-train overtook him, going slowly, and it occurred to him that he would step on the caboose and ride, and as he was about to step on, but before he had touched the car, he slipped and fell, and his left foot was crushed by the hind wheels. It was held that what he did after the purpose to step on the car caused him to change his conduct from that of walking along the track, to that of making preparation to step on the car, was within the exception, whether he had caught hold of the car or not: *Huston v. Insurance Co.*, 66 O. S. 246, IV Longsdorf's Notes, 905.

Under a clause which provides that the policy shall not take effect until the first premium is paid to the company or to authorized agent, such policy does not take effect until such premium is paid or until such payment is duly waived: *Insurance Co. v. Harvey*, 72 O. S. 174, IV Longsdorf's Notes, 989.

The requirement that a proof of death be made in writing is a reasonable requirement, as is also a requirement as to the identification of the deceased: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

Averments in a petition in a suit on a life insurance policy, that the condition as to proof of death was definitely performed on a certain date and that every condition required by the policy was performed, are wholly inconsistent with a subsequent averment that the condition of the policy with reference to proof of death had been waived; and in the absence of any averment of an excuse for non-performance, or any inference to be drawn from the petition that there was such an excuse, evidence could not be offered on the question of waiver: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

Notice of a defect in a proof of death is not necessary, where repeated notices have been given by the company that no proof of death has been filed: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

A beneficiary under an insurance policy who causes the death of the insured by his intentional, wrongful and felonious act can not recover upon such policy: *Filmore v. Insurance Co.*, 82 O. S. 208.

If an insurance policy contains a condition that it shall be invalid if the insured becomes so intemperate as to impair his health or induce delirium tremens, such policy is rendered invalid if the insured does become intemperate to such a degree although he does not drink to excess and although his death is not caused by such breach of condition: *Insurance Co. v. Attee*, 3 O. C. C. 650, 2 O. C. D. 378 [affirmed, without opinion, *Attee v. Insurance Co.*, 26 Bull. 263].

D. PREMIUMS.

1. *Payment of Premiums.*

(a) *Necessity.*

Where a policy of life insurance contains the provision that the policy "shall not take effect until the first premium shall have been paid to and accepted by the company or an authorized agent," the payment of such premium, unless waived, is necessary to put said policy in force: *Insurance Co. v. Harvey*, 72 O. S. 174, IV Longsdorf's Notes, 989.

A condition that no insurance shall be binding until the payment of premium, is waived by an express acknowledgment of payment made to give effect to the policy—for if once in effect the condition is at an end: *Insurance Co. v. Fellowes*, 12 Dec. Rep. 584, 1 D. 217; *Fellowes v. Insurance Co.*, 13 Dec. Rep. 79, 2 D. 128.

If the company repudiates its contract of insurance, and by its course of conduct clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender will not bar a recovery on the policy: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200.

Failure to pay a premium is excused only if the insurance company by some wrongful act or omission prevent such payment. In other cases diligence on the part of the assured does not excuse failure to make such payment: *Life Association v. Troy*, 20 O. C. C. 644, 10 O. C. D. 761 [affirmed, without opinion, *Life Association v. Troy*, 66 O. S. 675].

The premiums must be tendered during reasonable hours, but if so tendered, the policy can not be forfeited because there was no one at the office of the insurance company during business hours authorized to receive the premium: *Life Association v. Troy*, 20 O. C. C. 644, 10 O. C. D. 761

[affirmed, without opinion, *Life Association v. Troy*, 66 O. S. 675].

If an agent of an insurance company takes out insurance on his own life, payment of such premium to such agent by a member of his family does not operate as payment to the company if the agent does not transmit such premium to the insurance company: *Insurance Co. v. Harvey*, 72 O. S. 174, IV Longsdorf's Notes, 989.

If a policy acknowledges payment of the premium, the company must prove non-payment by clear evidence; and that the agent's books do not show the credit does not prove non-payment, but rather that the agent was careless: *Lee v. Insurance Co.*, 12 Dec. Rep. 109, 1 Hosea, 217.

Recital of payment of the premium is not conclusive that a note for part was taken as payment: *Robert v. Insurance Co.*, 12 Dec. Rep. 668, 1 D. 355 [affirmed, *Robert v. Insurance Co.*, 13 Dec. Rep. 66, 2 D. 106].

(b) By Premium Notes.

A provision that a note for the premium is not a payment, but an extension of time, and that the company is not liable while the note is due and unpaid, though it does not forfeit the policy for non-payment, suspends it, and if death occurs in the interim the company is not liable. The agent's agreement that the note need not be paid when due is not competent. There is nothing to waive. Nor is demand of payment of the note necessary: *McEvoy v. Insurance Co.*, 3 O. C. C. 569, 2 O. C. D. 329 [affirmed, without opinion, *McEvoy v. Insurance Co.*, 28 Bull. 256].

If the policy does not provide for forfeiture for non-payment of interest on premium notes, the assured is entitled to a renewal on tendering their face without interest and the new premium: *Insurance Co. v. French*, 30 O. S. 240, III Longsdorf's Notes, 526 [affirming *Insurance Co. v. French*, 13 Dec. Rep. 927, 2 C. S. C. R. 321].

So of a clause that the policy shall not be binding while the premium note after maturity is unpaid: *Wilson v. Insurance Co.*, 6 Dec. Rep. 708, 7 Am. L. Rec. 480.

If a policy is suspended during non-payment of an annual installment on a four-years' premium note, no premium is earned during such suspension, and the insured is entitled to a *pro rata* credit on the note: *Matthews v. Insurance Co.*, 40 O. S. 135, IV Longsdorf's Notes, 13.

A note given to a minor for an insurance premium is not void but is at the most voidable: *Insurance Co. v. Hilliard*, 63 O. S. 478, IV Longsdorf's Notes, 861.

Retaining a dishonored check given for part of the premium, and a dishonored note for the rest, shows that a statement to the assured that as the matter stood his policy was void, is not intended as a declaration of forfeiture: *Insurance Co. v. French*, 30 O. S. 240, III Longsdorf's Notes, 526.

Where credit is given, and the policy has attached a clause in the policy and in the note of forfeiture for non-payment is a condition subsequent, not self-operative, but a mere option, and must be clearly and definitely enforced. Whether this has been done is a question for the jury: *Insurance Co. v. French*, 30 O. S. 240, III Longsdorf's Notes, 526 [affirming *Insurance Co. v. French*, 13 Dec. Rep. 927, 2 C. S. C. R. 321].

A charter provision that the company should not be liable while an installment of the premium note is overdue is no defense to action on the note: *Insurance Co. v. Sorter*, 4 Dec. Rep. 226, 1 Clev. L. Rep. 133.

It is no defense to the premium note that the maker's application contained an incorrect statement as to his title, and the policy had a clause of avoidance therefor: *Webber v. Swing*, 36 Bull. 179 [without opinion in supreme court].

(c) In Installments.

A life policy called for a quarterly premium, and in case of death the balance of the year's premium was to be deducted from the sum insured. It was held that, on death, after paying one quarter, the other three are to be deducted; the premium is annual, but payable in quarterly installments: *Hesterberg v. Insurance Co.*, 13 Dec. Rep. 674, 1 C. S. C. R. 483.

An accident policy, issued to a railway engineer upon a stipulated premium per year, to be paid in four equal installments, for which he executes an assignment of part of his wages conditional that the payments are premiums for consecutive periods of two, three and five months, and each shall apply only to its corresponding insurance period, is in effect a policy for a year if all the payments are made. The first payment only having been made, no recovery can be had by the insured for an injury happening after he quit work and collected his salary in full notwithstanding the installment, if left with the railroad company, would not have been paid until a later date: *Herbert v. Insurance Co.*, 3 O. C. C. (N.S.) 7, 13 O. C. D. 225.

(d) By Beneficiary.

The fact that premiums on a life insurance policy were paid by the beneficiary, a sister of the insured, will not vitiate the policy:

Baker v. Insurance Co., 5 O. N. P. (N.S.) 383, 18 O. D. (N.P.) 426.

2. Forfeiture for Non-payment of Premiums.

Where a policy of insurance is made and accepted upon the express condition that the "entire policy shall be void * * * if the premium, or any note given therefor, shall have been due and unpaid for thirty days at the time any loss or damage shall happen to the property insured," there being no waiver of the condition, such policy will immediately be void if the premium or any note given therefor shall not be paid within thirty days after payment thereof is due; and neither demand of payment nor notice of intention to insist on the forfeiture is necessary on the part of the insurer: *Insurance Co. v. Wilson*, 70 O. S. 354, IV Longsdorf's Notes, 974.

Where a policy of insurance contains a clause of forfeiture by reason of the non-payment of premiums at a certain time, it is a valid part of the contract and the policy may be forfeited unless prohibited by statute: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

In a policy of life insurance, containing no clause of forfeiture and no provision for forfeiture, failure to pay the premiums on or about the day when they become due may work a suspension of the rights of the party under the policy, until such a length of time has elapsed as will indicate that he does not intend to pay or has practically withdrawn; the company may then give notice to the insured of its intention to forfeit the policy: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

Failure to pay the premium avoids the policy if so stipulated therein: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160; *Robert v. Insurance Co.*, 12 Dec. Rep. 668, 1 D. 355, 13 Dec. Rep. 66, 2 D. 106.

A claim of forfeiture and refusal to accept further premiums excuses the assured from continuing to tender them up to his death, which occurred within a year: *Smith v. Insurance Co.*, 7 Dec. Rep. 188, 1 Bull. 284.

The superior court held that to work a forfeiture for non-payment of a note for premium, a demand for its payment on the day of maturity during business hours must be made: *Insurance Co. v. French*, 13 Dec. Rep. 927, 2 C. S. C. R. 321 [the supreme court refused to pass on the question, *Insurance Co. v. French*, 30 O. S. 240, III Longsdorf's Notes, 526].

The phrase non-forfeitable in the name of a policy is controlled by a clause making it void for non-payment of premium: *Gates v.*

Insurance Co., 5 Dec. Rep. 313, 4 Am. L. Rec. 395.

If the policy contains no condition of forfeiture for non-payment of premium it is not forfeited by non-payment after the first premium, although the notes contain such condition in the absence of notice of maturity of the notes or demand of payment or notice of an election to forfeit on non-payment: *Insurance Co. v. Morrow*, 7 O. D. (N.P.) 118 [This point not in the decision on appeal *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419].

If a company claims that a policy has lapsed by non-payment of premium when due, and the assured claims a waiver of such forfeiture, equity has jurisdiction to determine the rights of the parties, and if the policy is in force to compel the company to receive premiums and issue renewal receipts: *Insurance Co. v. Tullidge*, 39 O. S. 240, III Longsdorf's Notes, 1023 [affirming *Tullidge v. Insurance Co.*, 8 Dec. Rep. 222, 6 Bull. 341].

Whether a company has waived its right to suspend its policy by its habit of receiving premiums after they had become due, is a question for the jury: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

The right of the beneficiary under a policy of life insurance to a paid-up term policy, after payment of three annual premiums, is not forfeited by a practical default of a subsequent premium for which notes were given in part, where a complete default would not have worked such a forfeiture, and especially where the partial payment of the premium in cash was more than sufficient to carry the policy beyond the death of the insured: *Kelsey v. Insurance Co.*, 10 O. L. R. 119, [refusing to follow, *Insurance Co. v. Buser*, 62 O. S. 385].

3. Waiver of Right of Forfeiture.

Where a company month after month collects premiums after they have become due, and on the 14th of January collects the monthly premium which became due November 1st, and on the 25th of the same month attempts to collect the premium which became due December 1st, and January 1st, but upon learning that the insured died on the preceding day refuses to accept the premium, and had given no notice to the insured of its intention to suspend or forfeit the policy, there is a very strong showing that the company had waived the right to suspend or forfeit the policy for non-payment, and it is error to direct a verdict for the company: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

A life company lending money on real estate and requiring the assured to take out life insurance as collateral security, and the policy contains no clause of forfeiture for non-payment of premium, though the notes have such clause, but the company gives no notice of their maturity or of an intent to forfeit, and renews the loan with premiums unpaid, it will be presumed that the company considers the policy as in force: *Insurance Co. v. Morrow*, 7 O. D. (N.P.) 118 [reversed, *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419].

While no amount of diligence will excuse non-payment of premium unless prevented by the company, yet if the assured, knowing the company's office hours, offered payment at the office during such hours, and could not pay because of the absence of anyone to receive payment, a judgment against the company can not be disturbed on this ground: *Insurance Co. v. Troy*, 20 O. C. C. 644, 10 O. C. D. 761 [affirmed, without opinion, *Life Association v. Troy*, 66 O. S. 675].

Taking a note for the premium waives a condition that the policy shall not be binding until "actual payment of the premium": *Little v. Insurance Co.*, 38 O. S. 110, III Longsdorf's Notes, 959 [affirming *Little v. Insurance Co.*, 5 Dec. Dep. 285, 4 Am. L. Rec. 228].

If an agent not authorized to waive a forfeiture for non-payment of premiums receives the overdue premium after the assured's death, giving an antedated receipt and transmits it, concealing the facts, the company, by receiving it in ignorance of the facts, does not ratify the act: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

4. Right to Paid-up Policy after Default.

A condition that on default after three years' premiums have been paid the policy shall, without surrender, but on paying all outstanding premium notes, become a paid-up term policy, payment of all such notes, though given after the three annual premiums were paid, is a condition precedent to becoming a paid-up policy: *Insurance Co. v. Buwer*, 62 O. S. 385, IV Longsdorf's Notes, 837.

An endorsement on a policy that a paid-up policy will be given is not an independent guaranty to give a paid-up policy, but must be construed with the policy: *Jander v. Insurance Co.*, 16 O. C. C. 536, 9 O. C. D. 462.

Where a policy provided that a paid-up policy would be given on demand on surrender of the policy while still alive, properly receipted, and the policy was payable to the wife, or, if she died, to the children, and after the insured's death, with premiums in

arrears, the wife claimed that he had demanded a paid-up policy of the agent, and had surrendered the policy but not receipted, and that as she was then alive, it could not be ascertained whether she or the children should have receipted, it was held that the agent could not waive the receipt, and that a receipt by her and a guardian of the children appointed for the purpose or by her alone was not excused: *Jander v. Insurance Co.*, 16 O. C. C. 536, 9 O. C. D. 462.

A clause giving a right to a paid-up policy after two premiums had been fully paid up, construed with a condition forfeiting the policy if a premium is not fully paid, limits the right to demand a paid-up policy to the time when the policy is in force: *Bussing v. Insurance Co.*, 34 O. S. 222, III Longsdorf's Notes, 710 [affirming *Bussing v. Insurance Co.*, 6 Dec. Rep. 607, 7 Am. L. Rec. 52, 7 Dec. Rep. 442, 3 Bull. 144].

Where premiums were to be partly cash and partly by note, under authority to loan part of the premium to the policy-holder, and in default of a cash premium or interest on the notes the policy was only to be good for part of the amount, and a default was made, it was held that the notes are a permanent loan to be paid out of dividends or deducted from the policy. Payment of the notes was not necessary to constitute payment of premiums. The amount due on the notes with annual interest, less dividends, is to be deducted from what is due on the policy. The right to future dividends is lost by forfeiture for non-payment of the cash premiums and interest on the notes: *Insurance Co. v. Bonner*, 36 O. S. 51, III Longsdorf's Notes, 830 [reversing *Bonner v. Insurance Co.*, 7 Dec. Rep. 207, 1 Bull. 293].

Annual premiums were payable part cash and part in notes in the policy, providing, (1) for forfeiture if the interest on outstanding premium notes was not paid. (2) After two premiums have been paid a paid-up policy would be given, notwithstanding a default in the payment of any subsequent premium. (3) If the policy becomes null all credits shall be forfeited to the company. Interest upon some of the premium notes being unpaid, the assured demanded a paid-up policy. It was held that under clauses 1 and 3 the policy was void and all credits forfeited to the company. Clause 3 did not apply to a default in interest: *Insurance Co. v. Robinson*, 40 O. S. 270, IV Longsdorf's Notes, 22 [reversing *Insurance Co. v. Robinson*, 4 Dec. Rep. 442, 2 Clev. L. Rep. 171].

A condition forfeiting the policy for default in any premium, but a paid-up policy will be issued if application is made within six months, being unambiguous is enforceable, and no paid-up policy can be required after six

months from the first default: *Jones v. Insurance Co.*, 10 Dec. Rep. 631, 22 Bull. 318.

An indorsement by the secretary on a forfeitable policy that if two payments are made while it is in force a paid-up policy will be given, is presumably authorized. Letters by the actuary, recognizing such action as usual with the company, are competent to show such authority: *Gates v. Insurance Co.*, 5 Dec. Rep. 313, 4 Am. L. Rec. 395.

5. Revivor after Non-payment of Premiums.

Where the policy contains the provision that "should this policy become void in consequence of non-payment of premiums, it may be revived if not more than fifty-two premiums are due, upon the payment of all arrears, and the presentation of evidence satisfactory to the company of the sound health of the insured," the company may rightfully refuse to accept four weeks' premiums on a policy forty-six days in arrears, an investigation having shown that the insured was far gone with consumption, his death having occurred seventeen days thereafter: *Insurance Co. v. Walton*, 4 O. C. C. (N.S.) 133, 15 O. C. D. 587.

6. Recovery of Premiums.

An action to recover insurance premiums alleged to be due and unpaid is not an action on an account, but is for money paid out at the request of the defendant: *Mead v. Cush*, 13 O. N. P. (N.S.) 470.

To constitute a consideration for the payment of premiums on a policy of life insurance, it is essential that the insurer incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy if the life insured should end: *Insurance Co. v. Felia*, 73 O. S. 46, IV Longsdorf's Notes, 998.

In an action to recover premiums paid to an insurer which has not incurred such risk, the rights of the parties at the beginning of the action should determine the judgment and the insurer can not by averments of its answer effectively waive such defense: *Insurance Co. v. Felia*, 73 O. S. 46, IV Longsdorf's Notes, 998.

A policy taken out by a wife on the life of her husband without his consent is absolutely void under a condition which provides that the policy is void unless the person on whose life it is taken consents thereto; and premiums paid upon such policy may be recovered if the person paying them was free from fraud: *Insurance Co. v. Felia*, 73 O. S. 46, IV Longsdorf's Notes, 998.

If an insurance company wrongfully declares the policy forfeited, and refuses to

accept the premium when duly tendered, and to give the insured the customary renewal receipt evidencing the continued life of the policy, the assured is, in equity, entitled to demand a rescission of the contract, and a return of the premiums paid thereon, with interest from the times of payment: *Insurance Co. v. Pottker*, 33 O. S. 459, III Longsdorf's Notes, 683.

If a policy is void *ab initio* for innocent misstatements in the application, the premiums paid may be recovered back: *Insurance Co. v. Pyle*, 44 O. S. 19, IV Longsdorf's Notes, 191.

Life policies for the benefit of a corporation, procured by the secretary and general manager on the lives of members of the board, without authority therefor by the board acting as a board, are void where the premiums are to be paid out of the company's treasury, and an action by the company will lie for the cancellation of such policies and recovery of the premiums paid: *Insurance Co. v. Schott*, 11 O. C. C. (N.S.) 401, 20 O. C. D. 656 [affirming *Schott v. Insurance Co.*, 7 O. N. P. (N.S.) 548, 19 O. D. (N.P.) 249].

A life insurance agent will be presumed to know that a corporation has no insurable interest in the lives of its directors, and an action will lie against the company for cancellation of the policies and recovery of the premiums paid: *Schott v. Insurance Co.*, 7 O. N. P. (N.S.) 548, 19 O. D. (N.P.) 249 [affirmed, *Insurance Co. v. Schott*, 11 O. C. C. (N.S.) 401, 20 O. C. D. 656; affirmed, without opinion, *Insurance Co. v. Schott*, 83 O. S. 507].

Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon without deduction for the expense of carrying the risk: *Insurance Co. v. Fuller*, 9 O. C. C. (N.S.) 441, 19 O. C. D. 415.

Generally the beneficiary of an insurance policy has a vested interest, and nothing can be done to prejudice such interest without his consent, but this principle does not apply to a beneficiary who is a minor, whose life has been insured and the premiums paid by another minor. The minor paying the premiums may avoid the contract and recover the premiums paid: *Insurance Co. v. Fuller*, 9 O. C. C. (N.S.) 441, 19 O. C. D. 415.

Where an insurance company which has not complied with the Ohio law requiring a license to do business, evades this requirement by issuing policies outside of the state on property located within the state, an action can not be prosecuted in the courts of the state for the recovery of premiums on such policies, but payment on a policy so

issued may be enforced within the jurisdiction of the state in which it was issued, and an action for recovery of premiums may be maintained within such state provided jurisdiction can be obtained over the person of the policy holder: *Casualty Co. v. Banking Co.*, 12 O. C. C. (N.S.) 200, 21 O. C. D. 428.

In a case, where a consolidated company rightly pleads that the obligation growing out of one of the options was *ultra vires*, a cause of action *quasi ex contractu* immediately arises in favor of the policy holder for recovery of premiums paid, and if the disaffirmance is wrongful, the insured may treat the contract as discharged, and sue at once for its breach, or for premiums paid, a right which is not affected by failure to pay further premiums: *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 16 O. C. D. 197 [reversed, without opinion, *Insurance Co. v. Hare*, 74 O. S. 466].

Failure of assured to make further payments of premiums under an *ultra vires* policy of insurance, can not result in any forfeiture of his right to recover from the company the premiums already paid: *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 16 O. C. D. 197 [reversed, without opinion, *Insurance Co. v. Hare*, 74 O. S. 466].

Where a wife insures the life of her husband without his consent or knowledge, and in her dealings with the company conceals this fact after she must have known that his consent was necessary, she is precluded from claiming that the premiums paid by her to the company were without consideration: *Marling v. Insurance Co.*, 6 O. L. R. 99.

The estoppel which precludes a party from recovering a premium paid in under an invalid policy, if the fraudulent conduct caused the issuing of the policy, is equally applicable when the fraudulent conduct takes place after the policy was issued and induces the insurance company to treat the policy as in effect: *Marling v. Insurance Co.*, 19 O. D. (N.P.) 55.

It was held by the circuit court that an insurance company could not be compelled to repay premiums which were paid by a wife upon a policy on the life of her husband, which was invalid because it was issued without his consent; the agent of an insurance company having represented to her that such policy was valid: *Brokamp v. Insurance Co.*, 16 O. C. C. 630, 8 O. C. D. 116.

There can be no apportionment or return of premium, if the risk has once commenced: *Fulton v. Insurance Co.*, 7 O. (pt. 2) 5, I Longsdorf's Notes, 383.

If a policy is merely voidable as for misrepresentation as to age, which is for the company's benefit, the insured can not recover

back the premiums paid: *Low v. Insurance Co.*, 41 O. S. 273, IV Longsdorf's Notes, 61 [affirming *Low v. Insurance Co.*, 6 Dec. Rep. 1088, 10 Am. L. Rec. 313, 8 Dec. Rep. 247, 6 Bull. 666].

The company's failure, on tendering back the money, to return premium notes which the forfeiture of the policy rendered uncollectible, will not affect its rights: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

A policyholder in a life insurance company defaulting in his premium payments is charged with constructive knowledge of fraud on the part of the company in misapplying its funds in speculation in stocks, payment of excessive salaries, etc., at the time he repudiated the contract, and the statute of limitations then began to run against an assignee of the policy suing to recover the premiums more than six years later: *Baumgarten v. Insurance Co.*, 7 O. L. R. 294.

A suit to rescind the policy and recover premiums based upon the wrongful refusal of an insurance company to receive further premiums or continue the policy in force, can not be maintained without the concurrence of the beneficiaries: *Insurance Co. v. Penn.*, 4 O. N. P. (N.S.) 97, 16 O. D. (N.P.) 375, 1 Hosea, 209.

It is the settled law of this state that the holder of a policy of life insurance induced by fraud and misrepresentation may, by an action brought in due time, recover from the insurance company the amount of premiums paid with interest thereon and without deduction for intervening insurance which he has not had and enjoyed: *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. ...].

7. Customs of Agents with Reference to Premiums.

Where a course of dealings has been pursued for several years between the agents of different insurance companies, whereby one calls upon the other to issue policies to his customers, which he does, and settlements are from time to time made between the two agents, when payment is made by the one to the other for policies so issued, the company issuing such policy will not be relieved from liability, because of the fact that payment of the premium has not been made to its agent, when the time for settlement between the two agents has not arrived, and when no demand for the payment of such premium has been made: *Insurance Co. v. Plato*, 3 O. C. C. (N.S.) 207, 13 O. C. D. 35.

Failure of the agent to call for the weekly premium, though such was the established custom of the company, does not waive a condition avoiding the policy if premiums are in arrears for four weeks. Both the policy and the pass-book stating that the agent's failure to call for the premium is not a waiver: *Meyer v. Insurance Co.*, 6 O. N. P. 34, 7 O. D. (N.P.) 573 [affirmed, on other points, *Meyer v. Insurance Co.*, 7 O. N. P. 480, 9 O. D. (N.P.) 596].

Where, by the terms of a policy of life insurance, the non-payment of the required annual premium, at the designated time, is declared to be a ground of forfeiture, but the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured. Where the insurance company, under such circumstances, with a view to avoid the policy, gives private instructions to the local agent not to give such customers notice to the insured, and not to call on him, as usual, for the payment of the premium, no right to declare the policy forfeited arises from a default in payment caused by such strategy and bad faith: *Insurance Co. v. Pottker*, 33 O. S. 459, III Longsdorf's Notes, 683.

Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of dividends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof a premium is not paid at the time specified in the policy, the company can not set up such failure to pay as a defense to a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200.

A company which had not disapproved of previous similar credits by its agents to the assured is estopped to deny authority of an agent to give him a sixty-days' credit for payment of premium: *Krumm v. Insurance Co.*, 40 O. S. 225, IV Longsdorf's Notes, 20; *Insurance Co. v. French*, 30 O. S. 240, III Longsdorf's Notes, 526.

If the policy provides that no agent except president and secretary can waive a forfeiture for non-payment of premiums, the company may, nevertheless, expressly or impliedly give an agent such authority, but empowering him to collect premiums does not do so: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

If an agent gives time to pay the premium without authority to do so, and the company charges the agent with the amount, this waives a condition that the policy is not binding until actual payment: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

A stipulation that agents have no authority to waive forfeitures for non-payment of premiums is controlled by a course of business in giving effect to overdue payments until notice that in future they would not be received: *Insurance Co. v. Tullidge*, 39 O. S. 240, III Longsdorf's Notes, 1023 [affirming *Tullidge v. Insurance*, 8 Dec. Rep. 222, 6 Bull. 341].

If a policy was to become void on non-payment of the premium note, and the note was sent to A for collection, who wrote "continue the policy in force and we will guarantee the payment of the note," to which the company made no reply, although it wrote other letters to him, it was held that A's letter did not by necessary implication call for a reply, if the company assented thereto, accordingly, the question of assent should have gone to the jury: *Fry v. Insurance Co.*, 40 O. S. 108, IV Longsdorf's Notes, 8.

E. DISCRIMINATION AND REBATES.

An answer in an action on notes given for life insurance, which alleges that (1) the notes were executed on an express agreement that they should be discounted with a certain brokerage firm of which the insured was a member and brokerage allowed such firm, otherwise the insurance should be void and the policy canceled; (2) that upon notice of failure to carry out said brokerage agreement, the policy was returned to the agent, cancellation demanded and return of the notes requested; and (3) that the insured became the beneficiary of a rebate, which was illegal and contrary to G. C., § 9404, is defective in that it fails to bring the insured within the terms of the statute so as to invalidate the notes or make them fail for want of consideration: *Dailey v. Chappell*, 12 O. C. C. (N.S.) 561, 21 O. C. D. 509.

It is within the discretion of the superintendent of insurance to refuse a license as agent of a foreign life insurance company to one who, in violation of the statute, has, without first obtaining such license, solicited

applications for insurance in such company, and, as a part of such solicitation, has offered a rebate of a portion of the regular premium: *Vorys v. State, ex rel.*, 67 O. S. 15, IV Longsdorf's Notes, 923.

G. C., § 9404, does not declare that the policy itself is invalid: *Tillinghast v. Craig*, 17 O. C. C. 531, 9 O. C. D. 459.

A note which is given on a rebate is invalid unless in the hands of a *bona fide* holder: *Tillinghast v. Craig*, 17 O. C. C. 531, 9 O. C. D. 459.

F. INSURABLE INTEREST.

1. In General.

A man may cause his own life to be insured for the benefit of a stranger and the want of insurable interest in the stranger will not invalidate the policy: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

A policy taken out by a man for his own benefit on the life of a stranger is void for want of insurable interest: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

The word "stranger" as used in *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517, having reference to insurable interest, includes a brother; and a policy of insurance taken out on the life of a brother who is in good health, is younger than the assured, does not depend upon him, and has no knowledge of the issuance of the policy, is not saved from the inhibition as to wagering contracts by the allegation that the purpose in taking out the policy was to provide a fund for the burial of the insured in case of his death: *Newmore v. Insurance Co.*, 8 O. C. C. (N.S.) 308, 18 O. C. D. 669.

A brother has no insurable interest in the life of a younger brother on whom he is not dependent: *Newmore v. Insurance Co.*, 8 O. C. C. (N.S.) 308, 18 O. C. D. 669.

Where one makes application for a policy of insurance on her life and names her sister as beneficiary, and a policy is issued in accordance with the application and premiums are collected thereon, the company is estopped in the event of the death of the insured from denying that the sister who was named as beneficiary had an insurable interest in the life of the insured: *Baker v. Insurance Co.*, 5 O. N. P. (N.S.) 383, 18 O. D. (N.P.) 426.

A grandfather has an insurable interest in the life of his grandson. The test is a degree of relationship which would constitute a good consideration for a gift: *Hilliard v. Sanford*, 4 O. N. P. 363, 6 O. D. (N.P.) 449.

A brother or sister may be made the beneficiary of insurance procured by a man on his own life. G. C., § 9393, permitting a man to insure for his wife's benefit free from creditors does not exclude this: *In re Address*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

A child may have an insurable interest in the parent's life: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517; *Shaddinger v. Insurance Co.*, 11 Dec. Rep. 892, 30 Bull. 337.

A person who is taking out insurance on his own life payable to his estate may transfer such policy to a third person having no insurable interest in his life: *Eckle v. Renner*, 41 O. S. 232, IV Longsdorf's Notes, 58. [The assignment in this case was without valuable consideration.]

The opposite result was reached in which the case was for value; and it was held that the assignment for value could not be made unless the assignee had an insurable interest: *Evans v. Moore*, 7 O. C. C. (N.S.) 123, 18 O. C. D. 1.

Only those having an insurable interest in the life of the insured can become beneficiaries under a policy either by assignment or otherwise. The case of *Eckle v. Renner*, 41 O. S. 232, IV Longsdorf's Notes, 58, though treated in the text-books as authority *contra*, is not decisive of that question, and the court, in the present case, on reason, good conscience and public policy, and in view of the square conflict in the rulings of the courts in the various states, prefers to follow the federal courts: *Evans v. Moore*, 7 O. C. C. (N.S.) 123, 18 O. C. D. 1.

In life insurance it is sufficient that at the time the policy was issued there was a relation existing entitling the party to be a beneficiary, and nothing occurring afterwards (in this case divorce and subsequent remarriage) will terminate her interest in the policy: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

A firm of two partners borrowed money from a life company on mortgage on their store building, and for further security insured their lives each for the benefit of the other for \$10,000. On death of one the company paid \$10,000 to the other, and the executrix seeks to recover half thereof. It was held, that it appearing that each paid his own premium, and that each got his insurance in consideration of the other doing likewise, the intention was that the survivor should get the fund and not the estate, and this intent governs and the executrix can not recover: *Dyas v. O'Neil*, 2 O. N. P. 81, 3 O. D. (N.P.) 309.

2. Corporation in Lives of Directors and Employees.

A corporation has not an insurable interest in the life of a director who is not indebted to the corporation: *Insurance Co. v. Schott*, 11 O. C. C. (N.S.) 401, 20 O. C. D. 656 [affirming *Insurance Co. v. Schott*, 7 O. N. P. (N.S.) 548, 19 O. D. (N.P.) 249, and affirmed without opinion, in *Insurance Co. v. Schott*, 83 O. S. 507].

Where a person is the owner of a large portion of the stock of a corporation, and by reason of his skill and experience he is largely relied upon to make the business of the corporation a success, and when, in borrowing money of banks and in dealing with creditors, and in inducing other persons to buy stock in such corporation, he represents that he has insured his life for the benefit of the corporation and that the policies therefor are assets of the corporation, such facts disclose an insurable interest in the corporation, and such insured person and his legal representatives are estopped from claiming that such policies are not based upon an insurable interest, or that the amounts due thereon do not belong to the corporation: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 675, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665].

G. C., §§ 9393, 9395 and 9396, do not prohibit a person from insuring his own life for the benefit of persons other than his wife and children: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 675, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665].

Where a life insurance company makes no defense, and pays the amount of its policy into court to abide the judgment of the court as between conflicting claimants, parties claiming an interest in the fund will not be allowed to object that the beneficiary named in the policy has no insurable interest: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 675, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665].

One who has obtained a valid insurance upon his life, may dispose of it as he sees fit, in the absence of prohibitory legislation or contract stipulations. It is immaterial, in such case, that the assignee has no insurable interest: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 675, and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665; ap-

proving and following *Eckel v. Renner*, 41 O. S. 232, IV Longsdorf's Notes, 58].

3. Widows and Children.

G. C., § 9397, treats a married woman as a *feme sole* in respect to policies of insurance taken out in her name on the life of her husband. Such policies become her separate property, and are placed beyond the reach of her husband or his creditors: *Insurance Co. v. Applegate*, 7 O. S. 292, II Longsdorf's Notes, 298.

A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of G. C., §§ 11102, *et seq.* In such case the only remedy of the creditor is found in the provisions of G. C., § 9395: *Lytle v. Baldinger*, 84 O. S. 1.

If a policy is issued to a married woman for a certain amount upon the life of her husband payable to her, her executors, administrators or assigns, and in case of her death before that of her husband, the insurance is to be payable to their children, the insured to be entitled to a paid up policy for two-twentieths of the sum originally insured after two annual premiums were paid, it was held that if she died before two annual premiums were paid, and the company recognized the husband as the real beneficiary, and accepted the premiums from him, the insurance company would be estopped to deny his right subsequently to demand a paid up policy after he had paid nine premiums: *Insurance Co. v. Hamilton*, 41 O. S. 274, IV Longsdorf's Notes, 61.

If the policy shows upon its face that it was obtained by a married woman upon her husband's life, and that she paid the premiums therefor, it is *prima facie* her property; and as such is not affected by G. C., §§ 9393 to 9396: *Weber v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

If a policy is made payable to a married woman upon her husband's life, the fact that she is subsequently divorced does not of itself defeat her rights under the policy: *Overhiser v. Overhiser*, 63 O. S. 77, IV Longsdorf's Notes, 849.

A policy of life insurance upon the life of a husband issued upon the joint application of the husband and wife was made payable to the wife. Upon the death of the husband, the wife received such money and invested it. At no time did she own any other property. At a time when a married woman could charge only her separate estate, she executed a written instrument together with her husband for the payment of money.

It was held that her interest in such policy at the time that she executed such written instrument could not be regarded as property which she could charge with such debt; and that accordingly such debt could not be enforced against the proceeds of such policy: *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872.

G. C., § 9397, is not retroactive, and does not apply to policies which were issued before it was enacted: *Plaut v. Insurance Co.*, 4 O. C. C. (N.S.) 94, 16 O. C. D. 499 [affirmed, without opinion, *Plaut v. Insurance Co.*, 65 O. S. 586].

The proceeds of a policy issued by a Massachusetts company, which by Massachusetts law were to be paid to the beneficiary and not to the creditors, must be so paid in Ohio: *In re Andres*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

G. C., § 9397, was said to be declaratory of the pre-existing law and not remedial: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

4. Wife Insuring Life of Husband.

If a life insurance policy is taken out and premiums paid by the assured, and the policy made payable at his death to his wife, and in case of her decease during his lifetime to her children by him, in such case, if all the beneficiaries named in the policy die before the death of the assured, such policy reverts to the assured, and at his death becomes subject to administration and bequest the same as his other personal estate: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

A policy of life insurance is not assignable by a married woman under G. C., § 9398, for the reason that this clause has relation to a married woman simply, and without any qualifying words expressing the assignor's intention, and operates to fix upon such assignment a presumptive intention to make provision for a married woman and her children jointly: *Reakirt v. Besuden*, 3 O. N. P. (N.S.) 646, 16 O. D. (N.P.) 697, 1 Hosea, 159 [affirmed, without opinion, *Besuden v. Reakirt*, 73 O. S. 383].

An assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use, and is valid under the second clause or exception of the statute: *Reakirt v. Besuden*, 3 O. N. P. (N.S.) 646, 16 O. D. (N.P.) 697, 1 Hosea, 159 [affirmed, without opinion, *Besuden v. Reakirt*, 73 O. S. 383].

A husband and wife made application for insurance upon the life of each for the benefit of the other. The insurance company without authority erased the name of the

husband from the wife's application and made such policy payable to their children. The parties could not read English. It was held that the proceeds of such policy should be paid in accordance with the original intention of the parties: *Fuss v. Kramer*, 11 Dec. Rep. 85, 24 Bull. 400.

G. C., § 9393, and the following sections apply to policies issued by foreign insurance companies: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

The policy of insurance purporting on its face to have been effected by a married woman on the life of her husband, wherein the company, in consideration of an annual premium duly paid by the wife and of like annual premiums to be paid by her during the continuance of the policy, or until ten full premiums have been paid, agrees to insure the life of the husband for the sole use of the wife to be paid her at his decease, and if not living then to her children for their use, is *prima facie*, the sole property of the wife, and as such is not affected by G. C., § 9393: *Loper v. Paxton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

G. ASSIGNMENT.

One to whom a life insurance policy has been pledged as security may pay the premiums thereon, and may enforce such premiums as against the proceeds of the policy: *Reakirt v. Besuden*, 3 O. N. P. (N.S.) 646, 16 O. D. (N.P.) 697, 1 Hosea 159 [affirmed, without opinion, *Besuden v. Reakirt*, 73 O. S. 383].

A policy of life insurance is not assignable by a married woman under G. C., § 9398, for the reason that it has relation to a married woman simply, and without any qualifying words expressing the assignor's intention, and operates to fix upon such assignment a presumptive intention to make provision for a married woman and her children jointly. But an assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use, and is valid under the second clause or exception of the statute: *Reakirt v. Besuden*, 3 O. N. P. (N.S.) 646, 16 O. D. (N.P.) 697, 1 Hosea, 159 [affirmed, without opinion, in *Besuden v. Reakirt*, 73 O. S. 383].

A transfer by an insolvent to his wife and children of policies of life insurance, made payable to his estate, is in fraud of creditors and may be set aside, and the policies ordered paid to his administrator or to a trustee for the benefit of his creditors: *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305.

If a married man has taken out a policy of insurance payable to himself and has paid the premium thereon, his assignment thereof to his wife, with intention to defraud his creditors is voidable at the option of such creditors: *Child v. Graham*, 8 Dec. Rep. 294, 7 Bull. 43.

An assignment to a person having no insurable interest in the life by one who had a policy on his own life for his own benefit, and no family—as where he assigned it to the infant daughter of a friend and delivered it to her father for her—is valid, and her guardian may recover the fund from the assured's administrator, to whom it had been paid: *Eckel v. Renner*, 41 O. S. 232, IV Longsdorf's Notes, 58.

Assignment by one of the distributees after action begun on the policy is not a breach of the clause forbidding assignment: *Insurance Co. v. Jordan*, 6 Dec. Rep. 1145, 10 Am. L. Rec. 625, 8 Dec. Rep. 313, 7 Bull. 71.

An endowment policy on a married woman's life, payable in fifteen years, or at death, to her husband if he survive her, but if she is alive, then to her, and if both are dead, to her children, is assignable by her after her husband's death, but before the fifteen years have expired: *Windhorst v. Wilhelms*, 1 O. C. C. 28, 1 O. C. D. 17.

Sending the accident ticket without signing the blank assignment is not assigning it, and the administrator properly sues: *Insurance Co. v. Jordan*, 6 Dec. Rep. 1145, 10 Am. L. Rec. 625, 8 Dec. Rep. 313, 7 Bull. 71.

A clause forbidding assignment of a life policy does not refer to assignments after loss. It is not different from other policies: *Lee v. Insurance Co.*, 12 Dec. Rep. 109, 1 H. 217.

G. C., § 9398, must be construed together with G. C., §§ 9394, *et seq.*, and 11034; and it was not intended to dispense with the good faith of such assignment: *Child v. Graham*, 8 Dec. Rep. 294, 7 Bull. 43.

G. C., § 9398, is not retroactive, and does not apply to insurance policies issued before it was enacted: *Plaut v. Insurance Co.*, 4 O. C. C. (N.S.) 94, 16 O. C. D. 499 [affirmed, without opinion, *Plaut v. Insurance Co.*, 65 O. S. 586].

Where a policy of life insurance was issued in Michigan, the residence at that time of both the assured and his wife who was made beneficiary, and an assignment of the policy was afterward made in Michigan to a resident of Michigan, and the assured died in Michigan, and the policy is still held there, and suit has been brought upon it by the assignee in the federal court in that state, an action brought in this state by the beneficiary, who is now a resident here, will be dismissed without prejudice

for failure to make a *bona fide* effort to bring in the assignee of the policy as a party to the action, and she will be remanded to the Michigan forum for a determination of her rights: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694, and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

One who has obtained a valid insurance upon his life, may dispose of it as he sees fit, in the absence of prohibitory legislation or contract stipulations. It is immaterial, in such case, that the assignee has no insurable interest: *Keckley v. Glass Co.*, 86 O. S. 213 [affirming *Glass Co. v. Insurance Co.*, 13 O. C. C. (N.S.) 240, 21 O. C. D. 676 and *Insurance Co. v. Glass Co.*, 13 O. C. C. (N.S.) 229, 21 O. C. D. 665; approving and following *Eckel v. Renner*, 41 O. S. 232, IV Longsdorf's Notes, 58].

A transfer of life insurance in payment of a debt arising out of transactions in stock on margins is void at common law and under the statutes of Ohio, and can be set aside at the suit of the assignee for the benefit of creditors; a proceeding under G. C., § 11106, by a creditor is not necessary: *Wachtel v. Campbell*, 21 O. C. C. 731, 12 O. C. D. 148. See also GAMBLING.

H. BENEFICIARY.

1. In General.

If an insurance company makes the policy payable to a person different from the one named in the application, and the insured being unable to read does not know of such mistake, the person named in the application is entitled to the proceeds of the policy: *Fuss v. Kroner*, 11 Dec. Rep. 85, 24 Bull. 400.

The concurrence of the beneficiaries is a condition precedent to valid action on the part of the insured in the nature of treating a contract of life insurance as rescinded and basing thereon a suit for recovery of premiums paid; nor can a suit, without the concurrence of the beneficiaries, be based upon the wrongful refusal of the company to receive further premiums or continue the policy in force: *Insurance Co. v. Penn*, 4 O. N. P. (N.S.) 97, 16 O. D. (N.P.) 375, 1 Hosea, 209.

G. C., § 9393, is said to apply to a case in which the husband effected the insurance, but the wife paid the premiums with her own money; and the policy was made payable to the husband: *Jacob v. Insurance Co.*, 13 Dec. Rep. 696, 1 C. S. C. R. 519.

The beneficiary of a life insurance policy can not recover thereon where the death of

the assured is caused by the intentional and felonious act of such beneficiary: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

When a husband, acting as the agent of his wife, takes out in her name, and for her sole use, a policy of insurance on his life, from a company whose charter makes such policy the exclusive property of the wife, and exempts its proceeds from liability for the husband's debts, the wife is, as to such policy, to be regarded as a *feme sole*: *Insurance Co. v. Applegate*, 7 O. S. 292, II Longsdorf's Notes, 298.

A took out life insurance payable to his mother, her executors, administrators or assigns. She having died he claimed the right to name himself as beneficiary. The company declining to say whether this could be done, A brought suit for breach of contract to recover premiums paid. It was held that the policy did not revert to A. Even if this is not so the company can not be called upon to declare the legal effect of A's claim: *Gass v. Insurance Co.*, 3 O. N. P. 216, 4 O. D. (N. P.) 234 [affirmed, without opinion, *Gass v. Insurance Co.*, 59 O. S. 626].

A and B, husband and wife, agreed to take a policy on the life of each for the other's benefit. The policy on B's life was made to her children, and he paid premiums for six years on it, without knowing he was not the beneficiary, being unable to read English. It was afterwards transferred to him as trustee, and he receipted for the money as trustee. It was held that he is entitled to it in his own right: *Fuss v. Kroner*, 11 Dec. Rep. 85, 24 Bull. 400.

The proceeds of a policy of life insurance are payable to the extent of his claim to an assignee of the policy without delivery, in preference to a subsequent assignee in whose possession the policy was placed: *Banking Co. v. Assurance Society*, 10 O. C. C. (N.S.) 396.

As the law stood in 1876, a contingent interest of a married woman in an insurance policy on the life of her husband, at the time she, with her husband, executed a written instrument acknowledging the loan of a sum of money which they promised to repay, did not constitute her separate property, chargeable in equity with the payment of that instrument; nor did the money thereafter collected on the policy, by relation, become so chargeable: *Sticken v. Schmidt*, 64 O. S. 355, IV Longsdorf's Notes, 872. See also HUSBAND AND WIFE.

2. Beneficiary in Event of Death of Wife.

If a life insurance policy is taken out and premiums paid by the assured, and the

policy is made payable at his death to his wife, and in case of her decease during his lifetime to her children by him, in such case, if all the beneficiaries named in the policy die before the death of the assured, such policy reverts to the assured, and at his death becomes subject to administration and bequest the same as his other personal estate: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

A caused his life to be insured and paid all premiums, and had the policy made payable to his wife, and in case of her death, to her children by him. A had only one child, a daughter, by his wife, and the daughter married and had one child, a son. The wife, daughter and son all died in the order named before the death of the assured. Afterwards, A died leaving two daughters by a former wife, and the husband of the deceased daughter surviving him. In a contest over the insurance money, between the administrator of A and the administrator of the deceased daughter and of the deceased son, it is held that the administrator of A is entitled to the insurance money: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

A policy of insurance on the life of a husband, taken out by his wife in 1869, and payable at his death to her or to "their children," lapses to him and his child by a previous marriage, at her prior death without issue by the present marriage, and her child by a former marriage does not participate: *Rothert v. Insurance Co.*, 1 O. N. P. (N.S.) 6.

The proceeds of a policy of life insurance procured by a husband on his life payable to his wife, her executors, administrators or assigns, and in case of her death to her children, upon the death of the wife before the husband, leaving three children surviving her, and later the death of one of these children, before his father, and leaving a child surviving him, are payable to the two surviving children of the assured upon the death of the father; and neither the administrator of the deceased son, nor his daughter, take under the policy: *Frank v. Bowman*, 1 O. S. U. 407, 35 Bull. 59.

G. C., § 9399, is not retroactive, and does not apply to an insurance policy issued before it was enacted: *Plaut v. Insurance Co.*, 4 O. C. C. (N.S.) 94, 16 O. C. D. 499 [affirmed, without opinion, *Plaut v. Insurance Co.*, 65 O. S. 586].

The term "legal heirs" in a policy issued to one who has neither wife nor children means those who would take under the statutes of descent and distribution: *In re Andres*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

A took insurance on his life in favor of his wife and children by her, payable, in case of the death of the "beneficiary" before him, to his heirs or assigns. He had a son by her who died before him, then he died, and his wife died last, but, before collecting the policy. The contest is between A's child by a former marriage and the wife's administrator. It was contended that an interest vested in the son, and on his death it ascended to A; also that the insurance was a gift to the wife and therefore descended as non-ancestral property to S's child, but it was held that the wife's administrator takes to the exclusion of the husband's child: *Lounsbury v. Richardson*, 36 Bull. 59 [without opinion in supreme court].

Where A took out a life policy for the benefit of his wife and child, containing a provision that on the death of the beneficiary before maturity, it should go to the heirs of the person whose life is insured, and the child died first, and then A, and then the wife, A or his heirs do not take the child's share, but the widow as surviving beneficiary took the fund. The fund is not a gift from the husband to the wife, under G. C., § 8577, so as to let in his heirs for one-half on her death intestate, because it did not come immediately from him but indirectly through the insurance company: *Richardson v. Michener*, 11 Dec. Rep. 830, 30 Bull. 120.

A policy on A's life issued to C, his wife, payable to her, "her executors, administrators or assigns," and in case of her death first, then to their children, and on surrender after two annual premiums a paid-up policy would be issued, and C died the same year childless, and A paid premiums for eight years and then demanded a paid-up policy, it was held that (1) as C died before paying two premiums, her administrator had no right to a paid-up policy; (2) the company having for eight years afterwards treated A as the beneficiary, it is estopped to deny his right to sue in his own name as beneficiary: *Insurance Co. v. Hamilton*, 41 O. S. 274, IV Longsdorf's Notes, 61.

An assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use, and is valid under the second clause or exception of G. C., § 9399: *Reakirt v. Besuden*, 3 O. N. P. (N.S.) 646, 16 O. D. (N.P.) 697, 1 Hosea, 159 [affirmed, without opinion, *Besuden v. Reakirt*, 73 O. S. 383].

3. Affected by Acts of Assured.

An attempt by the husband of the beneficiary, without knowledge of the wife, to

surrender the policy to the company, is inoperative, and the rights of the wife are not thereby impaired: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200.

If an insurance company has sent the notices to the insured (the husband of the beneficiary) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for the wife; but where it is shown to the company, by letters from the husband, very shortly after notice sent, that he and the wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed and made payable to his estate, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her, or of making a surrender of the policy: *Insurance Co. v. Smith*, 44 O. S. 156, IV Longsdorf's Notes, 200.

Where a policy of insurance is issued in the ordinary form, even although it be made with the wife as beneficiary, for the wife to be paid a certain sum upon the death of her husband, she has a right in that policy which can not be cut off by the admissions of the husband: *Foxeher v. Order of Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56.

If representations in regard to the condition of his health are made by the husband, in his application for the policy, which, by the terms of the policy, are made part thereof, the subsequent declarations of the husband, made pending his unauthorized negotiations for the surrender of the policy, and tending to show the false or fraudulent character of the representations upon which the policy issued, are not competent evidence in a suit brought by the wife upon the policy after the husband's death: *Insurance Co. v. Applegate*, 7 O. S. 292, II Longsdorf's Notes, 298.

A policy of insurance upon the life of C was issued on the joint application of himself and wife, for her sole benefit. In answer to a question in the application, C stated that he had had no sickness or disease during the seven years then last past. It was stipulated in the policy that if the statements in the application were not in all respects true, the policy should become void. It was held that in an action by the wife upon the policy, the declaration of C, made prior to the application, and tending to show that said statement was, to his knowledge, untrue, are incompetent: *Insurance Co. v. Cheever*, 36 O. S. 201, III Longsdorf's Notes, 840.

An insurance policy was issued upon the life of a man payable to him after a certain number of years, if he lived so long, but

otherwise payable to his wife. Subsequently by agreement with the insurance company, he gave a note for a premium which contained provisions for a forfeiture more burdensome than those contained in the original policy. Such forfeiture clause was without legal effect as against the rights of the wife: *Insurance Co. v. Buær*, 62 O. S. 385, IV Longsdorf's Notes, 837.

If insurance is made payable to a married woman, the fact that she is subsequently divorced from her husband does not of itself destroy her rights under such policy: *Overhiser v. Overhiser*, 63 O. S. 77, IV Longsdorf's Notes, 849.

When the insured, under a policy by which the beneficiary could be changed by written notice to the company at its home office accompanied by the policy, the change to take effect upon the indorsement thereof on the policy by the company, undertook to change the beneficiary and did all that he could to accomplish that result, and forwarded to the company due notice, but died before the company had approved such change of beneficiary, the attempted change was not effected, and the original beneficiary is entitled to the money payable under said policy, there being no evidence that the company had in any manner waived the provision in the policy respecting the change of beneficiary: *Douglas v. Insurance Co.*, 11 O. N. P. (N.S.) 513, 21 O. D. (N.P.) 516.

The consent of the company is required to effect a change of beneficiary under a policy of insurance, issued by a regular life insurance company, which provides that, subject to the approval of the company, the insured may at any time during the continuance of the policy change the beneficiary by written notice to the company at its home office, accompanied by the policy, such change to take effect on the indorsement of the same on the policy by the company: *Douglass v. Insurance Co.*, 11 O. N. P. (N.S.) 513, 21 O. D. (N.P.) 516.

4. Meaning of Legal Representatives.

The words "legal representatives," in their strict technical sense, mean executors or administrators, but these words appearing in a life insurance policy may be shown, by the context and surrounding circumstances, to mean "heirs or next of kin": *Hague v. Hague*, 11 O. C. C. (N.S.) 406, 20 O. C. D. 628 [affirmed, without opinion, *Hague v. Hague*, 81 O. S. 488].

I. EXEMPTION FROM CLAIMS OF CREDITOR.

1. Policy.

If a life insurance policy is taken out and premiums paid by the assured, and the

policy made payable at his death to his wife, and in case of her decease during his lifetime to her children by him, in such case, if all the beneficiaries named in the policy die before the death of the assured, such policy reverts to the assured, and at his death becomes subject to administration and bequest the same as his other personal estate: *Ryan v. Rothweiler*, 50 O. S. 595, IV Longsdorf's Notes, 517.

In a suit brought against the company, by the widow of an insured person, upon a policy in which she is named as the beneficiary, in a court in the state where such company is located, and in which suit by direction of the court, the company brings into court a sum of money sufficient to satisfy the amount due on the policy, and obtains an order requiring the administrator, resident of Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of copy of such order, and of citation upon such administrator, does not give the court jurisdiction of his person, and (there being no appearance nor other service on such administrator) a judgment in the action purporting to debar him from any claim or right as against such widow is, as to him, void: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

A policy of insurance purporting on its face to have been effected by a married woman on the life of her husband, wherein the company, in consideration of an annual premium duly paid by the wife and of like annual premiums to be paid by her during the continuance of the policy, or until ten full premiums have been paid, agrees to insure the life of the husband for the sole use of the wife, to be paid her at his decease, and if not living then to her children for their use, is *prima facie*, the sole property of the wife, and as such is not affected by G. C., § 9393. The fact that the premiums have been paid by the husband is not sufficient of itself, to overcome the legal effect of the terms of the contract. Where creditors of the husband seek to obtain satisfaction of their claims from the proceeds of such policy, they must establish, not only that the husband was insolvent at the time of his decease, but that such payments or some of them, were made in fraud of the rights of existing creditors. Such fraud will not be presumed from the fact that, during the time of the payment of premiums the insured made an assignment for the benefit of creditors, it appearing further, that he thereafter settled with all his creditors and continued business until his decease twelve years after the assignment and seven years after the payment of the last premium, and

that existing debts were all incurred a few weeks before his decease: *Weber v. Pawton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

Statutes like G. C., § 9394, being for the benefit of the family of the insured are in accordance with public policy and are construed liberally: *Richardson v. Michener*, 11 Dec. Rep. 830, 30 Bull. 120.

An insurance policy issued by a Massachusetts company operating on the assessment plan, which under Massachusetts law is payable to the beneficiaries and not to the creditors of the insured, is payable in a like manner in Ohio: *In re Andres*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

A debtor is under no legal obligation to insure his life for the benefit of creditors; and the statutory provision for the return to the debtor's estate of all the money used in the purchase of insurance gives to the creditor everything to which he is entitled or which he could have reached by any process of law: *Lytle v. Baldinger*, 84 O. S. 1 [affirming, *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of G. C., §§ 11104, *et seq.* In such case the only remedy of the creditor is found in the provisions of G. C., § 9395: *Lytle v. Baldinger*, 84 O. S. 1 [affirming, *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

The term "legal heirs," if used in the policy issued to one who has no wife or children, means those who would take under the statutes of descent and distribution: *In re Andres*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

A creditor applied for a policy on the debtor's life as security and paid the premiums. The policy was made payable to the debtor's estate, the agent saying this was sufficient. It was held that the creditor has a right to show the facts: *Rudeshauer v. Insurance Co.*, 18 O. C. C. 609, 10 O. C. D. 258.

Whether life or beneficial insurance exceeds the amount exempt from creditors under G. C., §§ 9394 and 11722, must be determined by considering each policy alone, and not by adding the premiums on all: *Hinsch v. D'Utassy*, 1 O. D. (N.P.) 372.

Only the annuity payable to an insured, under a policy of life insurance is subject under the laws of Ohio, to the claims of creditors in the event the insured passes through bankruptcy; the present value of the face of such a policy, made payable to the wife of the bankrupt, is exempt from

the claims of his creditors: *In re Schaefer*, 9 O. L. R. 357.

2. Premiums Paid in Fraud.

If the face of the policy shows that it was obtained by a wife upon her husband's life, and that she paid the premiums, it is *prima facie* her property; and as such is not affected by G. C., §§ 9393 to 9396: *Weber v. Pawton*, 48 O. S. 266, IV Longsdorf's Notes, 413.

A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of G. C., §§ 11102 *et seq.* In such case the only remedy of the creditor is found in the provisions of G. C., § 9395: *Lytle v. Baldinger*, 84 O. S. 1 [affirming, *Lytle v. Insurance Co.*, 5 O. N. P. (N.S.) 28, 17 O. D. (N.P.) 305].

G. C., § 9395, applies to a policy issued by a foreign insurance company as well as to one issued by a domestic insurance company: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

See to the same effect, *Carnegie Bros. v. Railway*, 1 O. N. P. 300, 3 O. D. (N.P.) 343.

An earlier form of G. C., § 9395, exempted insurance up to an amount for which the annual premium would be one hundred fifty dollars; and the excess over such amount could be reached by the creditors: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

Under the same statute, see also, 38 Bull. 239. (Editorial note; case in circuit court.)

Under G. C., § 9395, each policy was to be regarded as separate; and the amounts on one or more policies could not be added together: *Hinsch v. D'Utassy*, 1 O. D. (N.P.) 372.

An assignment of an insurance policy is voidable if made with intention to defraud the creditors: *Child v. Graham*, 8 Dec. Rep. 294, 7 Bull. 43.

J. AGENTS.

Where it is agreed between a life insurance agent and another that a commission shall be paid to him on the "first installment of premium" received from one recommended to the agency by him, the contract will be construed to mean that a commission is to be paid on the first annual premium paid, where it appears that the minds of the parties met on that basis: *Connelly v. Pickard*, 4 O. N. P. (N.S.) 294, 17 O. D. (N.P.) 116.

A contract of the character involved in this case, entered into between the general agent

of a life insurance company and one who is to serve under him, who is identified in the contract as "agent," is a contract with the general agent acting in his individual capacity, and is not one upon which the company is jointly liable: *Bigger v. Insurance Co.*, 8 O. N. P. (N.S.) 27, 19 O. D. (N.P.) 704.

The provisions of G. C., § 644, making it unlawful for one not duly authorized by the insurance company and licensed by the superintendent of insurance to procure, receive or forward applications for insurance in any company, are not applicable to a contract between an agent and one recommending a risk to pay a commission therefor: *Connelly v. Pickard*, 4 O. N. P. (N.S.) 294, 17 O. D. (N.P.) 116.

Where it is undisputed that a life insurance company is a stock company, the fact that the impression was conveyed by its agents that it was doing a mutual business, and that the policy-holders who elected to take participating contracts had written in their contracts that they should share in the profits "as apportioned by the company," does not transform the company into a mutual company, or make even the participating contracts mutual insurance contracts, or estop the company from treating the surplus fund as belonging to the stockholders: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

In an action by an insurance agent against his company for breach of contract of employment, by which he was to be allowed a commission on business secured, without any allowance for expenses, such agent can not prove as part of the damages for the breach, any expenses he was put to in conducting the business: *Jakowenko v. Life Association*, 21 O. C. C. 199, 11 O. C. D. 576.

Where a contract with an agent provides that he shall procure a fixed amount of business annually, and the contract is in force for a year and a half, it is error to instruct the jury that the annual average can be obtained by taking into the account the proportion of the second year during which the contract was in force: *Jakowenko v. Life Association*, 21 O. C. C. 199, 11 O. C. D. 576.

A limitation of the authority of agents, endorsed on the policy and on notices and receipts sent to the policy-holder, are not available to the company as a defense, where the policy-holder opened negotiations with the company direct and dealt with one who was termed "manager": *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. —].

Where the agent of a life insurance company, having knowledge that a policy has been issued on an application made through him, visits the insured and collects the first premium, but finding the insured complaining of being ill delays delivery of the policy but retains the premium, and in the meantime typhoid fever develops and the insured dies therefrom, the company is liable on the policy on the principle of ratification and estoppel: *Insurance Co. v. Shively*, 1 O. C. C. A. 63, 24 O. C. D. 357.

K. DEFENSES.

If a beneficiary brings action on a policy, an answer which avers that the plaintiff murdered the insured is equivalent in legal effect to alleging that the killing was intentional and felonious: *Filmore v. Insurance Co.*, 82 O. S. 208.

The beneficiary in a life insurance policy can not recover thereon where the death of the assured is caused by the intentional and felonious act of such beneficiary: *Filmore v. Insurance Co.*, 82 O. S. 208.

A provision that the insurance policy shall be invalid if the insured should die by his own hand does not prevent recovery in case of suicide, if the insured is insane when he committed the act: *Schultz v. Insurance Co.*, 40 O. S. 217, IV Longsdorf's Notes, 19.

A provision that a policy shall not be payable in case of suicide is valid: *Insurance Co. v. Maguire*, 19 O. C. C. 502, 10 O. C. D. 562; *Pagenhardt v. Insurance Co.*, 4 O. N. P. 169, 6 O. D. (N.P.) 190; *Stark v. Insurance Co.*, 24 Bull. 416.

In a clause of avoidance if the insured "shall, under any circumstances, die by his own hand," the words "under any circumstances" must be disregarded as too general and indefinite. "Die by his own hand" is used in the popular and legal signification, and does not apply where insanity is the controlling influence, though assured intended the act and understood its physical nature and effect. The burden is on the company to show death within this proviso, but sanity is presumed. If self-destruction is proved, plaintiff may in rebuttal show insanity: *Schultz v. Insurance Co.*, 40 O. S. 217, IV Longsdorf's Notes, 19 [reversing *Schultz v. Insurance Co.*, 6 Dec. Rep. 808, 8 Am. L. Rec. 306, 7 Dec. Rep. 668, 4 Bull. 848].

A clause avoiding a policy if the insured dies by his own hand, sane or insane, covers death by cutting his throat while in the delirium of fever, and no recovery can be had: *Pagenhardt v. Insurance Co.*, 4 O. N. P. 169, 6 O. D. (N.P.) 190.

A condition against death by insured's own hand, sane or insane, is valid, and there can be no recovery if he shot himself, although insane: *Insurance Co. v. Maguire*, 19 O. C. C. 502, 10 O. C. D. 562.

The provision in a life insurance policy that the death of a member by his own hand "is not a risk assumed" therein, is an exception which specifically excludes that class of deaths from the contract at its inception, and should be distinguished from an obligation to pay upon the death of the insured, with provision that the contract to pay should be void if the insured committed suicide: *Clemens v. Life Association*, 8 O. N. P. 587, 11 O. D. (N.P.) 717.

A five-year provision as to incontestability, contained in a policy of life insurance issued in lieu of a policy of the same number issued twelve years earlier, but without such a provision, does not read into the original policy a waiver of its exception of liability for death by suicide: *Clemens v. Life Association*, 8 O. N. P. 587, 11 O. D. (N.P.) 717.

If insured died from the effects of poison, taken by him with the knowledge or consent of such beneficiary, with the intent to commit suicide for the purpose of enabling the beneficiary to collect from the insurance company the sum of money named in the policy upon his life, the beneficiary can not recover: *Mieritz v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

If the insurer died from the effects of poison, and while suffering from the effects thereof was under the exclusive care and control of such beneficiary, who was at the time aware that such poison had been given him or taken by him, and that he was then suffering from the effects thereof, and fraudulently intended to permit such poison to cause his death, and neglected to administer to him remedies prescribed by his physician, or concealed from such physician the fact that insured was then suffering from the effects of such poison, such beneficiary can not recover on the policy: *Mieritz v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

If the insured died from the effects of poison, and his written application to the insurance company was made, and the poison was either given or caused to be given to, or taken by the insured, or permitted by such beneficiary to be taken by him, in furtherance of a conspiracy entered into by and between such beneficiary and the insured, to thereby cheat and defraud the company, such beneficiary can not recover on the policy: *Mieritz v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

In a suit upon a policy of life insurance, the defense of fraud in the procuring of the

insurance must be regarded as sustained, where the insured, who died within a few months after the policy was issued from the effects of enlargement of his spleen, to twenty-six times its normal size, failed to disclose his condition to the examining physician, although three physicians had told him of the bad condition of his health, one of whom had refused to pass him for life insurance, and one had told him he had heart disease, and one had discovered the enlargement; and this is true, notwithstanding the examining physician failed to discover his condition and numerous acquaintances testified to his apparent good health: *Insurance Co. v. Whittaker*, 7 O. C. C. (N.S.) 1, 18 O. C. D. 688.

A false statement made by the insured as to the condition of her health, in order to have the policy revived after it had become void under its terms by reason of failure to pay the premium, renders such policy invalid: *Baker v. Insurance Co.*, 5 O. N. P. (N.S.) 383, 18 O. D. (N.P.) 426.

A statement by the insured that no life insurance company or association had ever refused him as a risk is not false, although insured was refused by a mutual benefit association: *White v. Insurance Co.*, 11 Dec. Rep. 857, 30 Bull. 237.

After paying two annual premiums on a policy in the defendant company, issued in 1898, the policy-holder defaulted, and six years later an assignee of the policy sued for recovery of the premiums paid with interest, alleging fraud upon the part of the company in misapplying its funds in speculation in stocks, payment of excessive salaries, etc., knowledge of which illegal conduct had but recently come to him. It was held that if such fraud existed, the policy-holder was charged with constructive knowledge of it at the time he repudiated the contract by defaulting in payment of his premiums, and the statute of limitations had therefore run against the claim: *Baumgarten v. Insurance Co.*, 7 O. L. R. 294.

If the insured has failed to pay his assessments in due time, the fact that the neglect is that of his agent or employe is no excuse for such failure: *Graveson v. Life Association*, 8 O. C. C. 171, 6 O. C. D. 327 [affirmed, without opinion, *Graveson v. Life Association*, 37 Bull. 129].

A delay in declaring a policy forfeited for non-payment of premiums does not waive such ground of forfeiture: *Graveson v. Life Association*, 8 O. C. C. 171, 6 O. C. D. 327 [affirmed, without opinion, *Graveson v. Life Association*, 37 Bull. 129].

If an insurance company repeatedly notifies the beneficiaries that no proof of death has been filed, it is not necessary that the

insurance company should point out specifically the defects in the attempted proofs filed by them: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

The fact that the beneficiary in a life insurance policy was unchaste, or had committed adultery, or had children of a former marriage, does not affect her right to the proceeds of a policy of insurance on the life of her husband: *Mieritz v. Insurance Co.*, 8 O. N. P. 422, 11 O. D. (N.P.) 759.

Insurance issued to a minor may be voidable but it is not void: *Insurance Co. v. Hillard*, 63 O. S. 478, IV Longsdorf's Notes, 861.

A life insurance association company can not affirm its policy of insurance in part and repudiate it in part, thereby confining the assured to one of the benefits therein provided for when he had paid for the right to elect between two benefits therein set forth. Hence, when the obligation of the insurer was to pay \$3,000 in event of death, or, at the election of assured, to pay in final settlement, at a certain date, an amount to assured in cash "equal to ten full annual premiums as paid by insured," the company can not, in such case, defend against the election of assured to accept the latter option on the ground that such obligation was *ultra vires* the company, and at the same time insist that assured be held to and bound by the "whole life clause": *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 18 O. C. D. 197 [reversed, without opinion, *Insurance Co. v. Hare*, 74 O. S. 466].

IV. FOREIGN INSURANCE COMPANY.

A. WHAT IS FOREIGN INSURANCE COMPANY.

A foreign corporation which is organized for the purpose of defending physicians against malpractice suits is not an insurance company; and is not entitled to do business in this state under G. C., § 9365: *State, ex rel., v. Laylin*, 73 O. S. 90, IV Longsdorf's Notes, 999 [affirming *State v. Laylin*, 3 O. N. P. (N.S.) 185, 15 O. D. (N.P.) 360].

A company of another state organized "for insuring lives on the plan of assessment upon surviving members" must comply with the provisions of G. C., § 9365, and is not within the class included in G. C., §§ 9427, *et seq.*: *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948. See also *State v. Moore*, 39 O. S. 486, III Longsdorf's Notes, 1043; *State v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

Foreign insurance companies and associations, whether incorporated, or not, before commencing business in this state, are required to obtain a certificate of authority to

do so, from the Superintendent of Insurance: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

The loaning of money to persons living in this state made by a foreign insurance company is not a violation of G. C., § 9365, even if such loan is made to a person taking policies in such company: *Hall v. Kummero*, 7 O. N. P. 394, 5 O. D. (N.P.) 176.

A foreign insurance company must make the deposit provided for in G. C., § 9346, as a condition precedent to do business in Ohio: *Scottish Union v. Bowland*, 196 U. S. 611, 14 O. F. D. 543, 2 O. L. R. 515.

B. WHAT IS DOING BUSINESS.

G. C., § 9559, forbidding any foreign corporation which does a banking or other business in connection with insurance to do any business in this state, does not prohibit a foreign insurance company lending money on note and mortgage, though such loans are restricted to policy holders, and granted simply to induce the borrower to take a policy: *National Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49. See also BANKS AND BANKING.

A foreign insurance, lending money upon mortgage here to persons who take policies, does not violate the statute which forbids a company which does any other business in connection with insurance to act here, and such loan and mortgage is legal: *Hall v. Kummero*, 7 O. N. P. 394, 5 O. D. (N.P.) 176. See also CORPORATIONS.

The loan of money by a foreign insurance company secured by mortgages as a means of investing its surplus, is not doing business in this state; nor is it a violation of a provision that such insurance company shall not do a banking business: *Hall v. Kummero*, 7 O. N. P. 394, 5 O. D. (N.P.) 176.

C. METHOD OF SECURING LICENSE.

The deposit of bonds must be made by a foreign insurance company before it can do business in this state: *Scottish Union v. Bowland*, 196 U. S. 611, 14 O. F. D. 543, 2 O. L. R. 515.

Without the deposit of bonds foreign insurance companies are not authorized to do business in this state: *Scottish Union v. Bowland*, 196 U. S. 611, 14 O. F. D. 543, 2 O. L. R. 515.

Where a foreign insurance company, which offers to comply with our laws, applies for authority to transact its business within this state, the superintendent of insurance has no power, in the exercise of a mere arbitrary discretion, to refuse such admission: *State*,

ex rel., v. *Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

A mutual fire company of another state, similar to our companies, is not excluded from doing business in this state if it has \$50,000 in premium notes on which \$10,000 cash has been paid before beginning business: *State, ex rel.*, v. *Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

D. DURATION OF LICENSE.

G. C., § 9379, applies to licenses issued at any time during the year: *State v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

The license issued by the superintendent of insurance continues in force unless suspended or revoked, until the first day of April of the year next after its date of issue and no longer. (See G. C., § 9379): *State, ex rel.*, v. *Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

A certificate, so long as it remains in force, confers on the company or association receiving it, the right and privilege of carrying on its business in the state: *State, ex rel.*, v. *Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

The words of the act of 1873, conflicting with the former law modified the terms upon which the right to do business in Ohio was granted to companies of other states: *Lowe v. Insurance Co.*, 41 O. S. 273, IV Longsdorf's Notes, 61.

E. SERVICE OF SUMMONS.

G. C., § 9369, is valid and constitutional, and it is not a violation of Art. III, § 2, paragraph 7, of the constitution of the United States: *Insurance Co. v. Best*, 23 O. S. 105, III Longsdorf's Notes, 114.

An insurance company which has complied with G. C., § 9369, may be treated as a domestic corporation for the purpose of bringing suit: *Insurance Co. v. Best*, 23 O. S. 105, III Longsdorf's Notes, 114.

A foreign life insurance company may be sued in the county where assured died (G. C., § 11416), for the cause of action arose there, and summons may be issued to an other county where the managing agent lives. G. C., § 11292, allowing service on an agent in the county where the action is, is, in addition to G. C., § 11293, allowing service on the managing agent in the state, and does not confine the action to the residence of the managing agent: *Householder v. Life Association*, 6 O. N. P. 520, 8 O. D. (N.P.) 321. See also *VENUE*.

A foreign insurance company's consent, filed under G. C., § 9561, that service might be made by mail, drawn up to apply only

to actions on policies, must be construed in view of the statute as applicable to an action on an oral insurance: *Distilling Co. v. Insurance Co.*, 6 Dec. Rep. 1180, 12 Am. L. Rec. 168, 9 Dec. Rep. 32, 10 Bull. 82. See also *SUMMONS*.

An insurance company of another state doing business here may be garnisheed by process on a resident managing agent: *Rocke v. Raney*, 9 Dec. Rep. 617, 15 Bull. 333. See also *ATTACHMENT*.

F. CERTIFICATE OF AUTHORITY TO ACT AS AGENT.

G. C., § 9377, is a regulation imposed for the benefit of policy holders and others doing business with such company, to be enforced by the penalties provided in said act: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

G. C., § 9377, imposes a personal duty on the agent of a foreign company to procure such certificate, and file it with the recorder of the county, and the violation of such duty subjects him to a penalty; but his acts as such agent, within the scope of the authority conferred upon him by the company, are valid and binding, not only in favor of third persons but as between principal and agent, notwithstanding his failure to procure and file such certificate: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

It is within the discretion of the Superintendent of Insurance to refuse a license as agent of a foreign life insurance company to one who, in violation of the statute, has, without first obtaining such license, solicited applications for insurance in such company, and, as a part of such solicitation, has offered a rebate of a portion of the regular premium: *Vorys v. State*, 67 O. S. 15, IV Longsdorf's Notes, 923.

G. EFFECT OF POLICY IN VIOLATION OF STATUTE.

G. C., § 9372, is intended to protect the policy holders; and a failure to comply therewith is not a defense to the agent who has failed to account to the insurance company for premiums collected by him; nor is it a defense to the sureties upon his bond: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

The acts of an insurance agent who has not complied with these requirements are binding as between himself and the insurance company: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

They are also binding as between the insurance company and the insured: *Insurance*

Co. v. McMillen, 24 O. S. 67, III Longsdorf's Notes, 160.

An insurance policy issued in violation of these provisions is valid; and the provisions thereof with reference to payment of premiums must be complied with by the insured: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

H. REMOVAL OF CAUSES TO FEDERAL COURT.

§ 18, of the act of April 27, 1872 (69 v. 155), by which incorporated life insurance companies of other states are allowed to transact business in this state only on condition that they become, so far as remedies are sought against them here, subject to the exclusive jurisdiction of the courts of this state, is not, in the particular named, in violation of the seventh clause of § 2, of Art. III, of the constitution of the United States, which provides that the judicial power of the United States shall extend to controversies between citizens of different states: *Insurance Co. v. Best*, 23 O. S. 105, III Longsdorf's Notes, 114.

A statute which forbids a foreign insurance company which had complied with our statutes from removing a case to the federal court was held to be valid and constitutional; and such insurance company was not allowed to remove such case: *Insurance Co. v. Best*, 23 O. S. 105, III Longsdorf's Notes, 114.

The supreme court of the United States subsequently held that such a statute was invalid and unconstitutional; and that such foreign insurance company could nevertheless remove a case to the federal courts: *Insurance Co. v. Morse*, 87 U. S. (20 Wall.) 445.

For similar views, see *Doyle v. Insurance Co.*, 94 U. S. 535; *Rowland v. Insurance Co.*, 4 O. F. D. 444, 2 Bull. 56, Fed. Cases, 12-097.

After the supreme court had laid down this rule, the supreme court of Ohio regarded it as inadvisable to follow its original holding, although the majority of the court expressed themselves as satisfied that such original holding was correct; and thereafter a foreign insurance company has power to remove a case to the federal courts: *Assurance Co. v. Pierce*, 27 O. S. 155, III Longsdorf's Notes, 348.

However, the provision that such company shall be prevented from transacting business in Ohio upon transferring such case has been regarded as valid in the United States courts: *Doyle v. Insurance Co.*, 94 U. S. 535. (A case involving a similar Wisconsin statute.)

This case rests upon the principle that the state has the right to exclude such foreign insurance company; and that accordingly the

motives which underlie such exclusion can not be inquired into by the federal courts. This principle is contrary to that which is recognized in some of the recent United States decisions: See *Telegraph Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Railway v. Greene*, 216 U. S. 400.

The extent to which these cases affected the authority of *Doyle v. Insurance Co.*, 94 U. S. 535, has not, however, been determined by the United States supreme court.

I. OUSTER BY QUO WARRANTO.

A foreign insurance company, exercising in this state, franchises and privileges without authority of law may be ousted therefrom by a proceeding in *quo warranto*: *State, ex rel., v. Insurance Co.*, 49 O. S. 440, IV Longsdorf's Notes, 464.

The issuing of a license to a foreign insurance company to do business in this state, by the Superintendent of Insurance, is a ministerial and not a judicial act, and is therefore not a bar to a proceeding in *quo warranto* where it is charged with exercising franchises and privileges without authority of law: *State, ex rel., v. Insurance Co.*, 49 O. S. 440, IV Longsdorf's Notes, 464.

A Lloyds' Insurance Association which does business in this state without complying with the statutes is unlawfully exercising a franchise within the meaning of paragraph 1 of G. C., § 12303; and it is also acting as a corporation without being incorporated legally under paragraph 3, of such section: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

The authority to do business in the state, emanates from the state, and the privilege it confers is a franchise; and any company or association carrying on its business here, without having obtained such authority, is unlawfully exercising a franchise: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

V. MUTUAL PROTECTIVE LIFE.

A. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

Corporations organized under G. C., § 9427, which do not comply with the laws regulating regular mutual life insurance companies, have no power to issue policies guaranteeing any fixed amount to be paid at the death of the member, "except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it"; and those corporations so organized which do comply with such laws are authorized to issue endowment policies "promising to pay to members during life any

sum of money or thing of value." Such Ohio corporations are not permitted to do business in another state upon substantially the same basis and limitations as they are in Ohio, when by the laws of such other state they are not permitted to issue such endowment policies, nor any policy of insurance so conditioned, nor any that does not specify the sum of money to be paid, and unconditionally obligate such corporation to pay the amount so specified, to the beneficiaries of such payment; and corporations organized on the assessment plan under the laws of such other state, are not entitled to do business in this state: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

The business, which corporations of other states organized to insure lives of members on the assessment plan "shall be permitted to do in this state," under the provisions of G. C., §§ 9435, *et seq.*, is that contemplated by G. C., § 9427, which does not include the business of insuring the lives of members for the benefit of others than their families and heirs. A corporation of another state, organized for insuring lives upon the plan of assessments upon its members, without other limitation than that the policy holder shall have an insurable interest in the life of the member, is not embraced within either of said sections: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

That clause of G. C., § 9427, which provides, that "such company or association shall not be subject to the preceding sections of this chapter," does not apply to corporations of other states organized for insuring the lives of members for the benefit of others than their families and heirs. Corporations of that class, are not entitled to transact any business of insurance in this state, until they procure from the superintendent of insurance, a certificate of authority so to do; nor can any person act as agent in this state for such company, until a license to do so is procured from the superintendent of insurance, as required by G. C., § 9365. Such licenses continue in force, unless suspended or revoked, until the first day of April, of the year next after the date of their issue, and no longer (see G. C., § 9379): *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

Associations incorporated for the purposes specified in G. C., § 9427, whether incorporated before or since the amendment of February 3, 1875, are not subject to the laws of this state relating to life insurance companies: *State, ex rel., v. Association*, 26 O. S. 19, III Longsdorf's Notes, 282.

The supplementary act of April 12, 1880 (77 v. 178), did not enlarge the class of companies provided for in G. C., § 9427, but

merely prescribed the regulations, under which such companies, whether domestic or foreign, may do business in the state, and subjected them to additional supervision: *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

Corporations organized under G. C., § 9427, though not subject to the provisions of Title IX, Division III, Chapter 1, of the General Code, relating to life insurance companies on the mutual stock plan, are subject to all the general provisions of Title IX, Division 1, Chapter 1, which apply to corporations not for profit: *State v. Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

B. CORPORATIONS.

1. Organisation.

A certificate of incorporation under the act of February 3, 1875, setting forth that "the manner of carrying on the business shall be such as the association may from time to time prescribe by rules, regulations, and by-laws not inconsistent with the laws of the state," is not a compliance with the third clause of § 2, of the act of April 20, 1872, which requires the certificate to show "the manner of carrying on the business of said association": *State, ex rel., v. Relief Association*, 29 O. S. 399, III Longsdorf's Notes, 480.

2. Nature.

Corporations organized under G. C., § 9427, belong to the class of corporations which are organized not for profit: *State v. Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

If an association organized under G. C., § 9427, is not entitled as of right to a certificate to do business in another state, the insurance commissioner of Ohio can not be compelled to issue his certificate of authority to do business in this state, to a corporation organized under the laws of that other state to insure lives upon the assessment plan: *State, ex rel., v. Moore*, 39 O. S. 486, III Longsdorf's Notes, 1043.

By virtue of G. C., § 9459, G. C., §§ 9430 to 9548, do not apply to railway relief associations: *State, ex rel., v. Railway*, 68 O. S. 9, IV Longsdorf's Notes, 937.

G. C., §§ 9430 to 9548, were held to apply to railway relief associations in *Geowen v. Railway*, 10 Dec. Rep. 234, 19 Bull. 293.

3. Powers.

Corporations organized under G. C., § 9427, which do not comply with the laws regulating regular mutual life insurance companies, have no power to issue policies guaranteeing

any fixed amount to be paid at the death of the member, "except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it"; and those corporations so organized, which do comply with such laws are authorized to issue endowment policies "promising to pay to members during life any sum of money or thing of value." Such Ohio corporations are not permitted to do business in another state upon substantially the same basis and limitations as they are in Ohio, when by the laws of such other state they are not permitted to issue such endowment policies, nor any policy of insurance so conditioned, nor any that does not specify the sum of money to be paid, and unconditionally obligate such corporation to pay the amount so specified, to the beneficiaries of such payment; and corporations organized on the assessment plan under the laws of such other state, are not entitled to do business in this state: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

The business, which corporations of other states organized to insure lives of members on the assessment plan "shall be permitted to do in this state," under the provisions of G. C., §§ 9435, *et seq.*, is that contemplated by G. C., § 9427, which does not include the business of insuring the lives of members for the benefit of others than their families and heirs. A corporation of another state, organized for insuring lives upon the plan of assessments upon its members, without other limitation than that the policy-holder shall have an insurable interest in the life of the member, is not embraced within either of said sections: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

Power of expulsion can not be exercised by a committee for a subordinate branch of a beneficial organization unless authority therefor is expressly given and such authority is fairly exercised: *State, ex rel., v. Mystic Circle*, 9 O. C. C. 364, 6 O. C. D. 385 [reversed on ground that mandamus was not the proper remedy, *Mystic Circle v. State, ex rel.*, 61 O. S. 628, IV Longsdorf's Notes, 818].

Although G. C., §§ 9339 to 9350 and 9385, inclusive, under which life insurance companies intended to transact business on the mutual or stock plan, are organized, require such companies to have capital stock and stockholders; and although when thus organized they have no authority to transact business on the assessment plan, the want of such authority is not a consequence of their having capital stock and stockholders, nor of want of power in the legislature to

confer it, but results solely from an omission of the legislature to clothe them with such power. Notwithstanding the want of such authority in an Ohio corporation, created under those sections, yet, as the powers of a corporation depend on its charter and the laws of the state where it is organized, if the charter of an insurance company created in another state, together with the laws of such state, authorize it to transact business on the assessment plan, it should be admitted under G. C., §§ 9435, *et seq.*, to transact business on that plan within this state, upon its complying with this section in other respects, although it may have capital stock and stockholders, for whose benefit it was created: *State, ex rel., v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

That clause of G. C., § 9427, which provides, that "such company or association shall not be subject to the preceding sections of this chapter," does not apply to corporations of other states organized for insuring the lives of members for the benefit of others than their families and heirs. Corporations of that class, are not entitled to transact any business of insurance in this state, until they procure from the superintendent of insurance, a certificate of authority so to do; nor can any person act as agent in this state for such company, until a license to do so is procured from the superintendent of insurance, as required by G. C., § 9365. Such licenses continue in force, unless suspended or revoked, until the first day of April, of the year next after the date of their issue, and no longer (G. C., § 9379): *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

When a foreign corporation doing business in this state, is exercising its franchise in contravention of the laws thereof, it may be ousted therefrom, by proceedings in *quo warranto*: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

G. C., § 9459, and the following sections are not unconstitutional in that they confer upon an organization of the character of a mutual burial association, whether it be regarded as an insurance company or a beneficial society, rights and privileges differing from those bestowed upon other associations doing a similar business: *State, ex rel., v. Burial Association*, 8 O. C. C. (N.S.) 233, 18 O. C. D. 397.

The fact that the widow of an employee accepts benefits from a relief association does not preclude her from maintaining an action as executrix to recover damages for his death: *Railroad v. McCamey*, 12 O. C. C. 543, 5 O. C. D. 631.

4. Object.

The fact that an insurance company had induced persons to take policies in such company by falsely representing that it was doing a mutual business and the fact that the policies contained provisions that the policy-holders should share in the profits as apportioned by the company, does not make such company a mutual company if it is in fact a stock company: *State, ex rel., v. Insurance Co.*, 13 O. C. C. (N.S.) 49, 22 O. C. D. 262 [affirmed, without opinion, in *State, ex rel., v. Insurance Co.*, 84 O. S. 459].

What constitutes the transaction of the business of life insurance on the assessment plan within the meaning of that term as used in G. C., §§ 9435, *et seq.*, should be determined by the laws of this state, and according to those laws, that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policy-holders of a concern, the principal revenue of which must arise from post-mortem assessments intended to liquidate specific losses: *State, ex rel., v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

5. Membership.

The members of the corporation are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation are entitled to the mutual protection and relief provided, or whose family or heirs are, in case of death, entitled to the specific relief provided: *State v. Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

Corporations in Ohio are expressly authorized to do all needful acts to carry into effect the objects for which they are created, and accordingly they may become members or stockholders of a mutual insurance association proper protection; and a contract so entered into is not *ultra vires*, but valid, the general rule against incorporated companies purchasing shares in other companies notwithstanding: *Stone v. Traction Co.*, 4 O. N. P. (N.S.) 104, 16 O. D. (N.P.) 645.

C. BY-LAWS.

The by-laws and regulations adopted by an association determine the rights of its members; and a fund raised by the association in pursuance of such by-laws and regulations, to be paid to the family or heirs of a deceased member, in the manner therein specified, "unless otherwise directed by such member in his lifetime," will, on failure of the member to give such direction, be controlled by such laws and regula-

tions: *Arthur v. Benevolent Association*, 29 O. S. 557, III Longsdorf's Notes, 496 [approved in *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727].

A beneficiary can be changed only in compliance with the provisions of the by-laws: *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727.

The rule, as to change of beneficiaries and designation thereof, is not different where a certificate is issued by an association organized in another state, doing business in this state under G. C., § 9428: *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727.

By force of G. C., § 9429, an association may amend its by-laws: *Foresters of America v. Rennie*, 2 O. C. C. (N.S.) 510, 15 O. C. D. 790 [affirmed, without opinion, in *Foresters of America v. Rennie*, 71 O. S. 525].

A change in the beneficiary under a policy in a mutual benefit association is not rendered invalid by reason of irregularities, where the change is made substantially as provided for in the laws of the association, and to its full satisfaction and that of the insured, and the highest officers of the association have knowledge of the irregularities: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, in *Earley v. Earley*, 69 O. S. 562].

The rules and regulations of a mutual benefit association become a part of the contract between the company and one who agrees with such company that it may assume the risks and obligations of another company in which such person was insured: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

The by-laws of an association determine the control of the insured over the proceeds of the insurance; and his right to change the beneficiary: *Murphy v. Benevolent Association*, 13 O. D. (N.P.) 183.

The rights of a member of a beneficial association with reference to the drawing of sick benefits, are to be determined by the by-laws of the association as they stood at the time his sickness began; and a by-law adopted subsequent to the beginning of such sickness, which reduces the benefits to be paid, is without effect as to such member: *Foresters of America v. Rennie*, 2 O. C. C. (N.S.) 510, 15 O. C. D. 790 [affirmed, without opinion, in *Foresters of America v. Rennie*, 71 O. S. 525].

Rights which have vested under existing by-laws can not be impaired by a subsequent amendment to such by-laws: *Pellazino v. St. Joseph's Society*, 9 Dec. Rep. 635, 16 Bull. 27.

The rules and regulations of the order prescribing the method of changing the bene-

fiary, or imposing conditions on the right to change, are made for the benefit of the order and not for the beneficiary, and the order does not guarantee or promise him that it will enforce or will not abrogate such rules. A new certificate to another beneficiary, made at a member's request, without the consent of the original beneficiary, although the former rules required such consent, will supersede the original certificate: *Thesing v. Supreme Lodge*, 11 Dec. Rep. 88, 24 Bull. 401.

A benefit corporation organized under § 82, which provides for the formation of such associations "for the purpose of mutual protection and relief of members, and for the payment of stipulated sums of money to the families of heirs of deceased members," which association has not taken advantage of subsequent amendments to the act, may provide that certain ones shall be entitled to the endowment when the member does not designate any one, and if those parties are dead that no endowment shall be paid: *Halle v. Grand Lodge*, 1 O. C. C. (N.S.) 83, 14 O. C. D. 717.

If the policy-holders have sent proxies to the secretary of a mutual insurance company without instructions as to the method of voting, his discretion can not be reviewed by the courts in the absence of a showing of fraud; and he is not bound to follow any former custom or usage. The fact that the board of directors thus elected employs such secretary for a period of ten years does not of itself show fraud or bad faith: *Burch v. Coan*, 17 O. D. (N.P.) 717.

D. INSURANCE FOR FIXED AMOUNT.

Corporations organized under G. C., § 9427, which do not comply with the laws regulating regular mutual life insurance companies, have no power to issue policies guaranteeing any fixed amount to be paid at the death of the member, "except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it;" and those corporations so organized, which do comply with such laws, are authorized to issue endowment policies "promising to pay to members during life any sum of money or thing of value." Such Ohio corporations are not permitted to do business in another state upon substantially the same basis and limitations as they are in Ohio, when by the laws of such other state they are not permitted to issue such endowment policies, nor any policy of insurance so conditioned, nor any that does not specify the sum of money to be paid, and unconditionally obligate such corporation to pay the amount so specified to the

beneficiaries of such payment; and corporations organized on the assessment plan under the laws of such other state, are not entitled to do business in this state: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

E. BENEFICIARY.

1. Who May Be.

Mutual relief associations incorporated and organized under the act of April 20, 1872, as amended February 3, 1875, are not authorized to provide for the payment of stipulated sums of money to persons other than the family or heirs of a deceased member: *State v. Association*, 29 O. S. 399, III Longsdorf's Notes, 480.

A company of another state organized for "insuring lives on the plan of assessment upon surviving members," without limitation, does not come within the class of companies provided for in G. C., § 9427. This section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs: *State, ex rel., v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

A contract of insurance to pay in case of a member's death "to himself or assignees," "to his estate," "to his executors or administrators," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void: *State v. Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

Associations organized under G. C., § 9427, are not authorized to issue certificates of membership payable to the named beneficiary "or assigns," nor payable in case of death to others than the family or heirs of the insured: *State, ex rel., v. Association*, 42 O. S. 579, IV Longsdorf's Notes, 131.

No one can be a beneficiary of the insurance provided for in G. C., § 9427, unless he is of the family of the assured, or may, upon his death, become his heir: *Association v. Gonser*, 43 O. S. 1, IV Longsdorf's Notes, 141.

A beneficial corporation, whose charter provides that its particular business shall be to afford material aid to its members and their dependents by establishing a fund for the relief of sick and distressed members, and a benefit fund, from which, on the death of a member, a sum not exceeding \$5,000 shall be paid to the family or dependents of such member, is not authorized to issue a benefit certificate providing for payment to one not dependent upon such deceased member: *Benevolent Legion v. McGinness*, 59 O. S. 531, IV Longsdorf's Notes, 770.

A petition in an action against such a corporation, brought to recover upon a benefit certificate, in which the plaintiff is described simply as a brother of the deceased member, and containing no allegation showing that such brother was, in any way, dependent upon the deceased member, is bad on demurrer, and will not support a judgment: *Benevolent Legion v. McGinness*, 59 O. S. 531, IV Longsdorf's Notes, 770.

A member of an association formed under G. C., §§ 9427, *et seq.*, assigned for value his certificate of membership to a person who was not related to him by consanguinity or affinity; and the assignee, in reliance upon such assignment, paid the assessments upon such certificate until the death of the insured. The insured died, leaving a widow. The certificate was issued by an association whose rules provided that the beneficiary should be the widow, children, mother, sister, father or brother of the deceased member, in the order named, if not otherwise directed by the member. It was held that the assignment was invalid; and the association having paid the amount of the certificate into court, it would be applied first, to the payment of the costs; second, to the payment of the assessments which were paid by the assignee, together with interest thereon; and the balance to the widow of the insured: *Association v. Diebert*, 2 O. C. C. 462, 1 O. C. D. 589.

The word "dependent" as used in the benefit certificates of the Knights of Maccabees signifies a class by itself, and does not qualify the words "mother, father, sister, brother" which follow: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, *Earley v. Earley*, 69 O. S. 562].

The subsequent divorce of the wife of the insured, who was named as beneficiary in the certificate, does not destroy her rights in such certificate: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

The designation of an unmarried man of his brothers as beneficiaries of a fund payable at his death by a mutual benefit association is not invalidated or revoked by his subsequent marriage: *Johnson v. Benevolent Association*, 13 O. N. P. (N.S.) 568 [distinguishing *Brotherhood of Railway Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171].

Under the laws of Ohio, beneficiary certificates are to be construed with reference to the status of the beneficiary at the time of payment. The words "Alice B. Taylor" in the certificate are *descriptio personae*, and may be rejected as surplusage and the certificate is construed to mean that if there be no wife living, the benefits go to the

administratrix in trust for his heirs: *Brotherhood v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

G. C., § 9427 (as amended 88 v. 251), authorizes mutual aid associations to provide for payment to the "families, heirs, executors, administrators or assigns" of the member: *Association v. Bleher*, 3 O. N. P. (N.S.) 673, 16 O. D. (N.P.) 671.

G. C., § 9427, prior to amendment, authorized mutual relief associations to provide in their certificates for payment only to the family or heirs of the member as the beneficiary: *Association v. Bleher*, 3 O. N. P. (N.S.) 673, 16 O. D. (N.P.) 671.

The mother of the insured may be a beneficiary in a certificate, although she is not in fact a member of his family. Moreover, no one but the association could complain, and not it, after death: *Association v. Harrison*, 10 Dec. Rep. 786, 23 Bull. 360.

A certificate payable to the heirs of the insured is payable to his widow as against his brothers and sisters: *Jamieson v. Association*, 9 Dec. Rep. 388, 12 Bull. 272.

The proceeds of the insurance must be distributed in accordance with the rules of the beneficial organization if such rules comply with the requirements of the statute: *Murphy v. Benevolent Association*, 13 O. D. (N.P.) 183.

Where insurance in a mutual aid association is contracted for with reference to the laws of Ohio, and the policy is executed in Ohio, and is made payable in Ohio, the Ohio law as to distribution governs; and the insured, a resident of New York, having left at his death a widow and certain next of kin, but no children, the proceeds of the policy are distributable to the widow under the Ohio law, and not to the widow and next of kin under the New York law: *Aid Association v. Hey*, 17 O. D. (N.P.) 661, 4 O. L. R. 744.

2. Power of Insured to Change.

Where, by the laws and regulations of a mutual benefit association, the fund is to be paid "to the widow, children, mother, sister, father or brother of a deceased member, and in the order named, if not otherwise directed by the member previous to his death," the relatives will take the fund in the order named, unless the member in his lifetime executed such power of direction or appointment, thus changing the order of payment, and the will of a member, who died seized of property, real and personal, devising and bequeathing to his children "my estate and property, real, personal, and mixed," without referring to the power, or

the subject of it, is not such an execution of the power as will control the fund: *Arthur v. Association*, 29 O. S. 557, III Longsdorf's Notes, 496.

A bequest by an assured member of a company organized under G. C., § 9427, of the proceeds of his certificate of membership to a stranger or a creditor, does not constitute such legatee an "heir" of the testator, in the statutory sense of the term: *Association v. Gonser*, 43 O. S. 1, IV Longsdorf's Notes, 141.

Where a beneficial corporation has issued a benefit certificate to a member payable upon his decease to his wife, and afterward, acting upon a mistaken belief induced by the representation of the member, that such certificate has been lost, issues and delivers to the member a second certificate for a like amount, payable two-thirds to the wife and one-third to a person who is a brother of the member but not a dependent, such second certificate will be held invalid and the first be given full force and effect: *Benevolent Legion v. McGinness*, 59 O. S. 531, IV Longsdorf's Notes, 770.

If the charter and by-laws of an association provide that the amount of a certificate is to be paid to the family or to any person to whom the deceased may have elected that it should be paid to, and the deceased has designated his minor grandson as the beneficiary, the proceeds should be paid to the guardian of such grandson rather than to a trustee who is named in his subsequent will and empowered to apply the proceeds to the benefit of such grandson: *Murphy v. Association*, 13 O. D. (N.P.) 183.

That a will which disposes in general terms of testator's policies of insurance, does not pass certificates issued under the chapter relative to mutual benefit societies: *Association v. Harrison*, 10 Dec. Rep. 786, 23 Bull. 360.

A change of beneficiary must appear clearly intended. If a member's mother is named as beneficiary, his will leaving "all policies" to his wife and children where he had other policies is not sufficiently explicit: *Life Association v. Harrison*, 10 Dec. Rep. 786, 23 Bull. 360.

The beneficiary can not be changed except in the mode pointed out by the by-laws of the association. If these require surrender of the old and issue of a new certificate, the change can not be made by will. This applies to domestic associations, under G. C., § 9427, and also to those of another state acting here under G. C., § 9435, where their statute permits making by-laws, and such by-laws were made: *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727.

The distinction between certificates of beneficial societies and policies of life insurance, in respect to changes of beneficiaries is very marked. The law respecting life insurance has very little, if any, application to beneficial societies, and especially upon this particular question: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, *Earley v. Earley*, 69 O. S. 562].

3. Interest of Beneficiary.

The beneficiary named in a certificate of a beneficial society has no vested right in the anticipated benefit. It is not property, but a mere expectancy which may or may not ripen into property: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, in *Earley v. Earley*, 69 O. S. 562].

While a change of beneficiaries in a mutual benefit society must be made in accordance with the laws of the society, yet when the change is made substantially as provided by the laws of the society to its satisfaction, and that of the insured, a new certificate being issued to the new beneficiary, and the old certificate cancelled, although not delivered to the society, the first beneficiary can not object to the manner of change because the change is made without her knowledge and not in strict conformity to the law of the society: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, *Earley v. Earley*, 69 O. S. 562].

The beneficiary to whom a member of a mutual benevolent order has his death certificate payable, has no vested interest therein when the laws of the order reserve a right of the member to change the direction of the fund: *Thesing v. Supreme Lodge*, 11 Dec. Rep. 88, 24 Bull. 401.

A certificate payable to the wife of the insured, but reserving to him the right to change the beneficiary, does not pass to her administrator if she dies before her husband: *Tafel v. Knights of the Golden Rule*, 9 Dec. Rep. 279, 12 Bull. 35.

A certificate payable to the father of the insured must nevertheless be paid to the widow of the insured if the insured marries after he causes his father to be named in such certificate as the beneficiary: *Lett v. Brotherhood*, 44 Bull. 160.

The insurance benefit arising out of a mutual contract to pay premiums upon the assessment plan, is payable alone to the beneficiary and it is not subject to the claims of the creditors of the insured: *In re Andrews*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

Debts of the estate of the member are not a claim on the fund though the association is a foreign one and the fund has been paid

to the administrator: *In re Beyer*, Goebel, 241.

A person paying the assessments to keep up a policy in a mutual order on the life of another on an understanding that she should share the proceeds, has an equity in the policy and is entitled to reimbursement as against heirs: *Kritline v. Benefit Association*, 7 O. N. P. 439, 5 O. D. (N.P.) 592.

A married woman, being the beneficiary named in the certificate of a mutual benefit association, may before the death of her husband, if in good faith and for a valuable consideration, transfer or pledge her interest in such certificate for the payment of a valid debt. But if the transaction is in the nature of a wagering policy, whereby the transferee becomes the holder of a policy on a life in which he has no interest, or for more than his actual interest, such a transaction can not be upheld: *Brewing Co. v. Cassman*, 21 O. C. C. 465, 12 O. C. D. 141. See also MUTUAL BENEFIT SOCIETIES.

F. ASSESSMENTS.

A fraternal beneficial association having been apprised of a change of address of an insured can not predicate a forfeiture upon failure to pay an assessment, if by reason of its failure to record such change the requisite notice, mailed to the former address, was not in fact received by the member: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

Proof of the mailing of a letter, properly stamped and addressed, affords *prima facie* evidence of its receipt by the person to whom directed; and this applies notwithstanding the address of the addressee may have been lately changed, as in this case, the well-known accuracy, knowledge, facilities and practice of the post office department in such matters raising a presumption of delivery; but this being a rebuttable presumption, which may be met by evidence of equal weight or contravailing force, a preponderance of proof that it was not received is not necessary to overcome the presumption of delivery: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

If a mutual benefit association seeks to avoid liability on the ground of failure to pay assessments, such association has the burden of proof upon the question of service of notice of such assessments: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

If a mutual benefit association sends a notice in compliance with its rules and regulations, such notice is sufficient; but if not sent in compliance with its rules and regulations such notice is not sufficient unless it

was actually received by the insured: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

The holding in the case of *Swing v. Crane*, 11 O. C. C. (N.S.) 297, 22 O. C. D. 616, as to defenses a member of a mutual insurance company may set up against an assessment, does not militate against the findings of a trial court or the conclusions that may be reached in an action to enforce payment of such an assessment: *Leverome v. Brown*, 12 O. C. C. (N.S.) 277, 22 O. C. D. 722.

Members who fail to pay their assessments after the association has ceased doing business do not thereby forfeit their rights in the funds of such an association: *In re Mutual Aid Association*, 3 O. N. P. 145, 4 O. D. (N.P.) 272.

A former statute (92 v. 360, R. S., § 3661-18) which exempted funds arising from contracts of insurance in mutual benefit associations from the payments of the dues of the beneficiaries, was held to be unconstitutional in *Williams v. Donough*, 65 O. S. 499, IV Longsdorf's Notes, 890 [for opinion below, see *Williams v. Donough*, 6 O. N. P. 418, 9 O. D. (N.P.) 414]. This statute was repealed, 97 v. 421.

It being claimed that a member has forfeited his policy by failure to pay assessments, and the member claiming that the by-laws permit reinstatement on certain payments, which he tendered, equity has jurisdiction to settle rights of the parties at once and compel restoration if such should be the result: *Graveson v. Life Association*, 11 Dec. Rep. 369, 26 Bull. 183.

Equity will not relieve against forfeiture caused by neglect to pay an assessment, and where the member left it to his bookkeeper to make the payments, the latter's neglect is his neglect, and the bookkeeper's subsequently absconding as a defaulter, does not convert the prior neglect into an accident authorizing relief: *Graveson v. Life Association*, 8 O. C. C. 171, 6 O. C. D. 327, 11 Dec. Rep. 369, 26 Bull. 183.

Policy holders in a purely mutual company are bound to know its rules, and if a rule forbids the secretary making contracts which change policies, his promise to notify the assignee of a policy of any default by his assignor in paying premiums so that the former may pay and reinstate the policy, does not bind the company: *Gaff v. Insurance Co.*, 10 Dec. Rep. 86, 18 Bull. 310 [petition in error refused without opinion, *Gaff v. Insurance Co.*, 15 Bull. 373].

G. TRUSTEES.

The trustees are charged with the faithful performance of their trust. Any scheme

to collect money for individual profit is a breach of trust: *State, ex rel., v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

The members are those who, themselves or their families, are entitled to the relief provided for. The members and not the corporators or elected trustees are the controlling body, and the trustees or corporators have no power to declare their office perpetual, or assume a power to fill vacancies in their body: *State, ex rel., v. Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

Trustees of mutual benefit associations having voted to themselves and accepted designated sums of money, as compensation for their services for particular years, have no power, in subsequent years of their service, to vote themselves "back pay" for their services during such former years: *State, ex rel., v. Mutual Benefit Association*, 42 O. S. 579, IV Longsdorf's Notes, 131.

Trustees have no authority, by virtue simply of their trusteeship, to act for, or bind their association, except in their aggregate and administrative capacity as a board; and where they assume, by virtue of their trusteeship, to act in the separate and individual capacity of treasurer, secretary or as general or special agent of their association, they can not thereby create against it a legal liability to compensate them as trustees for such services: *State, ex rel., v. Mutual Benefit Association*, 42 O. S. 579, IV Longsdorf's Notes, 131.

Trustees, unless especially invested with the additional capacity and authority of officers or agents, are limited in their claims to compensation, to such sums as will reasonably compensate them for the time and expense incurred in going to, attending, and returning from, their official meetings, and for their services while in session: *State, ex rel., v. Mutual Benefit Association*, 42 O. S. 579, IV Longsdorf's Notes, 131.

Where the secretary of an insurance company, by voting proxies given him by the policy-holders, elects a new board of directors who, in turn, enter into a contract of employment with him for a term of ten years, it can not be said, because of the incidental benefits to the secretary, that the election of the new directors was a fraudulent collusion of which the re-employment of the secretary was a part, where it appears from the circumstances of the case that he was acting in good faith and for the best interests of the company: *Burch v. Coan*, 17 O. D. (N.P.) 717.

The secretary of a mutual insurance company, to whom the policy-holders have given their proxies to vote and cast their ballots at the election of officers for the company,

is vested with discretionary power, and the manner in which he exercised such power is not ground for complaint, unless it has been clearly abused: *Burch v. Coan*, 17 O. D. (N.P.) 717.

The trustees of a life insurance company organized under R. S., §§ 3631-24, *et seq.* (repealed, 97 v. 161), are not personally liable for a death loss on the policy issued by the company while they were in office as such trustees, but the policy holders and the beneficiaries under such policies, must trust to the companies and the protection afforded them by the sections referred to: *Kelley v. Bender*, 22 O. C. C. 144, 12 O. C. D. 181.

The general powers of an officer of a mutual insurance company will not give him the power to perform any act hostile to one or more of its members requiring discretion; and when such a company reserves the right to adopt either of two methods to replenish its mortuary fund such power is in its board of trustees and can not be delegated: *Beckel v. Insurance Co.*, 15 O. N. P. (N.S.) 266.

H. RIGHTS AND LIABILITIES OF MEMBERS.

The members of such a corporation are the controlling body, authorized to elect trustee, make by-laws, etc.: *State, ex rel., v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

A certificate of membership in a corporation by which the member in consideration of his payment of a membership fee, annual dues and a *pro rata* assessment with his fellow members to pay a sum of money to the family or heirs of a deceased member, in consideration of which the association at his death stipulates to pay to his family or heirs a sum of money, graduated by the number of members in his class, is a contract of life insurance: *State, ex rel., v. Life Association*, 38 O. S. 281, III Longsdorf's Notes, 968.

A change in the beneficiary under a policy in a mutual benefit association is not rendered invalid by reason of irregularities, where the change is made substantially as provided for in the laws of the association, and to its full satisfaction and that of the insured, and the highest officers of the association have knowledge of the irregularities. Accordingly, if the insured omits to pay the fee of 50 cents which is required on issuing a second certificate, but the benefit association nevertheless issues such certificate, it can not set up the failure to pay such fee as a defense in an action upon such certificate. In a finding of facts relative to a change of beneficiary, the material fact to be found was that the second certificate

changing the beneficiary was issued, and every intendment is in favor of its regularity: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, in *Earley v. Earley*, 69 O. S. 562].

A loss upon a policy issued by a mutual insurance company is not a debt of the company; and the trustees of such company are not personally liable therefor. The policy holder must rely upon the method of payment of such policies which is provided for by statute: *Kelly v. Bender*, 22 O. C. C. 144, 12 O. C. D. 181.

Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon: *Insurance Co. v. Fuller*, 9 O. C. C. (N.S.) 441, 19 O. C. D. 415 [affirmed, without opinion, *Insurance Co. v. Fuller*, 79 O. S. 451].

A mutual insurance company which has once been organized under statutory provisions (G. C., §§ 9427, *et seq.*), remains a corporation for the purpose of being sued until such steps are taken as legally end its existence: *Menge v. Insurance Co.*, 19 O. D. (N.P.) 347.

An action to appoint a receiver for a mutual insurance company is to be brought against such corporation in its corporate name; and the members or stockholders thereof can not be made parties nor can they be heard upon a motion to set aside the order appointing a receiver and authorizing him to collect the assets of the corporation and pay its obligations: *Menge v. Insurance Co.*, 19 O. D. (N.P.) 347.

In a mutual insurance company where the board of trustees has power to restore benefits to a member whose policy has been canceled by imposing conditions, and where the condition imposed is that, if such a member pass a successful medical examination—now if such a member under orders from such a board both to him and the company's regular medical examiner pass such an examination in the opinion of that physician, and the report of such examination is sent to the board—that member is at once reinstated, and it is not necessary for any further action by that board in the absence of any direct stipulation to the contrary: *Beckel v. Insurance Co.*, 15 O. N. P. (N.S.) 266.

I. REMEDIES OF MEMBERS AND BENEFICIARIES.

If a member of a private corporation formed under G. C., §§ 9427, *et seq.*, or under the following chapter, is expelled wrongfully his remedy is an action at law for damages. Mandamus to compel the association to re-

store him to membership will not lie: *Fraternal Mystic Circle v. State*, *ex rel.*, 61 O. S. 628, IV Longsdorf's Notes, 818 [reversing *State, ex rel.*, v. *Fraternal Mystic Circle*, 9 O. C. C. 364, 6 O. C. D. 385].

If a member of an association is expelled on the ground of immorality, mandamus will not lie to compel the association to reinstate him: *State v. Relief Society*, 7 Dec. Rep. 334, 2 Bull. 125.

Relator, without his knowledge, was expelled from membership in a society incorporated for benevolent purposes. After such expulsion he brought a civil action to recover damages for the loss of his rights and privileges as a member, occasioned by such expulsion, in which he recovered verdict and judgment, to reverse which the cause in error is now pending. It was held that the bringing such action is a waiver of his right to a mandamus to restore him to his rights and privileges of membership: *State, ex rel.*, v. *Lipa*, 28 O. S. 665, III Longsdorf's Notes, 430.

The decisions of the advisory committee of the relief department of a railroad may be made a condition precedent to the right of action of the insured; but such decisions can not, by agreement between the parties, be made final and conclusive: *Railway v. Slankard*, 56 O. S. 224, IV Longsdorf's Notes, 688.

Acceptance of benefits from relief associations by a widow is not a bar to an action for damages by her as administratrix: *Railroad v. McCamey*, 12 O. C. C. 543, 5 O. C. D. 631.

After the lapse of seven years a presumption of death arises if the insured has disappeared and has not been heard from; and a beneficiary who has kept the certificate alive by paying assessments may recover thereon: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

The officers of a mutual benefit association have no right to refuse to accept payment of an assessment by a beneficiary after the insured has disappeared and has not been heard from: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

J. CONSTRUCTION OF CERTIFICATES.

A person became a member of a mutual life association, and received a policy, which, on his death, entitled his "heirs" to receive a certain sum from the association. He died, leaving a widow and one child surviving him. It was held that his widow and child were his heirs as to said sum, and took it as tenants in common, and in the proportions fixed by the statute of descent and distribution, when the intestate has died

leaving a widow and child or children: *Life Association v. Pollard*, 3 O. C. C. 577, 2 O. C. D. 333.

In the by-laws of a society which provide for payment to "wife, husband, children, dependent, mother, father, sister, brother," etc., the word "dependent" signifies a class by itself and does not qualify "mother, father," etc., following it: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed without opinion in *Earley v. Earley*, 69 O. S. 562].

Under a provision that the certificate may be made payable to the family or the dependents of the insured, a certificate can not be made payable to a brother who is in fact not dependent on the insured: *McGinness v. Benevolent Legion*, 59 O. S. 531, IV Longsdorf's Notes, 770.

The term "legal heirs" includes the brothers and sisters: *In re Andress*, 5 O. N. P. 253, 6 O. D. (N.P.) 174.

The words "legal representatives" used to designate the beneficiary in the certificate of a mutual relief association issued prior to the amendment of G. C., § 9427, mean the "family and heirs of the deceased member," and not his administrator or executor: *Aid Association v. Bleher*, 3 O. N. P. (N.S.) 673, 16 O. D. (N.P.) 671.

The words of a policy issued in pursuance of this chapter on mutual benefit companies, in which the beneficiary is designated, should be construed as nearly as can be in the same way that such words would be construed if used in a will: *Aid Association v. Greene*, 79 Fed. 461, 9 O. F. D. 607.

A policy of life insurance issued in Ohio payable to the "heirs" of the insured, who was domiciled in New York; it was held that the word "heirs" in such a policy must be construed according to the New York law: *Aid Association v. Greene*, 79 Fed. 461, 9 O. F. D. 607.

K. DEFENSES.

A mutual aid association ceased to do business January 20, 1895, and applied for a receiver February 7, 1895. A receiver was appointed and the corporation was dissolved May 16, 1895. It was held that the matured certificate holders and beneficiaries, holders of certificates of deceased members, are not creditors of the association in such sense as to entitle them to preference in payment over unmatured certificate holders: *In re Aid Association*, 3 O. N. P. 145, 4 O. D. (N.P.) 272.

The fund of insolvent associations should be distributed *pro rata* among all certificate holders or representatives in proportion to the amounts paid in on each certificate re-

spectively, except that members who fail to pay assessments made after association becomes insolvent shall receive such *pro rata* less the amount of assessments which they failed to pay: *In re Aid Association*, 3 O. N. P. 145, 4 O. D. (N.P.) 272.

The fact that an association has paid extravagant salaries, that it has temporarily diverted funds to other than those for which they were created, or that its officers have exceeded their authority, does not authorize the appointment of a receiver upon the application of a creditor, unless he is able to show that his rights have been interfered with: *Baker v. Mystic Circle*, 1 O. D. (N.P.) 579, 32 Bull. 84.

Insolvency of a mutual protection association to insure lives on the assessment plan is not analogous to the insolvency of an ordinary business corporation: *Baker v. Mystic Circle*, 1 O. D. (N.P.) 579, 32 Bull. 84.

L. ANNUAL STATEMENT.

A certificate of incorporation under the act of February 3, 1875, setting forth that "the manner of carrying on the business shall be such as the association may from time to time prescribe by rules, regulations, and by-laws not inconsistent with the laws of the state," is not a compliance with the third clause of section 2 of the act of April 20, 1872, which requires the certificate to show "the manner of carrying on the business of said association": *State, ex rel., v. Relief Association*, 29 O. S. 399, III Longsdorf's Notes, 480.

G. C., § 9430, providing for an annual statement does not enlarge the class of companies provided for in G. C., § 9427: *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

G. C., § 9430, does not apply to railway relief associations (see G. C., § 9459): *State, ex rel., v. Railway*, 68 O. S. 9, IV Longsdorf's Notes, 937.

Under the provisions of G. C., §§ 9435, *et seq.*, the insurance commissioner can not be compelled to issue his certificate of authority to do business in this state, to a corporation organized under the laws of another state to insure lives upon the assessment plan, where, by the laws of such other state, Ohio companies organized to do the business contemplated in G. C., §§ 9427, *et seq.*, are not entitled, as of right, to a certificate of authority to do business therein: *State, ex rel., v. Moore*, 39 O. S. 486, III Longsdorf's Notes, 1043.

Whether a corporation which is shown upon a *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporation franchises, is a

question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it: *State, ex rel., v. Benefit Association*, 42 O. S. 579, IV Longsdorf's Notes, 131.

M. FOREIGN CORPORATIONS.

1. Admission.

G. C., § 9435, does not enlarge the class of companies or associations, but merely prescribes what such companies or associations, organized under the laws of any other state, shall be required to do before they are permitted to do business in this state: *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

The business, which corporations of other states organized to insure lives of members on the assessment plan "shall be permitted to do in this state," under the provisions of G. C., § 9435, and the following sections, is that contemplated by G. C., § 9427, which does not include the business of insuring the lives of members for the benefit of others than their families and heirs. A corporation of another state, organized for insuring lives upon the plan of assessments upon its members, without other limitation than that the policy-holder shall have an insurable interest in the life of the member, is not embraced within G. C., § 9427, or G. C., § 9435, and the following sections: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

While life insurance corporations organized in Ohio to transact business on the mutual plan have no authority to do business on the assessment plan, yet such a foreign corporation having such power should be admitted to do business here under G. C., § 9435, and the following sections: *State, ex rel., v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

What constitutes the transaction of the business of life insurance on the assessment plan within the meaning of that term as used in G. C., § 9435, and the following sections, should be determined by the laws of this state; and according to those laws, that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policy-holders of a concern, the principal source of revenue of which must arise from post-mortem assessments intended to liquidate specific losses: *State, ex rel., v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

While the powers of a foreign insurance corporation formed to do business on the assessment plan, and the scheme of insurance it may pursue, must be ascertained by an in-

spection of its charter, nevertheless when it seeks a license to transact business in this state the question whether that scheme falls within the class of assessment insurance, must be determined according to our own laws: *State, ex rel., v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

Under a clause in its charter authorizing insurance "against injuries of every nature and description to persons or property, causing loss, damage or liability," a foreign mutual casualty association, in the absence of statutory restrictions, has power to issue an assessable policy to a street railroad company "against liability for injury to, or death of persons arising by reason of casualty occurring in, upon, about or by reason of the street railroad or its equipment": *Stone v. Traction Co.*, 4 O. N. P. (N.S.) 104, 16 O. D. (N.P.) 645.

A contract of a traction company, necessary in carrying on its business, whereby by virtue of an assessable policy of insurance on the mutual plan, it becomes a member of a mutual casualty company, is not *ultra vires*, because of the general rule against the purchase by a corporation of shares in other companies: *Stone v. Traction Co.*, 4 O. N. P. (N.S.) 104, 16 O. D. (N.P.) 645.

Power to refuse a license or refuse a renewal to a company refusing to pay taxes is implied in the power given by G. C., § 4397, to revoke a license: *State v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

Pendency of an action by the superintendent to recover the taxes does not suspend this power to refuse to renew the license. The state is not compelled to elect between these two remedies: *State v. Insurance Co.*, 58 O. S. 1, IV Longsdorf's Notes, 731.

Societies of other states, doing business in this state by virtue of G. C., § 9435, are governed by the laws of this state in their dealings with residents of this state, as they would be without such provision: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, *Earley v. Earley*, 69 O. S. 562].

G. C., § 9438, is a regulation imposed for the benefit of policy-holders and others doing business with a foreign insurance company, to be enforced by the penalties provided by law: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

G. C., § 9438, imposes a personal duty on the agent of a foreign insurance company to procure a certificate and file it with the recorder of the county, and a violation of such duty subjects him to a penalty; but his acts as such agent, within the scope of the authority conferred upon him by the com-

pany, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding his failure to procure and file such certificate: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

A life policy issued by a foreign company, is not rendered void by the neglect of the company to comply with the provisions of the act of April 16, 1867, providing for the incorporation and regulation of insurance companies; nor will such neglect, in an action brought against the company on the policy, excuse the policy-holder from paying premiums according to the terms of the policy: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

The two and a half per cent. which a foreign mutual insurance company must pay to the superintendent of insurance, under G. C., § 5433, is based on its gross receipts, and not on its net receipts: *State, ex rel., v. Hahn*, 50 O. S. 714, IV Longsdorf's Notes, 524.

The rule as to the change of beneficiaries and the designation thereof, is not different where a certificate is issued by an association organized in another state, doing business in this state under G. C., § 9427: *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727.

2. Retaliation.

An Ohio corporation, not permitted to do business in another state on the endowment plan, nor to issue policies so conditioned, nor any except for a fixed sum, is not permitted to act there on substantially the same basis as in Ohio, and, accordingly, corporations of that state are not entitled to do business here: *State, ex rel., v. Insurance Co.*, 47 O. S. 167, IV Longsdorf's Notes, 362.

Under the provisions of G. C., § 9435, and the following sections, the insurance commissioner can not be compelled to issue his certificate of authority to do business in this state to a corporation organized under the laws of another state, to insure lives upon the assessment plan, where, by the laws of such other state, Ohio companies organized to do business contemplated in G. C., § 9427, are not entitled as of right, to a certificate of authority to do business therein: *State, ex rel., v. Moore*, 39 O. S. 486, III Longsdorf's Notes, 1043.

G. C., § 658, imposing the same discriminations on a foreign insurance company that its state imposes on our companies is a retaliatory and not a reciprocal statute, and therefore does not apply to cases not fairly within its letter. As that section only applies if the other state discriminates against our companies there, it does not apply until

we have a company doing business there, although the other state has a statute which would so discriminate: *State, ex rel., v. Insurance Co.*, 49 O. S. 440, IV Longsdorf's Notes, 464.

G. C., § 5432 (amended 100 v. 66), that agencies of foreign insurance companies shall return the gross receipts of the agency for taxation, prescribes the rate for every foreign insurance company doing business in this state. G. C., § 658, that if another state taxes our companies, its companies shall be subject to the same obligation here, only operates if our companies there are taxed at a higher rate than foreign companies pay under G. C., § 5436. In such case the superintendent of insurance can collect in addition a sum which will make the total equal to what the foreign rule would realize if applied here, but no more: *State, ex rel., v. Reinmund*, 45 O. S. 214, IV Longsdorf's Notes, 269. See also TAXATION.

3. Certificate.

G. C., § 9436, does not enlarge the class of companies or associations, but merely prescribes what such companies or associations organized under the laws of any other state, shall be required to do before they are permitted to do business in this state: *State v. Moore*, 38 O. S. 7, III Longsdorf's Notes, 948.

Under the provisions of G. C., §§ 9435, *et seq.*, the insurance commissioner can not be compelled to issue his certificate of authority to do business in this state, to a corporation organized under the laws of another state to insure lives upon the assessment plan, where, by the laws of such other state, Ohio companies organized to do the business contemplated in G. C., §§ 9427, *et seq.*, are not entitled, as of right, to a certificate of authority to do business therein: *State, ex rel., v. Moore*, 39 O. S. 486, III Longsdorf's Notes, 1043.

4. Effect of Failure to Comply with Statutory Provisions.

A life policy issued by a foreign company, is not rendered void by the neglect of the company to comply with the provisions of the act of April 16, 1867, providing for the incorporation and regulation of insurance companies (see G. C., §§ 9512, *et seq.*); nor will such neglect, in an action brought against the company on the policy, excuse the policy holder from paying premiums according to the terms of the policy: *Insurance Co. v. McMillen*, 24 O. S. 67, III Longsdorf's Notes, 160.

G. C., § 9438, imposes a personal duty on the agent of a foreign insurance company to

procure a certificate and file it with the recorder of the county, and a violation of such duty subjects him to a penalty; but his acts as such agent, within the scope of the authority conferred upon him by the company, are valid and binding, not only in favor of third persons, but as between principal and agent, notwithstanding his failure to procure and file such certificate: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

Such a statute is intended for the protection of the policy holders and all others who deal with the insurance company. While a violation of G. C., § 9453, holds the agent liable for the penalty described, his contracts made in violation of G. C., § 9453, are nevertheless valid; and neither he nor his sureties can take advantage of the violation of the statute as a defense in an action by the insurance company upon his bond to compel him to account for premiums belonging to the company and collected by him: *Insurance Co. v. Ellis*, 32 O. S. 388, III Longsdorf's Notes, 640.

A mutual casualty association, incorporated under the laws of a foreign state providing for the incorporation and regulation of insurance companies, for the purpose of carrying on business as an accident insurance company, and insuring its members on the mutual assessment plan against personal injury, disablement or death resulting from traveling or general accidents, or from the pursuit of any trade or business, and against injuries of every nature and description to persons or property, causing loss, damage or liability, is sufficiently empowered to write an assessable policy of insurance on the mutual plan, for a street railroad company in Ohio, absolving it against "injuries of every nature and description to persons or property, causing loss, damage or liability." On such casualty association becoming insolvent, its receiver, duly appointed by court, may maintain an action against said street railroad company to recover an assessment ordered by court to be levied on the members of said association, for the purpose of paying losses and expenses and otherwise liquidating the affairs of said mutual casualty association; and the plea that said contract is *ultra vires* on the part of said association, can not be urged on demurrer to a petition for such recovery, as the contract is not on its face beyond the scope of the power of the corporation by which it was made, and a proper showing to support the application of such doctrine must be made by the defendant by way of answer: *Stone v. Traction Co.*, 4 O. N. P. (N.S.) 104, 16 O. D. (N.P.) 645.

VI. FRATERNAL BENEFIT SOCIETIES.

A. DEFINITION AND NATURE.

The Royal Arcanum is a fraternal beneficial association within the meaning of G. C., §§ 9462, *et seq.*: *Williams v. Donough*, 65 O. S. 499, IV Longsdorf's Notes, 890; *Gilligan v. Royal Arcanum*, 5 O. C. C. (N.S.) 471, 16 O. C. D. 42 [affirmed, without opinion, in *Gilligan v. Royal Arcanum*, 72 O. S. 672].

The National Union is a fraternal beneficial association within the meaning of G. C., §§ 9462, *et seq.*: *Ingram v. National Union*, 17 O. D. (N.P.) 227, 4 O. L. R. 316.

The Endowment Rank of the Knights of Pythias is not within the scope of G. C., §§ 9462, *et seq.*: *Hildreth v. Knights of Pythias*, 8 O. N. P. 540, 11 O. D. (N.P.) 622.

The Endowment Rank of the Knights of Pythias was said in *Hildreth v. Knights of Pythias*, 8 O. N. P. 540, 11 O. D. (N.P.) 622, not to have a representative form of government.

An association established by a railway company, composed of some or all of its employes and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employes who apply for membership in said fund and are admitted, the railway company to take charge of and be responsible for the funds, make up deficiencies in the same, supply facilities for conducting the business and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company, is not an insurance company or association; and in agreeing to perform and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business: *State, ex rel., v. Railway*, 68 O. S. 9, IV Longsdorf's Notes, 937.

B. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

Under 92 v. 360, the superintendent of insurance was obliged to issue a certificate to any association which complied with the provisions of that statute: *State, ex rel., v. Vorys*, 69 O. S. 56, IV Longsdorf's Notes, 953.

Under a former statute (Bates section 3631-18, third edition) special exemption upon the proceeds of insurance in a corresponding chapter were created. This section was held to be unconstitutional as conferring a special privilege upon such organizations and

persons who took out insurance therein: *Williams v. Donough*, 65 O. S. 499, IV Longsdorf's Notes, 890 [for opinion below, see *Williams v. Donogh*, 6 O. N. P. 418, 9 O. D. (N.P.) 414].

R. S., § 3631-18 was repealed, 97 v. 421: *Williams v. Donough*, 65 O. S. 499, IV Longsdorf's Notes, 890 [for opinion below, see *Williams v. Donogh*, 6 O. N. P. 418, 9 O. D. (N.P.) 414].

The legislature is without power to delegate to a voluntary association of persons, unincorporated and unknown to the law, the right to fix the rates of assessment of fraternal insurance which shall be binding on all fraternal companies seeking to become incorporated under the laws of Ohio. Such attempted regulation in G. C., § 9476, is unreasonable and void: *State v. Lemert*, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 118.

A prosecuting attorney may institute and prosecute an action in *quo warranto* to oust a railway relief association which it is alleged has been organized and is being conducted in violation of the laws of the state: *State, ex rel., v. Pennsylvania Co.*, 13 O. C. C. (N.S.) 37 [affirmed, without opinion, *State, ex rel., v. Pennsylvania Co.*, 88 O. S. —].

It is competent for the general assembly to enact proper restrictions with reference to the character of relief associations which railway companies may maintain or assist in maintaining, and the requirement as to such relief associations in G. C., § 9010, is not violative of any constitutional provision: *State v. Pennsylvania Co.*, 13 O. C. C. (N. S.) 37 [affirmed, without opinion, *State, ex rel., v. Pennsylvania Co.*, 88 O. S. —].

Certificates of fraternal beneficiary organizations are not controlled by the rules of law applicable to ordinary life insurance: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

C. ORGANIZATION AND POWERS.

The legislature has no power to delegate to a voluntary association composed largely of nonresidents of Ohio the power to fix the minimum rate of assessments to be paid by an insurance company doing business on the assessment plan: *State, ex rel., v. Lemert*, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 113.

The legislature is without power to delegate to a voluntary association of persons, unincorporated and unknown to the law, the right to fix the rates of assessment of fraternal insurance which shall be binding on all fraternal companies seeking to become incorporated under the laws of Ohio: *State,*

ex rel., v. Lemert, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 113.

The first trustees of a beneficial association have power to adopt a provision which concerns the conduct of its business, such as providing that the members shall not be entitled to share in the benefit fund for the loss of a hand, unless amputation at or above the writ follows the injury: *The Chevaliers v. Shearer*, 6 O. C. C. (N.S.) 587, 17 O. C. D. 509.

If a fraternal beneficiary association which has been operating as a voluntary unincorporated association complies with the statutory provision of this state with reference to incorporation under the laws of Ohio, the superintendent of insurance has no power to refuse to certify and record such articles or to issue a certificate authorizing such organization to do business in Ohio; and mandamus will lie to compel the superintendent of insurance to issue such certificate. The fact that the incorporators have not filed a stipulation that the rate of regular payments or assessments should not be lower for death benefits than those required by the national fraternal congress table of mortality (see G. C., § 9476) is both premature since such announcement should be made only after such certificate is issued, and also unnecessary since such provision is unconstitutional in that the legislature can not delegate the right to fix such rates of such voluntary association: *State, ex rel., v. Lemert*, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 113.

The phenomenal growth of the National Union organization necessitated the adoption of new policies, the making of new tables, and an increase in the expense account, and what has been done by the Senate in that behalf was within the discretion of a governing body, and being free from deceit and fraud does not furnish a predicate for judicial examination: *Ingram v. National Union*, 17 O. D. (N.P.) 227, 4 O. L. R. 316.

D. FUNDS.

A nonresident fraternal beneficiary association, authorized by its charter and by the laws of the state in which it is chartered, and providing for the raising of funds to meet its contract obligations for surrender values, loan values, paid up insurance and dividends, may, under G. C., § 9470, prohibiting payment of reserve funds to individual use and benefit as distinguished from exclusive use thereof by the association "unless otherwise provided in the contract," provide for such insurance in this state: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

The adjudication of a claim by the duly authorized trustees of a fraternal organiza-

tion with delivery of the order, establishes a lien on the funds of the organization, which a court of equity will recognize as against a subsequently appointed receiver or assignee of the organization: *State v. United Workmen*, 11 O. C. C. (N.S.) 438, 20 O. C. D. 818.

The adjudication by the Supreme Lodge of the Ancient Order of United Workmen of a claim in favor of a beneficiary, and the issuing of a warrant on the treasury for payment of the claim, is a disposition of the fund which will prevail against the claims of general creditors asserted through receivers subsequently appointed in *quo warranto* proceedings: *Hunt v. A. O. U. W.*, 19 O. D. (N.P.) 130, 5 O. L. R. 374 [affirmed, without opinion, *McKemy v. Hunt*, 79 O. S. 431].

Certificate need not set forth the provision as to extra assessments if the association constitution and by-laws provide therefor and they are made a part of the certificate: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

One who is named as beneficiary in a certificate issued by the grand lodge of a fraternal organization, which had incorporated under the laws of Ohio, by virtue of the authority conferred upon it by the supreme lodge of such order which had incorporated under the laws of Texas, may maintain an action against the supreme lodge and against the receiver of the grand lodge and may recover a judgment against each to be paid to the extent of the funds in the hands of the supreme lodge or which the supreme lodge has power to raise, which funds are charged by the law of the order with the payment of such certificate: *Grear v. Supreme Lodge*, 21 O. D. (N.P.) 66.

One who has asked for an unconditional money judgment against a fraternal organization may have judgment payable out of the fund which is in the hands of such organization or may be received by it and which by the law of such order is charged with the payment of such certificates: *Grear v. Supreme Lodge*, 21 O. D. (N.P.) 66.

A division of funds will not be disturbed because done in an irregular way, where a just and equitable result has been obtained: *Grand Grove U. A. O. D. v. Mullen*, 1 O. C. C. (N.S.) 63, 14 O. C. D. 239.

On dissolution of a society to pay widows a monthly sum during widowhood and good behavior, the fund must be distributed for the value of the widow's life by annuity tables without reckoning the possibility of remarrying, or of behavior, and the surplus to members. The widows of those dying after dissolution can not share except as distributees of the husband's estates. Nor

can a widow who remarried before the distribution and again became a widow. A widow who gets more than her share by reason of others not being made parties can not be compelled to pay back. Accumulation of the fund since dissolution must go to the widows in proportion to their shares: *Collier v. Benevolent Association*, 7 Dec. Rep. 10, 1 Bull. 18.

Distribution of the surplus funds of an insolvent mutual aid society after paying all outside debts must proceed on the following lines: 1. Holders of matured certificate and beneficiaries of death claims are not creditors in such sense as to have a priority over other certificate holders. 2. Members in arrears for an assessment levied after the society had stopped business do not forfeit their rights, for the stoppage excused non-payment. 3. The fund will be distributed among all certificate holders in proportion to the amount paid on each, except that the assessment will be deducted from those in default: *In re Mutual Aid Association*, 3 O. N. P. 145, 4 O. D. (N.P.) 272.

Funds in the possession of local branches as a reserve subject to the order of the supreme lodge can not, upon the latter becoming insolvent, be appropriated by them, but belong to the receiver of the concern: *Schroder v. Supreme Sitting Iron Hall*, 7 O. N. P. 243, 1 O. D. (N.P.) 408.

A creditor of a mutual benefit corporation, whose claim is not in judgment, can not have a receiver on the ground of insolvency on the same tests of insolvency that apply to a business corporation. A benefit society is not insolvent because it has no money and refuses to pay for the money is in the members' pockets, nor because of a falling off of membership. Nor will a receiver be granted because of extravagant salaries paid to officers; courts can not review such matters if honestly done. Nor because of temporary use of the funds for paying claims which belong to other funds, especially if the by-law claimed to forbid it is ambiguous. Nor the unauthorized acts of the officers which do not injure plaintiff's interests. Nor for failure to call in funds from subordinate lodges to repair a deficiency in the fund when the only effect would be a short delay: *Baker v. Fraternal Mystic Circle*, 32 Bull. 84.

E. REPORT.

Where an association was doing business in this state when G. C., §§ 9462, *et seq.*, were passed, and continued to do business after the passage of that act, but failed for some time to file its annual report with the State Commissioner of Insurance as required

thereby as a condition for its privilege of doing business in this State, a certificate falling due in the meantime will not be void in the hands of the beneficiary: *Brewing Co. v. Cassman*, 21 O. C. C. 465, 12 O. C. D. 141.

F. BENEFICIARIES.

1. Who May Be.

A person who is not of the class for whose benefit a benefit society is authorized to issue a policy of insurance, can not legally be made a beneficiary in the policy, or demand the amount payable upon the death of the assured: *Starr v. Knights of Maccabees*, 6 O. C. C. (N.S.) 473, 17 O. C. D. 475 [affirmed, without opinion, in *Styre v. Starr*, 74 O. S. 501].

A woman who has occupied the relation of wife for a period of twelve years in the honest belief that she was the wife of the man with whom she was living, which relation, however, was unlawful in that he had a wife living at the time from whom he had never been divorced, is a "dependent" within the meaning of the charter and by-laws of a benefit society which authorizes the designation of dependents as beneficiaries in policies of insurance issued to their members, and is, therefore, as against the lawful wife or the heirs of the assured, entitled to the proceeds of a policy of insurance issued to him by the society without notice of such relation, in which she was referred to as his wife and designated as the beneficiary, notwithstanding the policy was issued after she discovered the unlawful relation referred to: *Starr v. Maccabees*, 6 O. C. C. (N.S.) 473, 17 O. C. D. 475 [affirmed, without opinion, in *Styre v. Starr*, 74 O. S. 501].

Certificates must be payable to such of the classes named therein: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

Under the laws of Ohio, beneficiary certificates are to be construed with reference to the status of the beneficiary at the time of payment. The words "Alice B. Taylor" in the certificate are *descriptio personae* and may be rejected as surplusage and the certificate is construed to mean that if there be no wife living, the benefits go to the administratrix in trust for his heirs: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

A wife who has secured a divorce subsequent to the issuance of a certificate in a fraternal beneficiary association is precluded from recovering benefits as wife or beneficiary: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

Under the laws of this state a benefit certificate in a fraternal beneficiary association neither lapses nor reverts to the association if the beneficiary, the wife, secures an absolute divorce prior to the death of the insured, but should be paid to the administratrix: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

Policy of insurance issued by the fraternal organization known as the National Union is not made contestable by the fact that the mother of the insured is named as the beneficiary, notwithstanding she is not a member of the family of the insured or dependent upon him for support: *National Union v. Shaw*, 9 O. N. P. (N.S.) 474, 20 O. D. (N.P.) 225.

Under the law of the Supreme Tent of the Knights of the Maccabees of the World a father is a proper beneficiary, although not dependent upon the insured: *Earley v. Earley*, 3 O. C. C. (N.S.) 71, 13 O. C. D. 618 [affirmed, without opinion, *Earley v. Earley*, 69 O. S. 562].

2. Power of Insured to Change.

A member of a fraternal beneficiary association may at any time change his beneficiary or make a new substitution without the consent of the beneficiary named: *Brotherhood Railroad Trainmen v. Taylor*, 9 O. C. C. (N.S.) 17, 19 O. C. D. 171.

Where a member of the Modern Woodmen of America forwarded to the official camp, three days before his death, a petition designating his son as beneficiary under a policy held by him and accompanied the petition with the required fee, but the new certificate was not issued until after his death, a case is presented which warrants the association in paying the amount of the policy to the son named in the new certificate: *Modern Woodmen v. Daerr*, 11 O. N. P. (N.S.) 360.

If the children of the member are named as beneficiaries of the death certificate and the member abandons them and ceases to pay dues and assessments, and his wife pays them for years for the children's sake, the member loses the right to change the beneficiaries, and the children are entitled to the fund at his death: *Tudor v. Tudor*, 26 Bull. 368.

But an amendment of the rules of the Odd Fellows' Benevolent Association, by omitting the words "in his lifetime," allows a change by will: *Vance v. Park*, 7 O. N. P. 138, 7 O. D. (N.P.) 564 [reversed, on weight of evidence, *Vance v. Park*, 15 O. C. C. 713, 8 O. C. D. 425].

Where the right exists in one insured in a beneficial order to change the beneficiary un-

der his policy, such policy up to the time of his death constitutes a part of his estate: *Fowhever v. Order of Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56.

Rules of the order prescribing the method of making such change, as where they required a surrender of the original certificate, are made for the benefit of the order and not of the beneficiary, and may be altered, abrogated or waived by it: *Thesing v. Supreme Lodge Catholic Knights*, 11 Dec. Rep. 88, 24 Bull. 401.

Where the by-laws of a mutual benefit association require a member to designate a beneficiary, and upon his failure so to do provide that the benefits shall be paid to certain heirs in the order named, the association has the right to say what shall be done with the benefits in the event of neglect on the part of the member to designate a beneficiary, and of failure of such heirs as are specified in the by-laws: *Halle v. Grand Lodge I. O. B. B.*, 1 O. C. C. (N.S.) 83, 14 O. C. D. 717 [affirmed, without opinion, *Halle v. Grand Lodge I. O. B. B.*, 72 O. S. 607].

The fact that the association may elect to treat the benefits as having lapsed, which is contrary to the spirit of the statute, does not entitle heirs at law who are not specified in the by-laws to recover the fund: *Halle v. Grand Lodge I. O. B. B.*, 1 O. C. C. (N.S.) 83, 14 O. C. D. 717 [affirmed, without opinion, *Halle v. Grand Lodge I. O. B. B.*, 72 O. S. 607].

3. Interest of Beneficiary.

A by-law adopted by a fraternal benefit association, which provides that a benefit certificate issued to a member shall be void and all benefits thereunder forfeited in case the insured shall die by suicide, felonious or otherwise, sane or insane, although adopted after the benefit certificate was issued to the insured and before the death of the insured by suicide, violates no vested right of the beneficiary: *Tisch v. Protected Home Circle*, 72 O. S. 233, IV Longsdorf's Notes, 989 [affirming, *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489].

It is not an invasion of vested rights to make an amendment applicable to certificates in existence at the time the amendment was adopted: *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489.

The rights of a member of a beneficial association, with reference to the drawing of sick benefits, are to be determined by the by-laws of the association as they stood at the time his sickness began; and a by-law adopted subsequent to the beginning of such sickness, which reduces the benefits to be

paid, is without effect as to such member: *Court Forrest City No. 10 v. Rennie*, 2 O. C. C. (N.S.) 510, 15 O. C. D. 790 [following *Pellazzino v. Catholic Society*, 9 Dec. Rep. 635, 16 Bull. 27].

A wife has no vested interest in a certificate of insurance issued by a fraternal order, and another beneficiary may be substituted for her without her consent; but if it appear that premiums on the policy were paid by her out of her personal earnings, either regularly or occasionally, a court will order that the amounts so paid by her be returned to her out of the proceeds of the policy: *National Union v. Shaic*, 9 O. N. P. (N.S.) 474, 20 O. D. (N.P.) 225.

The payee named in the death certificate or policy has no vested interest therein when the laws of the order reserve to the member a right to change the direction of the fund: *Thesing v. Supreme Lodge Catholic Knights*, 11 Dec. Rep. 88, 24 Bull. 401.

A member of a mutual benefit association had paid all the assessments made on him by the association up to the time when he disappeared. The association thereon declined to accept payment of the assessment coming due subsequently to his disappearance, tendered by the beneficiary named in the certificate, on account of such disappearance, and did not longer make any assessments on him. It was held that in an action brought on such certificate after seven years from the disappearance of such member had elapsed, that the presumption being that he was dead, the beneficiary was entitled to recover on the certificate: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

Where a member of a beneficiary association, by whose constitution the death fund is to be paid to the family or "whoever the deceased may have elected," has designated his minor grandson the beneficiary of an insurance policy therein, the guardian of the latter will be entitled to the proceeds thereof in preference to a trustee appointed by a will subsequently executed to apply the proceeds to the benefit of such beneficiary: *Murphy v. Benevolent Association*, 13 O. D. (N.P.) 183.

A devise of all property to a wife on her oral promise to give the proceeds of a death certificate to grandchildren affixes a trust provable by parol and the grandchildren are entitled *per capita*: *Vance v. Park*, 7 O. N. P. 138, 7 O. D. (N.P.) 564 [reversed, on weight of evidence, *Vance v. Park*, 15 O. C. 713, 8 O. C. D. 425].

G. LIABILITY OF SOCIETY.

The members of a lodge of the Independent Order of Odd Fellows are not liable to

another member of the same lodge for sick benefits, unless there is some law of the order expressly making them so liable. The obligation to pay sick benefits, as the laws of the order in this state stood in the year 1890, rested alone upon the lodge, and not upon the members or officers thereof: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849.

The expectancy of life of the beneficiaries determines their interests in the proceeds on dissolution of a mutual benefit association: *Collier v. Steamboat Captains' Association*, 7 Dec. Rep. 10, 1 Bull. 18.

The tribunal of a fraternal order has power to make a final decision upon the question of the right to benefits: *Cincinnati Lodge v. Littlebury*, 8 Dec. Rep. 194, 6 Bull. 237.

A member of a fraternal organization is charged with a knowledge of the powers of such organization and can not enforce against it an *ultra vires* contract whereby it made an unconditional promise to pay a fixed sum of money to the holder of a certificate issued by such order: *Grear v. Supreme Lodge*, 21 O. D. (N.P.) 66.

A regulation of a fraternal beneficiary association, providing that any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise, does not cover the case of an amputation or severance of only a part of a hand, although the hand is permanently disabled for use in performing any manual service whatever: *Brotherhood of Railroad Trainmen v. Walsh*, 89 O. S. —.

H. CONTRACT OF MEMBERSHIP.

1. What Constitutes.

The stipulations in the application and certificate of a beneficial association together with the provisions of the laws of the association, constitute the essential terms of the contract between the insured and the association by which the beneficiary is bound: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion in *Pete v. Woodmen*, 74 O. S. 445].

The certificate, constitution, rules and regulations and the by-laws of a beneficial association constitute the contract between the

association and its members: *Chevaliers v. Shearer*, 6 O. C. C. (N.S.) 587, 17 O. C. D. 509.

When a certificate issued by a beneficial association to one of its members, provided that if the holder lose one of his hands by accident, he shall be paid one-fourth the face value of the policy from the benefit fund, and that "this certificate is issued subject to, and to be construed and controlled by the constitution, laws, rules and regulations of the order," the holder thereof is not entitled to recover for a permanent loss of one of his hands, unless it be amputated at or above the wrist, where the constitution provides for payment only in such case, and this notwithstanding the holder had no actual knowledge of such latter provision: *Chevaliers v. Shearer*, 6 O. C. C. (N. S.) 587, 17 O. C. D. 509.

A member of a beneficial association in whose application for membership and a certificate of insurance it is stipulated that such certificate shall become null and void in event of his failure to comply with all the laws and rules of the association, and whose certificate also contains a stipulation that it is issued and accepted "subject to all the laws, rules and regulations" of the association, and "shall be null and void if said sovereign (the member) does not comply with all * * * the laws, rules and regulations of the Sovereign Camp," and that if the "dues and beneficiary fund assessment levied against the person named in the certificate by the association are not paid as required by the constitution and laws of the order, this certificate shall be null and void" is conclusively presumed to have knowledge of the provisions of such constitution, laws, rules and regulations, and to have assented thereto, and he is bound thereby: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion in *Pete v. Woodmen*, 74 O. S. 445].

Where the application for insurance in a fraternal order is made a part of the contract both by its own terms and by the constitution of the order, it is reversible error to charge the jury that the contract of insurance is embodied in the constitution and the certificate: *Brotherhood v. Daley*, 11 O. C. C. (N.S.) 464, 21 O. C. D. 391 [reversing *Daley v. Brotherhood*, 7 O. N. P. (N.S.) 238, 19 O. D. (N.P.) 60].

The rules and regulations of a mutual benefit association become part of the contract between the company and one accepting its proposal to assume the risks and obligations of another company: *Judge v. Mutual Benefit Association*, 10 O. C. C. (N. S.) 473, 20 O. C. D. 133.

A certificate of a foreign fraternal beneficiary association is sufficient if it provides therein that the constitution and by-laws of such association are made a part thereof as if set out therein in full: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

Where the certificate sets forth that the constitution and by-laws are part thereof and such constitution and by-laws provide for extra assessments, this complies with G. C., § 9471, requiring contracts with members to provide for extra assessments, because G. C., § 9469, provides that the certificate charter, constitution and by-laws constitute the contract; accordingly, this provision is contained in the contract though not incorporated in the certificate: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

Where a member of a mutual benefit association falls ill while in good standing with his dues paid up to the date of his illness, and after being ill a number of months dies with his dues paid up to the date of his death, his widow is entitled to the funeral benefits allowed to members in good standing, although during the deceased's last illness his dues were paid from time to time in lump sums instead of weekly, as called for by the by-laws of the order. A by-law of a mutual benefit association which provides that any member who is in arrears and becomes ill shall not be entitled to receive benefits from the association during his last illness, even though he should pay up all his back dues, is a reasonable by-law and not void on the ground that it is unequal or because it is vexatious or manifestly detrimental to the interests of the society: *Bennett v. J. O. U. A. M.*, 1 O. N. P. (N.S.) 445, 14 O. D. (N.P.) 593 [affirmed, *J. O. U. A. M. v. Bennett*, 16 O. C. D. 110].

A by-law adopted by a fraternal benefit association which provides that a benefit certificate issued to a member shall be void and all benefits forfeited in case the insured shall die by suicide, felonious or otherwise, sane or insane, is consistent with the purposes of the association and with its corporate charter, and imposes a reasonable condition upon which the parties to the contract may agree: *Tisch v. Protected Home Circle*, 72 O. S. 233, IV Loughsford's Notes, 989 [affirming *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489].

2. Fraud and Misrepresentation.

False answers to application for insurance relative to health, the applicant not knowing their falsity, will not avoid the

policy: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

Statements as to the following matters, in an application for insurance, are material, and false answers relative to same will avoid the policy: "Good health," "consulting physicians," "disease of genital organs or urinary organs," "fits, convulsions, headaches, severe or frequent," "loss of consciousness, tumors, etc.," "illness, ailment or injury not mentioned," "other insurance," "treatment in hospital," "anything in physical condition, family history or personal habits tending to shorten life": *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

False answers to questions in application for insurance constitute a breach of the warranty of their truth, if such answers are fairly contemplated by the parties to be of sufficient importance and of such a character as to require it, and plaintiff can not recover: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

To render an insurance policy void on the ground of false answers in the application, it is not necessary that death resulted from affliction of any kind had at the time of the application: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

The burden of proof of the untruthfulness of answers in an application for insurance is upon the company, and must be shown by a preponderance of the evidence: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

In actions upon contracts of life insurance the general rule as to declarations made by the deceased are applicable where the policy was held in a mutual benefit society, and oral statements made by the insured with reference to his physical condition prior and subsequent to the time of the filing of his application for insurance are not competent for the purpose of showing the falsity of the written answers contained in his application: *Daley v. Railway Trainmen*, 7 O. N. P. (N.S.) 238, 19 O. D. (N.P.) 60.

Fraternal beneficiary orders authorized by G. C., § 9462, are exempt from the provisions of G. C., § 9391, providing that certain false statements made in the applications for insurance can not bar recovery on the policies issued thereupon: *Grand Lodge of A. O. U. W. v. Bunkers*, 3 O. C. C. (N.S.) 256, 13 O. C. D. 487; *Gilligan v. Royal Arcanum*, 5 O. C. C. (N.S.) 471, 16 O. C. D. 42.

3. Construction.

In an application for insurance the question as to "any illness, ailment, or injury" does not include trifling and passing ail-

ments, etc.: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

"Good health" in application for insurance does not mean entirely and absolutely free from all bodily infirmities or tendency to disease, but a reasonably good state of health, free from disease or illness tending seriously or materially to weaken or undermine the constitution: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

In an application for insurance, the question as to "treatment in hospital" means taken to a hospital and treated in the ordinary sense, not casually being placed in a room of a hospital until restored from a fainting spell: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

In an application for insurance the question as to "headaches, severe or frequent" does not contemplate every trifling, passing pain: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

In application for insurance "consulting physicians" means some actual and serious consulting a physician and treatment by him, but does not include trivial matters of bodily discomfort: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

In an application for insurance the question as to "loss of consciousness" does not include a fainting spell long forgotten, not the result of bad physical condition: *Hess v. Ladies of Maccabees*, 4 O. L. R. 30.

Where it is provided in a policy of life insurance that the policy shall be void should the insured be killed while employed as a "railroad freight brakeman," this provision is not rendered inoperative by reason of the fact that his employment was what was known as a "district yard brakeman," if it appears that the hazard connected with the employment remains substantially the same: *Snow v. Modern Woodmen*, 4 O. C. C. (N.S.) 68, 14 O. C. D. 142.

4. Waiver.

Where the constitution of a fraternal beneficial order provides that no person shall be admitted to beneficial membership who is engaged in the sale at retail of intoxicating liquors, the officers thereof have no authority to waive such provision: *Grand Lodge of A. O. U. W. v. Bunkers*, 3 O. C. C. (N.S.) 256, 13 O. C. D. 487.

Failure of the officers of a mutual benefit society to enforce the rules constituting the contract between the members of the order contract between the members of the order, *Fahey v. Catholic Order of Foresters*, 3 O. L. R. 642, 51 Bull. 102.

When officers of a company have approved of a method of dealing not in strict accord

with written rules of the company, other persons knowing thereof may justly assume that they may act in the same way; this rule is founded on the principle of estoppel: *Fahey v. Catholic Order of Foresters*, 3 O. L. R. 642, 51 Bull. 102.

A local secretary of a beneficial association is without authority by extending the time of payment or accepting overdue assessments without the knowledge or assent of the association or its officers, to suspend a provision in the constitution and by-laws of the association to the effect that nonpayment of assessments at the time they become due shall *ipso facto* suspend the delinquent from membership, when such authority to agents is expressly denied by the laws of the association, and members of the association are conclusively presumed to have knowledge of such absence of authority: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion, in *Pete v. Woodmen*, 74 O. S. 445].

5. Amendment of By-laws.

Where a benefit certificate by a fraternal benefit association is silent in regard to suicide by the insured, but the application therefor contains agreements, signed by the insured, to conform in all respects to the laws, rules and usages of the order then in force, or which might thereafter be adopted by the association, and that such compliance is the express condition upon which the insured shall be entitled to participate in the beneficiary fund, which application is made a part of the contract, and such benefit association afterwards and before the death of the insured adopts a by-law which provides that "the benefit certificate issued to a member shall be void and all benefits thereunder forfeited in case the insured shall die by suicide, felonious or otherwise, sane or insane," such by-law thereby becomes a condition in the contract, which, if broken by the insured, will defeat a recovery thereunder: *Tisch v. Protected Home Circle*, 72 O. S. 233, IV Longsdorf's Notes, 989 [affirming *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489].

A provision in the constitution and by-laws that alterations and amendments may be made by the supreme circle, renders legal an amendment providing that all certificates shall become void and the benefits thereunder shall be forfeited in case the insured dies by suicide, whether sane or insane: *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489.

Where a fraternal beneficiary association reserves the right to amend its by-laws, a by-law providing that no death losses shall

be paid where the only evidence of death is the presumption arising from disappearance for seven years, is for the mutual benefit of the members, not against public policy, and is binding upon the beneficiary of a member, notwithstanding its adoption but fifteen days before the legal presumption of the member's death would be established, and notwithstanding the receipt of dues and assessments from the beneficiary up to date of the amendment: *McGovern v. Brotherhood of L. F. & E.*, 12 O. C. C. (N.S.) 137, 21 O. C. D. 243 [affirmed, without opinion, *McGovern v. Brotherhood*, 85 O. S. 460].

A reserved right to amend all by-laws gives no power to reduce the time for sick benefits to a member already on the sick list. His rights are vested and he is a creditor. Right to amend is not a right to repudiate a debt: *Pellazzino v. German Catholic Society*, 9 Dec. Rep. 635, 16 Bull. 27.

A benefit certificate by the laws of the order could only be legally issued on an application requiring a compliance by the applicant with the rules that are or may be enacted by the order, but by mistake his application was on a blank requiring compliance with the rules of the grand lodge of this particular jurisdiction. The supreme governing body of the order afterwards divided that jurisdiction into two, and thereby imposed a heavier assessment on such member, the mortality being greater in his grand lodge's jurisdiction. It was held that he is subject to such change. It does not violate his contract. Also payments by him after the change would waive any right to object: *Steuve v. Grand Lodge*, 5 O. C. C. 471, 3 O. C. D. 231.

6. Failure to Pay Assessments.

(a) Right to Decline Delinquent Assessments.

Where when the previous delinquencies were received the insured was in good health and entitled to discharge his delinquencies and be reinstated, irregularities in the receipt of such delinquencies will not affect the right of the assessments after the insured is dead or while he is dying; nor its right to defend on the ground that such delinquency terminated the rights of the beneficiaries under the certificate in accordance with the laws of the association: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion, in *Pete v. Woodmen*, 74 O. S. 445].

Payment of overdue assessments by a son of a delinquent member, after the death of such member, or while he is dying, will neither prevent the *ipso facto* suspension from membership of the delinquent member,

or the certificate of insurance held by him from becoming null and void under the laws of the association so provided in such a case, where there are no incidents connected with his relations to the association that would fairly lead him to suppose that reinstatement would be granted if he should become sick while delinquent, or, that suspension and loss of benefits would not attach by reason thereof: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion, in *Pete v. Woodmen*, 74 O. S. 445].

Calls sent out by a beneficial association addressed to its local secretaries directing them to collect the assessments therein named, and to mail or deliver to every member of the local order a reminder to pay the assessment and dues on or before certain date, but without specially naming any member, is not a waiver by the association of its constitution and laws providing for the *ipso facto* suspension from membership of delinquent members. Such calls can only be construed as calls upon such delinquents as are still in good health and present themselves in person for reinstatement, or furnish the prescribed certificate of good health, as required by the laws of the association: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion, *Pete v. Woodmen*, 74 O. S. 445].

Where the laws of a beneficial association provide for suspension and loss of benefits in case a member shall be delinquent with respect to payment of assessments, and he is so delinquent, the fact that a local secretary may have irregularly and without authority received from the member or the beneficiaries on former occasions payments of assessments with respect to which the member was delinquent, and may have reported the reinstatement of the member, and the further fact that the general officers of the association, in ignorance of such unauthorized and irregular acts on the part of the local secretary, may have received the delinquent assessments thus collected, will not estop the association from availing itself of subsequent delinquencies as a defense to a suit on the certificate; nor will it therefore be required to accept payment of such subsequent delinquencies under like conditions, as previous delinquencies were so irregularly received: *Pete v. Woodmen*, 5 O. C. C. (N.S.) 446, 16 O. C. D. 653 [affirmed, without opinion, in *Pete v. Woodmen*, 74 O. S. 445].

Membership in a mutual benefit society can not be forfeited, against the will of the member, by delinquency, *ipso facto*, but he must first be given an opportunity to justify himself, and this must be followed by some

action by the society looking to a severance of relations between the society and the member: *Schwartz v. Catholic Union*, 9 O. C. C. (N.S.) 337, 19 O. C. D. 471.

The mere fact that a policy holder in a beneficial order expresses dissatisfaction on account of "double header" assessments, and an intention to quit the order and not pay any more, while it may be competent evidence upon certain issues, can not alone deprive the beneficiary of rights under the certificate: *Crockett v. Order of Red Cross*, 4 O. C. C. (N.S.) 519, 14 O. C. D. 421.

A right to reinstatement, after forfeiture for not paying an assessment, on a satisfactory medical examination means satisfactory to the medical officer of the society, and if his judgment is fair and honest and in accordance with medical authority it is final: *Graveson v. Life Association*, 8 O. C. C. 171, 6 O. C. D. 327 [appeal from *Graveson v. Life Association*, 26 Bull. 183].

Reinstatement by paying all past assessments, furnishing a medical certificate and then receiving a majority of ballots is not complete until such vote, although delayed by consent for inquiry as to an apparent misstatement as to age, and on death of the member before conclusion of the inquiry in his favor, death benefits are not recoverable: *Council Catholic Knights v. Connema*, 3 O. C. C. 130, 2 O. C. D. 74.

A relief society confined to employes of railways is a legal body, though gotten up by the defendant, a railroad company, to protect itself from lawsuits, and by the act of 1880, is excepted from that statute; accordingly, a member after discharge from the employment of the railroad can not recover the dues retained from his wages on the ground that the railroad was doing an insurance business: *Gearen v. Railway*, 19 Bull. 293.

(b) Notice of Assessments.

Where the constitution of a beneficial order provides that all members shall be notified of assessments, notice of an assessment must be in fact given to a member before forfeiture of his rights as such will result from failure to pay the assessment, and the mere placing in the mails of a notice addressed to a member is not sufficient: *Crockett v. Order of Red Cross*, 4 O. C. C. (N.S.) 519, 14 O. C. D. 421.

A notice of an assessment by a mutual benefit association, sent in accordance with its rules to the correct address, binds the assured whether received or not, but if not so sent, the assured is not in default unless it was actually received: *Judge v. Mutual*

Benefit Association, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

Forfeiture of rights of a beneficiary in a mutual benefit association can not be predicated upon a failure to pay an assessment, where such failure was due to want of the required notice resulting from the company's failure to record a change of address: *Judge v. Mutual Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

Where the rules of a mutual benefit association provide for notice of assessments "by mail directed to his last recorded address," it is the duty of the company, when notified, to record the address correctly, and failure so to do will not excuse it from giving the proper notice: *Judge v. Mutual Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

Where rights to death benefits were to be forfeited by ten days' failure to pay an assessment, but a resolution was passed to publish calls for assessments and send a collector to notify members, and an assessment was made, but a member had no notice, and the collector did not call, and accordingly, did not pay, and after his death the wife paid the money on the collector's demand, it was held, (1) as the member had no knowledge of the assessment, his widow did not lose her right. He is not obliged to take the risk of seeing the publication. (2) The widow receiving back the payment is not a binding release, the consideration being grossly inadequate. (4) The hardship to the society is nothing; it only lost a few days' interest on one assessment: *Mutual Relief Society v. Billau*, 5 Dec. Rep. 217, 3 Am. L. Rec. 546.

Under a provision terminating membership by nonpayment of an assessment after 30 days from date of notice, and that notice shall not consist of mailing or delivering, the 30 days begin not from the date of notice, but from mailing or delivering: *Williams v. Life Association*, 6 Dec. Rep. 1168, 11 Am. L. Rec. 48, 8 Dec. Rep. 456, 8 Bull. 32.

Failure to pay an assessment in time by reason of the defalcation of the member's bookkeeper, who was in the habit of making the payments, is not accident or surprise, but is the member's risk: *Graveson v. Life Association*, 8 O. C. C. 171, 6 O. C. D. 327 [appeal from *Graveson v. Life Association*, 26 Bull. 183].

(c) Waiver of Irregularities in Payment of Assessments.

The fact that an association has waived prompt payments of assessments in the case of persons in sound health does not justify

the assumption that the assessments would be waived in the case of one who was dying at that time: *Fahey v. Order of Foresters*, 3 O. L. R. 642, 51 Bull. 102.

The fact that officers of a mutual benefit association ignore certain rules, does not of itself constitute a new and a different rule: *Fahey v. Order of Foresters*, 3 O. L. R. 642, 51 Bull. 102.

Delay for a few days to declare a forfeiture for nonpayment is not a waiver, nor is issuing a notice for a latter assessment two days before the time for forfeiture had arrived: *Graveson v. Life Association*, 8 O. C. 171, 6 O. C. D. 327.

Where defendant's constitution made eligibility to membership dependent on being a member of the Red Men, receiving assessments in ignorance that a member had ceased to be a member of the Red Men is not a waiver. Nor is failure to tender back the assessments to the widow a waiver, for they would go to the administrator: *Springmier v. Benevolent Association*, 8 Dec. Rep. 89, 5 Bull. 516.

A rule that a member of a protective association would be dropped if dropped from his lodge, and the rules of his lodge required the secretary to notify those in arrears for dues, and if not paid in four weeks he should be dropped, it was held that the burden is on the association to show forfeiture, and it is not shown by an entry on its books that he had been dropped without proof that he had received notice from the secretary. If the association has received assessments two years after such entry on the lodge books in ignorance thereof, a surrender of the policy by members of his family when on his deathbed on demand of the secretary will not prevent a recovery of the fund: *Protective Association v. Hook*, 9 Dec. Rep. 89, 10 Bull. 391.

7. Assignment.

It is not necessary for the beneficiary under a certificate of life insurance assigned as secretary for a *bona fide* valid debt to notify the insurer in order to make such assignment valid, but if the insurer, without knowledge of such assignment, should pay the beneficiary the proceeds of such certificate, such payment would be good: *Brewing Co. v. Cassman*, 21 O. C. C. 465, 12 O. C. D. 141.

A certificate of insurance issued upon the life of one of its members by a fraternal beneficiary society governed by the chapter on fraternal insurance, is a chose in action payable to the beneficiary and he may pledge it as security for loans made before or after the death of the insured: *Brewing Co. v.*

Cassman, 21 O. C. C. 465, 12 O. C. D. 141. See also *Arthur v. Beneficial Association*, 29 O. S. 557, IV Longsdorf's Notes, 500; *Charch v. Charch*, 57 O. S. 561, IV Longsdorf's Notes, 727.

Where a member of the Modern Woodmen of America forwarded to the official camp, three days before his death, a petition designating his son as beneficiary under a policy held by him and accompanied the petition with the required fee, but the new certificate was not issued until after his death, a case is presented which warrants the association in paying the amount of the policy to the son named in the new certificate: *Modern Woodmen v. Daerr*, 11 O. N. P. (N.S.) 360.

8. Amount Payable.

The beneficiary is entitled to the maximum named in the contract of insurance unless it is shown that the assessment, if levied, would not have produced such an amount: *Herron v. Catholic Knights*, 17 O. D. (N.P.) 190, 3 O. L. R. 598 [reversed on another point in *Catholic Knights v. Herron*, 17 O. D. (N. P.) 789, 4 O. L. R. 686].

If insurance under this chapter is made in Ohio with reference to the laws of Ohio, such laws control as to the distribution of such insurance although the insured was a resident of New York at the time of his death: *Aid Association v. Hey*, 17 O. D. (N. P.) 661, 4 O. L. R. 744.

I. MEMBERS.

1. Who May Be.

Where the constitution of a fraternal order provides that no person shall be admitted to beneficial membership who is engaged in the sale of intoxicating liquors, the officers of the order are without power to waive this provision: *A. O. U. W. v. Bunkers*, 3 O. C. C. (N.S.) 256, 13 O. C. D. 487.

2. Expulsion.

If a mutual relief society had a right to expel for feigning sickness, but not for disorderly conduct, and the charges seemed to be on the latter ground, but the witness showed the member while drawing benefits was drunk instead of sick, and he had due notice of the chance to defend the charges, such charges will be deemed sufficient for the former ground, especially so after an acquiescence for two years: *State, ex rel., v. Algemeiner*, 7 Dec. Rep. 449, 3 Bull. 295.

In an action by B, as beneficiary of a certificate on the life of A, which requires compliance with the laws of the order, and one of these is that a member will be expelled if

he engages in the liquor business, A was expelled without charges, on his confession in open meeting. The expulsion is legal, for his relation to the society is contractual, and he could waive charges and a trial. Moreover, his violation of rules would be a defense without expulsion: *Drake v. A. O. U. W.*, 1 Dayton Term Rep. (Iddings) 111.

Where a member of a mutual benefit society failed to comply with the requirements of the organization for a long period before his death, a jury is justified in finding that he received notice of the non-fulfillment of his obligations and was properly tried, and that his connection with the order will not be presumed after he has failed to pay the assessments which make possible the fund for which the order exists: *Herron v. Catholic Knights*, 15 O. D. (N.P.) 703, 2 O. L. R. 352.

The beneficiaries of an expelled member of a subordinate lodge of a mutual benefit association, whereof there is a superior body which prescribes the laws of the subordinate lodges, and among other things has provided a right of appeal to the superior body in a case of expulsion, can not recover the prescribed benefits in case of death of such expelled member, where the deceased did not exhaust his rights under the rules of the order, or make any effort to secure a reversal or modification of the decree of expulsion, or make any protest thereto: *Knights of St. John v. Herron*, 17 O. D. (N.P.) 789, 4 O. L. R. 686 [reversing *Herron v. Knights of St. John*, 17 O. D. (N.P.) 190, 3 O. L. R. 598].

A member of a beneficial order who acquiesces in his expulsion, pays no dues, and does not regard himself a member of such order, ceases to be a member even if his expulsion was not upon due notice and after a proper trial: *Foshever v. Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56 [affirmed, without opinion, *Foshever v. Red Cross*, 68 O. S. 717].

When a member of a benevolent association is suspended for nonpayment of dues and has not, at the time of his death, complied with the rules for reinstatement, the beneficiaries can not recover: *Supreme Council v. Connema*, 3 O. C. C. 130, 2 O. C. D. 74.

Courts can not interfere and by mandamus reinstate an expelled member of a benevolent order where he has not exhausted a right of appeal within the order. That the appellate officer had voted for the expulsion is no reason for not appealing. If such officer refuses to hear the appeal the remedy is mandamus against him: *State, ex rel., v. Knights of Golden Rule*, 9 Dec. Rep. 1, 10 Bull. 2. See also CORPORATIONS.

3. Waiver of Rights.

The beneficiary in a benefit certificate of a mutual fraternal society is not entitled to recover thereon, where the member to whom it had been issued had three years before his death been illegally expelled from membership therein, but who during such three years had not objected to such expulsion, applied for reinstatement, appealed therefrom as provided in the by-laws, or paid or tendered any dues or assessments accruing after the attempted expulsion: *Dimmer v. Catholic Knights of America*, 22 O. C. C. 366, 12 O. C. D. 413.

In such case three years is more than a reasonable time for the member to determine what he wished to do, or intended to do with regard to his void expulsion, and his neglect to do anything for that time, avoids the certificate: *Dimmer v. Catholic Knights of America*, 22 O. C. C. 366, 12 O. C. D. 413.

In such case, where such a length of time has elapsed that all reasonable men would agree that it was a reasonable length of time, the question then becomes a matter of law for determination by the court: *Dimmer v. Catholic Knights of America*, 22 O. C. C. 366, 12 O. C. D. 413.

Failure by a beneficial order to observe the formalities prescribed by its constitution as to the suspension of members and cancellation of their policies, renders such action illegal; but a member who ceases after such action to pay his dues, or to attend the meetings of the order, or to recognize himself in any way as a member thereof, will be held as a matter of law to have acquiesced in the action taken: *Foshever v. Order of Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56.

Failure of a member of a mutual benefit society to prosecute his rights in the tribunals of the organization, must be regarded by a jury before whom testimony thereof is presented as acquiescences on his part in the action thus taken, and a verdict embodying a contrary finding should be set aside: *Herron v. Knights of St. John*, 15 O. D. (N.P.) 703, 2 O. L. R. 352.

J. DEMAND.

Demand is not a necessary prerequisite to recovery by a beneficiary under a certificate of insurance in a mutual benefit society: *Herron v. Catholic Knights*, 17 O. D. (N.P.) 190, 3 O. L. R. 598 [reversed on another point in *Catholic Knights v. Herron*, 17 O. D. (N.P.) 789, 4 O. L. R. 686].

K. REMEDIES.

1. Appeals to Tribunals of Order.

The mutual interests of the members of a fraternal beneficiary association warrant their regulating their own affairs to the entire exclusion of the courts: *McGovern v. Brotherhood*, 12 O. C. C. (N.S.) 137, 21 O. C. D. 243 [affirmed, without opinion, *McGovern v. Brotherhood*, 85 O. S. 460].

In G. C., §9462, and analogous sections the beneficiary must in the first instance, exhaust the remedies provided for by the constitution and laws of the association: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849, 44 Bull. 212; *Catholic Knights v. Herron*, 17 O. D. (N.P.) 789, 4 O. L. R. 686 [reversing *Herron v. Catholic Knights*, 17 O. D. (N.P.) 190, 3 O. L. R. 598]. See to same effect, *Foresters v. Herlinger*, 6 O. C. C. (N.S.) 28, 17 O. C. D. 151.

The beneficial organization known as the National Union is a representative body, the rules of which afford a proper method of review to an aggrieved member: *Ingram v. National Union*, 17 O. D. (N.P.) 227, 4 O. L. R. 316.

The members of a lodge of the Independent Order of Odd Fellows are not liable to another member of the same lodge for sick benefits, unless there is some law of the order expressly making them so liable. The obligation to pay sick benefits, as the laws of the order in this state stood in the year 1890, rested alone upon the lodge, and not upon the members or officers thereof: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849 (decided under 92 v. 360).

When a member of such order claims to be entitled to sick benefits, he must seek his remedy, in the first instance, in the lodge and the tribunals of the order, and the determination of the matter by such lodge and tribunals in substantial accordance with the laws of the order, will be final and conclusive of the right to receive such benefits. If the lodge refuses or neglects upon proper demand to have the right to such benefits determined in substantial accordance with the laws of the order, or refuses to pay such benefits after the same have been awarded to such member, then such member may sue in the civil courts for the recovery of such benefits: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849 (decided under 92 v. 360).

Where, in the proceedings in a lodge in substantial accordance with its laws, it is determined that such member has no right to sick benefits, and the member appeals to the next higher tribunal in the order, and the lodge furnishes him a proper transcript

of the proceedings, and he fails to secure a hearing of his appeal by reason of his own negligence, or by reason of the negligence of such higher tribunal or some officer thereof, such failure to secure a hearing on his appeal will not entitle him to sue the lodge for such benefits in the civil courts: *Myers v. Jenkins*, 63 O. S. 101, IV Longsdorf's Notes, 849 (decided under 92 v. 360).

Under the constitution, by-laws, and regulations of the Independent Order of Foresters, a beneficiary must exhaust her remedy in the tribunals of the order for the payment of the death certificate before she can appeal to the civil courts: *Supreme Court of Foresters v. Herlinger*, 6 O. C. C. (N.S.) 28, 17 O. C. D. 151; *Knights of St. John v. Herron*, 17 O. D. (N.P.) 789, 4 O. L. R. 686 [reversing *Herron v. Knights of St. John*, 17 O. D. (N.P.) 190, 3 O. L. R. 598].

Failure of a member of a mutual benefit society, and particularly of an officer, when difference had arisen between the organization and himself, to prosecute before the organization the remedy provided by appeal or otherwise, is sufficient ground for afterwards denying him relief before a court of justice. Such failure must be regarded by a jury before whom testimony thereof is presented as acquiescence on the part of the member in the action thus taken, and a verdict embodying a contrary finding should be set aside: *Herron v. Catholic Knights*, 15 O. D. (N.P.) 703, 2 O. L. R. 352.

The beneficiaries of an expelled member of a subordinate lodge of a mutual benefit association, whereof there is a superior body which prescribes the laws of the subordinate lodges, and among other things has provided a right of appeal to the superior body in a case of expulsion, can not recover the prescribed benefits in case of death of such expelled member, where the deceased did not exhaust his rights under the rules of the order, or make any effort to secure a reversal or modification of the decree of expulsion, or make any protest thereto: *Catholic Knights v. Herron*, 17 O. D. (N.P.) 789, 4 O. L. R. 686 [reversing *Herron v. Catholic Knights*, 17 O. D. (N.P.) 190, 3 O. L. R. 598].

A member of a mutual benefit association is subject to the decision of the judicatories of the order, and can not apply to the courts unless a property right or contract is infringed: *Steuve v. Grand Lodge*, 5 O. C. C. 471, 3 O. C. D. 231.

The courts can not review the decision of the body to which the constitution of the society leaves the decision of the right to benefits: *I. O. O. F. v. Littlebury*, 8 Dec. Rep. 194, 6 Bull. 237.

The Supreme Lodge of the A. O. U. W. has the power to alter, amend or abrogate the laws of the order, and has exclusive jurisdiction over all matters pertaining to the welfare of the order: *Steuve v. Grand Lodge*, 5 O. C. C. 471, 3 O. C. D. 231.

The fund contributed by members of a mutual benefit society for relief of members or families is not a charity to be controlled by equity. Equity will not interpret the laws of the order to compel officers and agents to conform thereto. The proper tribunals of the society must administer its internal affairs. But rights in the fund are property rights, and equity will restrain a misapplication of them, and in such suit the secretaries of the subordinate lodges instead of the lodges may in proper cases be parties: *Stadler v. Brith*, 5 Dec. Rep. 221, 3 Am. L. Rec. 589.

A rule of the relief department of a railroad provided that the ruling of the advisory committee on appeal should be final and conclusive. It was held that, in so far as the rule seeks to bar resort to the courts it is void, and, after rejection of the claim by all the judicatories of the body, action lies: *Railway v. Stankard*, 56 O. S. 224, IV Longsdorf's Notes, 688.

An appeal having been denied from a decision refusing sick benefits, action lies in the courts to recover: *Myers v. Lucas*, 16 O. C. C. 545, 8 O. C. D. 431.

Where an Odd Fellows' lodge rejected a claim for sick benefits, but higher lodges on appeal ordered it to investigate, and the member sued it, its answer that it is willing to investigate, but plaintiff refuses to submit, states a defense. If the by-laws of a voluntary association provide for a trial, a member must submit to the decision of that forum: *Schryver v. Columbia Lodge*, 3 O. C. C. 422, 2 O. C. D. 238.

The right of appeal in the Odd Fellows' constitution from a lodge's proceedings "in all matters of form required by the constitution and laws," does not give an appeal from an order to pay sick and funeral benefits. Accordingly, if the lodge ordered them paid, a reversal of the order on appeal was void, and is no defense to an action for the benefits: *Mattoon v. Wentworth*, 7 Dec. Rep. 639, 4 Bull. 513.

Where the charter of a beneficial insurance association provides for a supreme circle to become the legislative and governing body of the order, a member can not interpose the objection that, inasmuch as the order is a corporation, the legislative power must be lodged with the stockholders, who in such an association are the membership: *Protected Home Circle v. Tisch*, 1 O. C. C. (N.S.) 185, 14 O. C. D. 489.

2. Injunction.

A member of a fraternal organization can not have an injunction against payments by such organization until he has exhausted all the remedies which the rules and regulations of such organization afford to him: *Coss v. B. & P. O. E.*, 4 O. C. C. (N.S.) 11, 14 O. C. D. 36.

The discretion of the governing body of a beneficial order can not be controlled by injunction in the absence of fraud or bad faith: *Ingram v. National Union*, 17 O. D. (N.P.) 227, 4 O. L. R. 316.

The courts have jurisdiction to hear an injunction against a masonic lodge from expelling members for membership in a Cerneau lodge: *Forest City Lodge Case*, 11 Dec. Rep. 854, 30 Bull. 225.

The expulsion of a member will be reviewed by the courts for fraud, but not for errors or irregularities: *Kent v. Odd Fellows Benefit Association*, 9 Dec. Rep. 522, 14 Bull. 237. See also INJUNCTION.

3. Mandamus.

Mandamus will not lie to compel a fraternal organization to restore a member who has been expelled unlawfully: *Mystic Circle v. State, ex rel.*, 61 O. S. 628, IV Longsdorf's Notes, 818 [reversing *State, ex rel.*, v. *Mystic Circle*, 9 O. C. C. 364, 6 O. C. D. 385].

A member of a private corporation organized for the mutual protection and relief of its members, though unlawfully expelled and excluded from participation in its benefits, is not entitled to a writ of mandamus to compel it to restore him to membership, because: (1) Such restoration is not an act especially enjoined by law. (2) He has a plain and adequate remedy in the ordinary course of the law: *Mystic Circle v. State, ex rel.*, 61 O. S. 628, IV Longsdorf's Notes, 818 [reversing *State, ex rel.*, v. *Mystic Circle*, 9 O. C. C. 364, 6 O. C. D. 385].

L. FOREIGN SOCIETY.

Where an association is organized or incorporated in another state, province or territory, under laws which provide for such an association operating within the description, in substance, as set forth in G. C., § 9462, and is shown by certificate to be authorized to do business in that state, and is not now doing business within this state, such association has the right to be admitted to do business within this state, when it shall have filed with the superintendent of insurance the required papers, as provided in G. C., § 9464, and under such circumstances G. C., § 9467, is mandatory upon the

superintendent of insurance to issue to such association a certificate authorizing it to do business within the state of Ohio: *State, ex rel., v. Vorys*, 69 O. S. 56, IV Longsdorf's Notes, 953.

The notice of revocation or discontinuance of a license prescribed by G. C., § 9490, is mandatory and jurisdictional: *State, ex rel., v. Lemert*, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 113.

It is not in contravention of the laws of this state for a fraternal beneficial association, chartered under the laws of Pennsylvania, to issue certificates in this state which contain provisions for payment to its members of cash surrender values, loan values, paid-up insurance and dividends arising from accumulated savings from death losses and expenses: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

Where the certificate of a fraternal beneficial association chartered under the laws of Pennsylvania, sets forth that its constitution and by-laws are made a part thereof, and there is a provision in said constitution and by-laws as to extra assessments, it is not necessary that the certificate set forth such provision: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

VII. GENERAL PROVISIONS REGULATING INSURANCE OTHER THAN LIFE.

A. POWER OF LEGISLATURE TO REGULATE.

An insurance company which was created before the present constitution by a special act of incorporation, must comply with such reasonable policy regulations as the state may subsequently impose upon insurance companies of that kind: *State, ex rel., v. Insurance Co.*, 50 O. S. 252, IV Longsdorf's Notes, 497 [affirmed, *Insurance Co. v. Ohio*, 153 U. S. 446, 8 O. F. D. 207].

An insurance company to which the franchise of making contracts of insurance is granted is subject to the control of the state not only as to the nature of the business which it may do, but also as to the form of the contract which it may make: *Robbins v. Hennessy*, 86 O. S. 181.

The right to carry on the business of insurance is a franchise and not a matter of natural right in this state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536; *Robbins v. Hennessy*, 86 O. S. 181.

B. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

G. C., § 9510 and the following sections, apply to the formation of insurance companies other than life insurance; and G. C., §§ 8623, *et seq.*, do not apply: *State v. Live Stock Co.*, 38 O. S. 347, III Longsdorf's Notes, 974.

The fact that G. C., § 9510, has been extended so as to include insurance other than fire insurance, and to authorize fire insurance corporations to insure against damage by lightning and tornadoes does not amount to a special grant of corporate power within the provisions of Art. XIII, § 1, of the Ohio constitution: *Insurance Co. v. Hahn*, 53 O. S. 639, 33 Bull. 286.

C. CORPORATION.

1. Formation of Corporation.

A verbal promise to take shares, while the stock is being subscribed which is necessary to authorize an organization, does not constitute the promisor a stockholder or member of such corporation, and a promise to pay for such shares is without a sufficient consideration to support it. A recovery on such promise to pay can not be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration: *Fanning v. Insurance Co.*, 37 O. S. 339, III Longsdorf's Notes, 916.

The general statute, G. C., § 8623, "corporations may be formed in the manner provided in this chapter for any purpose," etc., does not apply to corporations otherwise provided for, and, accordingly, does not authorize the organization of insurance companies, they being elsewhere specially provided for: *State v. Stock Co.*, 38 O. S. 347, III Longsdorf's Notes, 974. See also CORPORATIONS.

2. Investment of Capital.

An insurance company authorized to invest its funds as the directors deem best, has no power to purchase on credit, the note of a creditor in order to set it off against his claim. Such a contract is not an investment, and, as it would furnish a temptation to withhold prompt payment to depress the value of the creditor's paper and buy it cheap, is opposed to the objects of G. C., §§ 9510, *et seq.*: *Straus v. Insurance Co.*, 5 O. S. 59, II Longsdorf's Notes, 157.

Authority to an insurance company to invest its funds as its directors may think advisable, does not give it authority to purchase a note given by a policy holder whose loss it has refused to pay, such note being purchased under an agreement that if it can

not be used as a set-off against such policy-holder in an action by him upon such policy, it may be returned to the person from whom the insurance company bought it: *Straus v. Insurance Co.*, 5 O. S. 59, II Longsdorf's Notes, 157.

The purchase of a bill of exchange, although apparently within the power of an insurance company, is unauthorized if the object is to secure stock of such insurance company which belongs to one of the parties who is liable upon such bill for the benefit of one of the officers of the insurance company, who is also an assignor of such bill: *Bank v. Insurance Co.*, 12 O. S. 601, II Longsdorf's Notes, 585.

An insurance company which has power to lend its funds, but has no power to engage in the business of dealing in exchange or acting as a money broker, may purchase a bill of exchange, if in good faith, as an investment or as a means of collecting a debt: *Bank v. Insurance Co.*, 12 O. S. 601, II Longsdorf's Notes, 585.

The system of insurance provided for by G. C., §§ 9524, *et seq.*, is essentially different from that provided for by G. C., §§ 9593, *et seq.*: *Richards v. Canning Co.*, 7 O. N. P. 68, 9 O. D. (N.P.) 70.

3. Report.

A fire insurance company organized under a special charter before the adoption of the present constitution, is subject to such reasonable regulations as the legislature may prescribe by general law, and the public good may require—such regulations serving to secure the ends for which the company was created, and not being repugnant to the franchises and privileges granted in its charter. A fire insurance company thus incorporated, will not be exempt from a compliance with the requirements of G. C., §§ 9557, 9590 and 9591, to prepare and deposit annually in the office of the superintendent of insurance, a statement of its condition, unless such exemption appear to have been clearly granted by its charter: *State, ex rel., v. Insurance Co.*, 50 O. S. 252, IV Longsdorf's Notes, 497 [affirmed, *Insurance Co. v. Ohio*, 153 U. S. 446, 8 O. F. D. 207].

Unpaid dividends which have been declared by a mutual fire insurance company, which can not be claimed by the policy-holder except by renewing his insurance and having such dividend credited upon his premium, are not *bona fide* debts of the insurance company which can be deducted from its credits: *French v. Insurance Co.*, 12 O. D. (N.P.) 183.

D. AGENT.

1. Who is Agent.

A person soliciting risks for an insurance company, with authority to obtain applications on which policies are issued is the agent of the company: *Insurance Co. v. Sickles*, 2 O. C. C. (N.S.) 222, 13 O. C. D. 594, 14 O. C. D. 232.

G. C., § 9586, which provides that any person who solicits insurance and procures an application therefor shall be held to be the agent of the company thereafter issuing a policy on such application, anything in the policy to the contrary notwithstanding, was not intended to give to a mere solicitor of insurance all the powers of a general agent, or to change the rules of the common law as to the authority of an agent to bind his principal: *McBee v. Insurance Co.*, 11 O. N. P. (N.S.) 75.

A mortgagor is not in any sense the agent of the mortgagee in procuring insurance on the mortgaged premises for the benefit of the mortgagee as his interest may appear and in accordance with an agreement so to do: *Insurance Co. v. Boland*, 8 O. C. C. (N.S.) 325, 20 O. C. D. 811 [affirming *Agner v. Insurance Co.*, 2 O. N. P. (N.S.) 254, 14 O. D. (N.P.) 288; affirmed, without opinion, *Insurance Co. v. Boland*, 72 O. S. 645; *Insurance Co. v. Agner*, 73 O. S. 393, IV Longsdorf's Notes, 1004].

A soliciting agent who is employed by an insurance company to secure applications upon which policies are issued is the agent of the insurance company and not of the insured. Accordingly, if he fills up an application and in so doing makes a mistake, such mistake is that of the insurance company and not of the insured: *Insurance Co. v. Williams*, 39 O. S. 584, III Longsdorf's Notes, 1050.

A provision in the policy to the effect that the soliciting agent is to be regarded as the agent of the insured has no legal effect: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382.

A contract of hiring, entered into between one describing himself as general agent of a life insurance company and one who is to serve under him, who is identified in the contract as "agent," is a contract with the general agent acting in his individual capacity, and is not one upon which the company is jointly liable: *Bigger v. Insurance Co.*, 8 O. N. P. (N.S.) 27, 19 O. D. (N.P.) 704.

An adjuster employed by the insurance company to act for it in the matter is its agent and binds it for all he does in the matter within the scope and line of his employment and duties: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [af-

firmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

If one insurance agent secures insurance through another insurance agent both agents are to be regarded as agents of the insurance company and not of the insured: *Insurance Co. v. Provision Co.*, 13 O. C. C. 661, 7 O. C. D. 563.

G. C., § 9586, does not prevent a person who is the agent of two or more insurance companies from acting as the agent of the insured in order to obtain insurance from a third insurance company, in case the insurance policy is in force when delivered to such agent without acceptance by the insured in person: *Insurance Co. v. Shoemaker*, 22 Bull. 315.

The fact that an insurance company issues a policy at the request or recommendation of a soliciting agent shows *prima facie* that such agent has authority to make contracts on behalf of the insurance company: *Hilliard v. Insurance Co.*, 7 O. N. P. 561, 5 O. D. (N.P.) 576.

Where the premium was paid to an insurance broker who was to place the insurance, and he applied to an agent of defendant who placed it with defendant, it was held that, G. C., § 9586, providing that one who procures an application shall be deemed agent of the company, must be deemed to make the first broker the agent of the company and not of the insured the same as if he had applied to the company direct, instead of to an intermediate agent, the latter being rather his agent than the company's in such case: *Insurance Co. v. Provision Co.*, 13 O. C. C. 661, 7 O. C. D. 562.

The purpose of G. C., § 644, is to require all agents, general agents, sub-agents and soliciting agents and only such to be licensed. The test is whether the person thus aiding is acting in such capacity that his act is the act of the company: *Connelly v. Pickard*, 4 O. N. P. (N.S.) 294, 17 O. D. (N.P.) 116.

2. Authority of Agent.

An agent having the power to waive in writing certain printed provisions of a policy of insurance has authority to write into such policy conditions and provisions in conflict with the printed provisions that he has authority to waive, and such written provision will be held to be a waiver in writing of any such printed conditions in direct conflict therewith: *Bank v Insurance Co.*, 83 O. S. 309.

Where an insurance company has given authority to its agent to make, execute and deliver a policy of insurance, but has not given authority to such agent to make a later verbal contract waiving any provision

of the policy, a verbal contract undertaking to waive any provision of the policy will not bind the company. But the company will be bound if with knowledge of the facts it ratifies such act of the agent; and this may be done by the company by its direct acts which show such ratification or indirectly by conduct: *Bank v. Insurance Co.*, 83 O. S. 309.

Where the insurance policy stipulates that the violation of certain of its provisions will release the company issuing it from all liability thereon, and the agent issuing the policy is advised of acts of the insured claimed to be in violation of such provisions, and such policy is returned to the agent, and the company is notified by the agent of the act complained of, it is the duty of the company to act within reasonable time and to return either the unearned premium or the policy, and if it fails to instruct its agent within reasonable time with reference thereto and the agent returns the policy to the insured retaining for his principal the unearned premium, the company can not avoid liability for loss thereafter occurring for and on account of the acts in violation of such contract of which it had knowledge before the return of the policy: *Bank v. Insurance Co.*, 83 O. S. 309.

The return of such policy by the agent, if it be a contract the agent was then authorized to make, will operate as a new contract between the parties as of the date of its re-delivery: *Bank v. Insurance Co.*, 83 O. S. 309.

An insurance company issued an insurance policy upon a stock of goods upon which property there was concurrent insurance. Soon afterwards the insurance company revoked the authority of such agent, but did not give notice of this fact to the insured of the loss. Subsequently such agent who also represented another insurance company notified the insured that the company which had issued such policy wished to cancel it; and he offered to effect an equal amount of insurance in another company and produce a regular insurance policy in such other company. Thereupon the owner of such goods believing that the agent represented the original company surrendered the policy in the first company and accepted the policy of the second company. A loss occurred soon afterwards. The agent then returned to the insured the policy of the original company, but the insured retained the policy issued by the second company and brought suit thereon. It was held that the insured had a right to rely upon the continuance of the authority of the agent to represent the first insurance company and to accept such policy for cancellation; and that since such agent

also represented the second insurance company, and as such agent delivered the policy of the second insurance company as a substitute of the policy of the first insurance company, the second insurance company was liable: *Insurance Co. v. Stambaugh T. Co.*, 76 O. S. 138, IV Longsdorf's Notes, 1023.

One engaged in a general fire insurance business, representing a number of companies, may be authorized by an owner desiring to keep his property insured, to accept for him the company's notice of cancellation of an existing policy and thereupon to write the risk in another company. Such authority may be directly given, or may be inferred from a course of dealing between the parties involving such transactions. But there is no presumption that the agent to procure a policy of insurance has authority, after he has procured and delivered it to the insured, to receive notice of cancellation and discharge the policy: *Johnson v. Insurance Co.*, 66 O. S. 6, IV Longsdorf's Notes, 895.

The general principle that when a matter is entrusted to an agent he will be regarded as having authority, in the absence of notice to the contrary, to carry the business to its completion, applies to the agent of a fire insurance company, where policies signed in blank are entrusted to him to be filled out and delivered and the premiums collected, and the policy-holder has no notice or knowledge of the location or existence of any other agent of the company. And further, under the general principles of agency, if the company denied liability, the agent had authority to communicate that fact to the policy-holder: *Stacy v. Insurance Co.*, 1 O. C. C. (N.S.) 441, 15 O. C. D. 67.

If the insured makes a correct statement of the facts to the insurance agents an overvaluation made by such agent does not render the policy invalid: *Insurance Co. v. Bowersox*, 6 O. C. C. 1, 3 O. C. D. 321.

The agent of an insurance company, who had full power in a large territory to receive proposals for insurance against loss by fire, to fix rates of premium, to receive moneys, to countersign, issue, renew and consent to the transfer of policies of insurance, signed by the president of the company and attested by the secretary, does not exceed his authority in appointing a sub-agent authorized to solicit and receive applications, fix rates of premiums and forward the applications, on which, if approved, he, the appointing agent, is to issue policies, insuring against loss from the date named in the application. The person so appointed is the agent of the company for these purposes, and his acts in this capacity are the acts of the company. Where an application has

been made to such sub-agent and such application has been sent to the office of the agent authorized to issue the policy, the company is liable for a loss occurring before the issuing of the policy and after the date named in the application for the commencement of the risk: *Krumm v. Insurance Co.*, 40 O. S. 225, IV Longsdorf's Notes, 20.

Authority to an agent to make contracts of insurance and to issue policies carries with it authority to give credit for the payment of the premiums; unless such agent's authority is especially restricted and notice of such restriction is given to the insured: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

In an action to recover on a written contract for life insurance and upon an alleged subsequent verbal modification of the same, statements and representations made by the agent who solicited the policy, prior to and contemporaneous with the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

The power of an agent to waive conditions in a policy of fire insurance is not different from the same power in life insurance: *Insurance Co. v. Balduin*, 62 O. S. 368, IV Longsdorf's Notes, 836 [approving and following *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832].

An insurance adjuster or "state agent" is without authority to waive a provision in a fire insurance policy that the same shall become void in case of loss if sworn statements therein referred to are not rendered to the company within sixty days after a fire, unless such waiver be indorsed upon or added to the policy, where it is stipulated in the policy that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such, as by the terms of this policy, may be the subject of agreement indorsed thereon or added thereto": *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387.

An insurance company or its authorized agents may waive by parol a condition in the policy as to other insurance, or be estopped by acts to deny the same, notwithstanding a provision requiring in such cases, an indorsement on or condition attached to the policy: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

By-laws of a mutual insurance company limiting the agent's powers or prescribing the manner or consent to "other insurance"

may be waived, abrogated or abandoned: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

An insurance company is liable for the acts of its agent within real or apparent authority; and printed instructions are ineffectual to limit his authority if the company has in effect conferred such authority or if it causes the general public by its conduct to believe that such authority has been conferred: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

In a policy which insures against loss from liability to employees of the insured who may accidentally sustain bodily injury while in the employ of the insured, "under circumstances which shall impose upon the insured a common law or statutory liability to such employees by reason thereof," a stipulation as follows: "Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor," is of the essence of the contract and can not be waived by an agent of the company without authority therefor: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841.

If a policy contains a stipulation that "no agent has authority to waive or alter anything in this policy contained," and the same is accepted by the insured, it is both notice to and an agreement by, the insured that an agent has no authority to waive or alter anything contained in the policy: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841 [approving and following *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832].

Where it does not appear that a solicitor of fire insurance was authorized to waive the provision of the policy against other insurance, or that the agents who wrote the policy consented to such a waiver or had knowledge that other insurance had been placed on the same property, a petition for a reformation of the policy so as to provide for such waiver will be denied: *McBee v. Insurance Co.*, 11 O. N. P. (N.S.) 75.

G. C., § 9586, was not intended to give to a mere solicitor of insurance all the powers of a general agent, or to change the rules of the common law as to the authority of an agent to bind his principal: *McBee v. Insurance Co.*, 11 O. N. P. (N.S.) 75.

An agent may waive notice and proof of loss, although the policy expressly provides that an agent has no such authority: *Insurance Co. v. Danison*, 38 Bull. 163 (supreme court, without opinion).

Policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841 [approving and following *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341].

The insurer may not defeat the policy when a loss occurs by denying the truth of the application nor the authority of the agent, although he has transcended his authority, unless the insured is chargeable with knowledge: *Insurance Co. v. McGookney*, 33 O. S. 555, III Longsdorf's Notes, 688.

Where an agent of an insurance company, intrusted with certificates for intermediary insurance duly signed by the secretary of the company, with authority to deliver the same to applicants, erases therefrom a material stipulation, and afterward delivers the same to an applicant for insurance, who has no knowledge of the circumstances of the erasure or the want of authority on part of the agent to make it, the company will be bound by the certificate to the same extent as if the erasure had been authorized: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

A corporation engaged in the business of storing goods for hire is bound by a stipulation to effect insurance on goods stored with it, the stipulation being incident to a contract of bailment executed in its name by an agent who, though without express authority to stipulate to insure, is by it held out to the public as authorized to make contracts for storage in the conduct of its business, the bailor acting in good faith and without notice of any limitation upon the agent's authority: *Storage Co. v. Cox*, 74 O. S. 284, IV Longsdorf's Notes, 1009.

Where the agent of the company, in filling out the application for a policy of insurance against loss by burglary or larceny, construes a certain question asked of applicant, to suit the circumstances of the particular case, he acts for the company, and such company can not escape liability on the policy on the ground of the incorrectness of a statement in the application, based on a contrary construction: *Kandar v. Indemnity Co.*, 10 O. C. C. (N.S.) 449, 20 O. C. D. 260.

Plaintiff holding property by title bond and entitled to a deed on payment of a small balance still due, applied for insurance and correctly stated his title to the agent who informed him that he was owner and this was an unincumbered title, and so wrote up the application, which plaintiff signed. The application is made part of the policy. A fire occurred. It was held that, the contract will be reformed and relief granted.

The mistake or fraud is that of the agent; the plaintiff had a right to adopt the agent's terms of description: *Harris v. Insurance Co.*, 18 O. 116, I Longsdorf's Notes, 839.

An untrue representation as to incumbrances not fraudulently made, and the facts are known to the insurer's agent, who wrote the statement from his own knowledge, will not avoid the policy though the insured adopted and signed the application: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

Fraudulent acts of the agent within the apparent limits of his authority as substituting a spurious application for the genuine, bind his company: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

False answers being inserted in the application without the insured's knowledge by an agent to forward applications, the agency can not be shifted to the insured by a clause in the policy that the person procuring the insurance shall be deemed agent of the insured: *Insurance Co. v. McIntyre*, 7 Dec. Rep. 577, 4 Bull. 21.

Contrary ruled in case of a mutual company: *Sykora v. Insurance Co.*, 7 Dec. Rep. 372, 2 Bull. 223.

Where the charter of a mutual company is made obligatory on all members, and provides that a policy on incumbered property shall be void unless the incumbrance is stated in the written application, it was held that, if the application states the property is owned in fee the policy is void, though verbal notice of the incumbrance was given to the soliciting agent: *Smith v. Insurance Co.*, 19 O. S. 287, II Longsdorf's Notes, 946.

An agent to receive and forward applications acts as agent of the appellant. Notice to him is not notice to the company: *Smith v. Insurance Co.*, 19 O. S. 287, II Longsdorf's Notes, 946.

A sub-agent representing the company in a particular branch becomes a direct representative of the company, and it is bound by notice to him and by his acts in such branch: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

Where the assured claimed that he had correctly informed the agent as to the amount of liens on the property, and the agent had written them falsely in the application, and the company pleads the falsity in defense, it is for the jury to say whether the company had knowledge of the liens and whether the insured was guilty of fraud: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

An agreement by the dowress with the agent that her children, the heirs, will guard

the property from fire pending the decision of the company as to canceling the policy, does not bind the heirs. She can not act for them: *Insurance Co. v. Britton*, 31 O. S. 488, III Longsdorf's Notes, 600.

3. Preliminary Contract with Agent.

In the absence of a provision to the contrary the insurance takes effect from the time that the insured makes a contract with the insurance agent for a policy of insurance: *Palm v. Insurance Co.*, 20 O. 529, I Longsdorf's Notes, 923.

Where an application has been made to a sub-agent, appointed by a general agent and such application has been sent to the office of the agent authorized to issue the policy, the company is liable for a loss occurring before the issuing of the policy and after the date named in the application for the commencement of the risk: *Krumm v. Insurance Co.*, 40 O. S. 225, IV Longsdorf's Notes, 20.

The fact that the insurance policy was not delivered until after the loss does not relieve the insurance company from liability if the agent received the premium or charged it to himself as agent, the policy was prepared ready for delivery, and notice given to the insurance company before the loss: *Insurance Co. v. Shoemaker*, 22 Bull. 315.

Where an agent is authorized to receive applications, determine the character and amount of the risk and the rate, and collect the premium, and all this has been done, the contract is made and the risk has commenced, although the agent has no power to issue the policy and although the loss occurs before the application has reached the home office: *Palm v. Insurance Co.*, 20 O. 529, I Longsdorf's Notes, 923 [doubted on bill of review in same case, *Insurance Co. v. Palm*, 5 O. S. 107, II Longsdorf's Notes, 163].

If a company has a general and known rule that until payment of the premium there is no contract, its acceptance of a risk and drawing up the policy and laying it aside for the insured but never delivering it will not be ground in equity to decree performance of the contract if the premium was not paid before loss: *Flint v. Insurance Co.*, 8 O. 501, I Longsdorf's Notes, 450.

If an agent is entrusted with certificates of preliminary insurance, duly signed, his alteration thereof, by erasing a material part, is at the company's risk, and binds it: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

It was questioned if a condition that a policy does not attach until the premium is paid applies to preliminary insurance in *In-*

Insurance Co. v. Kelly, 24 O. S. 345, III Longsdorf's Notes, 177.

A charter provision that all contracts of insurance shall be signed by the president and attested by the secretary does not prevent the defendant showing a parol agreement that the policy shall only cover part of the property and be released as to the rest: *Halliday v. Insurance Co.*, 7 Dec. Rep. 134, 1 Bull. 286.

An agent with power to make and renew insurance and assent to transfers can make a binding oral contract that a policy to a mortgagee assigned by him to a buyer of the property, the mortgage being paid, shall have the force of a new policy to the buyer: *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614 [affirming *Wall v. Insurance Co.*, 7 Dec. Rep. 408, 2 Bull. 333].

4. Compensation of Agent.

Where it is agreed between a life insurance agent and another that a commission shall be paid to him on the "first installment of premium" received from one recommended to the agency by him, the contract will be construed to mean that a commission is to be paid on the first annual premium paid, where it appears that the minds of the parties met on that basis: *Connelly v. Pickard*, 4 O. N. P. (N.S.) 294, 17 O. D. (N.P.) 116.

Under a divisible contract for the sale and transfer of an insurance business to A, providing that the vendor should not solicit business in the future for any outside company, the only right accruing to A through the failure of the vendor to abide by such provision is a claim for compensation in damages for the amount of business diverted from the agency. In such a case, it is for the jury to say, in fixing the damages to be recovered whether the commissions which went to an outside company would have gone to A in the absence of efforts of the vendor to divert them: *Poicer v. Brown*, 2 O. C. C. (N.S.) 320, 15 O. C. D. 420.

A general life insurance company's general agent for a specified territory, whose compensation is to be by commissions on policies procured by him or his sub-agents employed by him, but the compensation is subject to certain conditions expressed in the contract of employment, can not give to a sub-agent any greater right to his compensation than he himself had. His contract with the local agent is subject to the conditions of his own contract: *Insurance Co. v. Hessberg*, 27 O. S. 393, III Longsdorf's Notes, 366.

An agent's right to continued commissions is ended by his resignation. Acceptance of the resignation to take effect when he balanced his accounts does not prolong his term, for that is his duty: *Moses v. Insurance Co.*, 7 Dec. Rep. 609, 4 Bull. 214.

An appointment of a general agent for a state is not exclusive, and the company may appoint other general agents, but if the latter's operations materially lessen the first agent's advantages under his contract, he may terminate it, or have an action for damages: *Myers v. Insurance Co.*, 3 Dec. Rep. 490, 9 Am. L. Reg. (N.S.) 82.

A general agency for a life insurance company, in which no time is fixed, is revocable, like any other agency, at the will of either party. If there is a right to commissions on renewals, a revocation is subject to damages. But infidelity of the agent to the company, as by knowingly employing incompetent medical examiners; persuading policyholders to change into other companies; not giving sufficient time to the company's business, etc., destroys the rights in such renewal, as does also an abandonment by the agent of a substantial part of the business, unless assented to by the company. If there is a right to commissions on renewals as long as collected by the agent he must be ready and willing to collect, otherwise he loses the right. His abandonment of soliciting new insurances is ground to terminate this right, as well as the agency for other purposes; but if the company fail to discharge him for this, and he continued to collect renewals with its assent, his rights therein continued: *Myers v. Insurance Co.*, 3 Dec. Rep. 490, 9 Am. L. Reg. (N.S.) 82.

Damages for refusal to allow commissions on renewals are conjectural, because the insured may refuse to renew, and may drop his insurance; but the jury may resort to estimates furnished of the probabilities of the number dropped: *Myers v. Insurance Co.*, 3 Dec. Rep. 490, 9 Am. L. Reg. (N.S.) 82.

A contract employing an insurance agent, fixing no term, the compensation to be a commission of 25 per cent. on all first premiums collected by them and 10 per cent. for each next four years' renewal, it was held that, the agent can not recover commissions on renewals after the company has terminated the agency: *Trimble v. Insurance Co.*, 9 Dec. Rep. 414, 13 Bull. 109, 10 Dec. Rep. 533, 22 Bull. 37 [affirmed, without opinion, *Insurance Co. v. Trimble*, 21 Bull. 67].

5. Purchase of Agency.

The purchaser of a fire insurance agency, with a covenant that the vendors will not engage in a competitive business for a period

of years, can not bind by a custom as to the control of information with reference to expiration of policies, and thereby restrict the rights of others who were not parties to the contract of purchase and sale: *Bryson-Bedwell-Brubacher Co. v. Archer*, 1 O. C. C. A. 305 [affirmed by supreme court, without opinion, *Bryson-Bedwell-Brubacher Co. v. Archer*, 89 O. S. —].

E. POLICY.

1. Form.

(a) Oral Contracts.

A valid contract of insurance may be made by parol, when not forbidden by statute or a provision of the company's charter which has been brought to the knowledge of the other contracting party; and, as in other cases of parol contracts, the assent of the parties to the terms of the agreement may be shown by their acts and the attending circumstances, as well as by the words they have employed: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

See to the same effect, *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177; *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614; *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017; *Bartels v. Insurance Co.*, 15 O. D. (N.P.) 452, 2 O. L. R. 408.

Verbal agreements of insurance are not invalid: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177 [overruling *Cockerill v. Insurance Co.*, 16 O. 148, I Longsdorf's Notes, 757].

Parol contracts of insurance are valid and may be enforced at law or in equity: *Bartels v. Insurance Co.*, 15 O. D. (N.P.) 452, 2 O. L. R. 408.

A verbal promise that an insurance policy shall cover certain property, which promise led up to and was used to induce the making of the contract may be shown where the policy does not definitely express the same: *Insurance Co. v. Walrath*, 17 O. C. C. 509, 9 O. C. D. 699.

Upon the delivery of a policy pursuant to an oral contract for insurance, the policy relates back to the date of the oral contract: *Bennett v. Insurance Co.*, 11 Dec. Rep. 429, 27 Bull. 15.

In an early Ohio case, since overruled, it was held that the policy of insurance must be in writing; and that verbal waivers of conditions or forfeitures had no legal effect: *Cockerill v. Insurance Co.*, 16 O. 148, I Longsdorf's Notes, 757.

If a policy has been assigned together with the property upon which it was taken,

an oral agreement that such policy shall have the effect of a new policy is valid and binding: *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614.

In the absence of specific restrictions upon the power of the agent an oral agreement of an insurance agent within the scope of his authority is binding upon the insurance company: *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614.

A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect *in praesenti*: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

In order to establish the relation of insurer and insured in parol, as existing before the delivery of the policy, the plaintiff must do so by full and clear proof: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

In the absence of such stipulation in the application or policy as makes the actual delivery of the policy a condition precedent to the consummation of the contract of insurance, the actual delivery or non-delivery of the policy is not of itself conclusive evidence of the completion of the contract of insurance; but the unconditional acceptance of the application by the insurer is a consummation of the contract: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

Where there is no oral agreement for insurance prior to the policy, if a policy has been executed in form, but has not passed out of the possession of the insurer or his agent and no payment of premium has been made, the contract is *prima facie* incomplete; and the burden is upon the party who asserts that there is a contract, to show that the policy became operative by the intention of both parties: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

Where, there being no oral agreement for insurance to take effect prior to the issue of the policy upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy and, without parting with the possession thereof, wrote to the applicant that he had "issued" a policy, but would hold the same until he should have time to hear from his company, and the company thereafter rejected the risk, and the agent forwarded the policy to the company, these facts constitute no proof of a consummated contract of insurance, although the applicant may not have received notice of the refusal of the risk: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

The fact that the charter of an insurance company provides that policies of insurance shall be signed by the president and attested by the secretary and shall take effect when so executed, does not render oral agreements for insurance or for the modification of existing insurance policies invalid: *Halliday v. Insurance Co.*, 7 Dec. Rep. 193, 1 Bull. 286.

G. C., § 9587, refers to the final policy and not to the preliminary contract: *Bartels v. Insurance Co.*, 15 O. D. (N.P.) 452, 2 O. L. R. 408.

An insurance company will not be compelled to issue a policy unless the proof is clear that the contract to do so was complete: *Neville v. Insurance Co.*, 19 O. 452, I Longsdorf's Notes, 889.

(b) Preliminary Oral Modifications.

A general agent of a fire insurance company may make a preliminary contract of insurance which is binding upon the insurance company; but if he represents several companies he must in some way designate the company for which he contracts in order to bind it. It is not, however, necessary that he give notice to such company of such designation: *Insurance Co. v. Bennett*, 1 O. N. P. 71, 1 O. D. (N.P.) 60.

An agent authorized to make contracts of fire insurance and issue policies, may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice; and such waiver may be express or implied: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

When nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

In an action to recover on a written contract for life insurance and upon an alleged subsequent verbal modification of the same, statements and representations made by the agent who solicited the policy, prior to and contemporaneous with the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract: *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832.

A policy under seal may be modified by indorsement not under seal: *Gates v. Insurance Co.*, 5 Dec. Rep. 313, 4 Am. L. Rec. 395.

If the charter gives the company power to do "all things relative to the object of the association," a later clause that contracts of insurance shall be signed by the president will be confined to the final instrument, and will not disable the company to authorize an agent to make preliminary contracts of insurance: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

Agreements, acts and conduct of the parties occurring prior to and contemporaneously with the delivery of the policy, and inconsistent with the terms thereof, are merged in the written contract and are available only in an equitable proceeding to reform the contract. Reformation may be sought in a reply, together with a cause of action for judgment, after the policy is reformed: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

Both the insurer and assured are conclusively presumed to know and understand all the provisions of a fire insurance policy which is issued by the former and accepted by the latter; and in an action thereunder by the assured to recover for a loss covered thereby, he must stand or fall by its terms, in the absence of fraud or mutual mistake, or other circumstances which will effect an estoppel: *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387.

A policy on tobacco in a five-story building, No. 19, H street, occupied as a tobacco factory connected by wooden bridges from the upper story, being indefinite, may be shown by parol to include tobacco in the upper story of another building fronting on another street and connected by wooden bridges: *Harris v. Insurance Co.*, 13 Dec. Rep. 599, 1 C. S. C. R. 361.

2. Delivery of Policy.

Where there is no oral agreement for insurance prior to the policy, if a policy has been executed in form, but has not passed out of the possession of the insurer or his agent and no payment of premium has been made the contract is *prima facie* incomplete, and the burden is upon the party who asserts that there is a contract to show that the policy became operative by the intention of both parties: *Insurance Co. v. Whitman*, 75 O. S. 312, IV Longsdorf's Notes, 1017.

The payment of the agreed premium to the company, nor the delivery of the policy to the insured before the loss are not conditions precedent to the taking effect of the policy: *Johnson v. Insurance Co.*, 66 O. S. 6, IV Longsdorf's Notes, 895.

In determining whether there has been a delivery of a policy, effect will be given to the intention of the parties, and when the

terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

Where an application has been made to a sub-agent, appointed by a general agent and such application has been sent to the office of the agent authorized to issue the policy, the company is liable for a loss occurring before the issuing of the policy and after the date named in the application for the commencement of the risk: *Krumm v. Insurance Co.*, 40 O. S. 225, IV Longsdorf's Notes, 20.

In the absence of a provision to the contrary the insurance takes effect from the time that the insured makes a contract with the insurance agent for a policy of insurance: *Palm v. Insurance Co.*, 20 O. 529, I Longsdorf's Notes, 923.

The fact that the insurance policy was not delivered until after the loss does not relieve the insurance company from liability if the agent received the premium or charged it to himself as agent, the policy was prepared ready for delivery, and notice given to the insurance company before the loss: *Insurance Co. v. Shoemaker*, 22 Bull. 315.

Where the agent of several fire insurance companies agrees to insure certain property at a given rate without naming the company in which he will place the risk, and thereupon such agent writes the policy in one of his companies, the fact that the policy is not delivered to the assured, is not sufficient to relieve the company from liability thereon. Nor is the company relieved by the fact that no company was named between agent and the assured: *Insurance Co. v. Plato*, 3 O. C. C. (N.S.) 207, 13 O. C. D. 35.

3. Cancellation.

G. C., § 9577 and the following sections apply only to cases in which the policy of insurance is cancelled upon the written request of the person who has insured. They do not apply to cases in which the policies were canceled by the voluntary action of the insurance company: *Insurance Co. v. Brecheisen*, 50 O. S. 542, IV Longsdorf's Notes, 512.

The parties to a contract of insurance are free to fix the terms and conditions upon which a policy may be canceled by the company; but when the insurance is terminated upon the request of the person insured, the parties must comply with G. C., § 9577 and the following sections: *Insurance*

Co. v. Brecheisen, 50 O. S. 542, IV Longsdorf's Notes, 512.

A contract of insurance provided as follows: "This insurance may be terminated at any time at the request of the assured, upon the payment of any assessments that may be due and unpaid. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and when the assured shall have paid the proportion of losses and expenses due the company under the provisions of this policy, at the date of such cancellation, the premium note shall be surrendered." It was held that the policy was canceled and the insurance terminated by the giving of notice of cancellation by the company to the assured; and that the return of unearned premium was not a condition precedent to such cancellation: *Insurance Co. v. Brecheisen*, 50 O. S. 542, IV Longsdorf's Notes, 512.

One engaged in a general fire insurance business, representing a number of companies, may be authorized by an owner desiring to keep his property insured to accept for him the company's notice of cancellation of an existing policy and thereupon, to write the risk in another company. Such authority may be directly given or may be inferred from a course of dealing between the parties involving such transactions. But there is no presumption that the agent to procure a policy of insurance has authority after he has procured and delivered it to the insured, to receive notice of cancellation and discharge the policy: *Johnson v. Insurance Co.*, 66 O. S. 6, IV Longsdorf's Notes, 895.

G. C., § 9577, does not change the character of the contract until advantage is taken of the option to cancel the policy and to have the premium refunded; and until such option is exercised the company is not indebted to the insured for such premium: *Insurance Co. v. Cappellar*, 38 O. S. 560, III Longsdorf's Notes, 993 [affirming *Insurance Co. v. Cappellar*, 8 Dec. Rep. 493, 8 Bull. 247]; *French v. Insurance Co.*, 12 O. D. (N.P.) 183.

The fact that one is insured in a mutual insurance company, has cancelled his policy and received his premium note does not relieve him from liability for assessments, for debts of the company which were incurred while he was a member: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

An option to cancel the insurance on notice and tendering back a *pro rata* proportion of the premium, may be exercised on non-payment of a note for the premium when due, and if the company has the note, it is

not necessary to tender back in cash a proportion of the premium or credit it on the note. The note is thereafter subject to such credit: *Little v. Insurance Co.*, 38 O. S. 110, III Longsdorf's Notes, 959 [affirming *Little v. Insurance Co.*, 5 Dec. Rep. 285, 4 Am. L. Rec. 228].

Where the method of canceling a policy provided therein was not pursued, but the assured had handed it to the agent to be considered as canceled only when the risk was placed in another company, which was not done, the want of authority in the agent to make such condition is immaterial. A consent cancellation must be accepted with the conditions or not at all: *Insurance Co. v. Leonard*, 9 O. C. C. 46, 6 O. C. D. 49.

A reservation of a right to cancel for increase of risk "or any other cause" does not restrict cancellation to increase of risk, and non-payment of premium is sufficient ground: *Coddington v. Insurance Co.*, 3 Dec. Rep. 291, 1 Gaz. 108.

The reserved right to terminate insurance and return unearned premium is legal. The exercise of such right is no defense to the surety on the premium note: *Irwin v. Insurance Co.*, 13 Dec. Rep. 43, 2 D. 68 [affirming *Insurance Co. v. Irwin*, 12 Dec. Rep. 714, 1 D. 430].

A proposal by the insured for cancellation of the old policy and issuance of a new one for longer time must be accepted or rejected in its entirety, and does not authorize the insurer to cancel the existing policy: *Wilkins v. Insurance Co.*, 30 O. S. 317, III Longsdorf's Notes, 532 [reversing *Wilkins v. Insurance Co.*, 13 Dec. Rep. 592, 1 C. S. C. R. 349, 13 Dec. Rep. 856, 2 C. S. C. R. 204].

That the policy is issued on a forged application substituted by the agent for a genuine one, is no ground for rescission after death of the insured, though not discovered until then, for he can not be put in *statu quo*: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

Cancellation of a policy for non-payment of a note given for the premium is complete without return of the note, for since the premium during the currency of the note is unpaid, it can be held for that: *Coddington v. Insurance Co.*, 3 Dec. Rep. 291, 1 Gaz. 108.

An agent's statement that a five-year policy is from year to year, and can be terminated by refusal to pay installments on the premium note, is a mere opinion and no defense to the note: *Insurance Co. v. Sorter*, 4 Dec. Rep. 226, 1 Clev. L. Rep. 133.

When a contract between two insurance companies, by which one undertakes to reinsure certain policies issued by the other, contains a condition that "the insurance

may also be, at any time, terminated at the option of the company, by giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy," such contract is not separable and applies to the entire reinsurance and would not allow of the canceling of any one policy and the return of the premium thereon: *Insurance Co. v. Insurance Co.*, 13 O. D. (N.P.) 226. See also CONTRACTS.

F. CONTRIBUTION BETWEEN INSURERS.

A policy of insurance on a building against loss or damage by fire, reserved to the insurer the right to repair or rebuild upon giving notice of such intention within ninety days after proof of loss. After such proof the insurer served notice of its intention to rebuild, "acting jointly with other insurance companies claiming to be interested." At the time of the fire and of this notice, there were ten separate policies, in as many different companies, upon the same building; eight of which served like notices, severally signed by the company serving them. Before the time expired to rebuild, but while these insurers were taking steps for that purpose, the plaintiff compromised and settled with all said companies so electing to rebuild, except defendant, and released each of them from all liability, receiving for such release an amount of money in the aggregate much less than the amount of these policies. The defendant's policy had this condition: "In no case shall the claim be for a greater sum than the actual damages to or cash value of the property at the time of the fire; nor shall the assured be entitled to recover of this company in a greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general, or floating policies, and without reference to the solvency or liability of other insurance." It was held (1) that the liability of the defendant on its policy as a money indemnity for loss or damage by fire was by above quoted condition in its policy, several and not joint; (2) that the service by defendant of its intention to rebuild, acting jointly with the other companies, having like concurrent insurance, and serving like notices, converted the respective policies from contracts for a money indemnity into contracts of indemnity, payable in repairing or rebuilding, to be performed in the time named in the within a reasonable time. (3) Upon such conversion by the election of the insurers, their liability for failure to rebuild is several, and not joint, unless this several liability was, by agreement with plaintiff, con-

verted into a joint liability. The service of the notices did not operate to change the terms of this policy. Hence the plaintiff may recover on this policy such share of the whole damage as the sum insured bears to the whole amount insured without reference to the solvency or liability of other insurance. (4) That after the policy has been thus converted into a building contract, the insured might settle and compromise with any of the companies thus bound to rebuild without releasing the others from such proportionate share of such loss as their policies bore to the aggregate insurance. (5) That in ascertaining defendant's proportionate share of the entire loss, reference must be had to the aggregate insurance without regard to the fact that some of the companies had been settled with for a less sum than they were liable for, or that others did not elect to rebuild, or were insolvent or not liable: *Good v. Insurance Co.*, 43 O. S. 394, IV Longsdorf's Notes, 173.

The owner of a stock of goods who has them insured in two different companies is entitled, in case the goods are burned, to recover a judgment for the full amount of goods destroyed, which judgment must not exceed the amount of the policy issued by each or both of said companies; and the fact that he has recovered judgment against one of the companies, is no defense in a suit by the insured against the other company. When one of said judgments and the costs of both suits have been fully paid, it operates as a satisfaction to the extent of the amount paid on the judgment as to both judgments: *Insurance Co. v. Sample*, 2 O. N. P. (N.S.) 629, 15 O. D. (N.P.) 421 [affirmed, without opinion, *Sample v. Insurance Co.*, 76 O. S. 577].

In an action by a number of fire insurance companies to cancel policies and set aside an appraisal and award on the ground that the loss as returned was excessive by reason of fraudulent representations as to the amount of goods destroyed, the fact that the interests of the insurance companies were several and their policies were issued for separate considerations and were of different classes does not render the action several or present a misjoinder of parties plaintiff, where the primary relief sought is the cancellation of the award: *Michael v. Security Insurance Co.*, 6 O. N. P. (N.S.) 401, 18 O. D. (N.P.) 530.

Where a stock of goods is insured in two or more companies and final judgments have been obtained, the payment of one of said judgments and the costs in each suit operates as a satisfaction of the other judgments to the extent of the amount paid on said judgment: *Insurance Co. v. Sample*, 2

O. N. P. (N.S.) 629, 15 O. D. (N.P.) 421 [affirmed, without opinion, *Sample v. Insurance Co.*, 76 O. S. 577].

The fact that two or more insurance policies contain provisions for appraisal and the appraisal is had thereunder does not make such contracts joint; and an action thereon must be brought against the insurance companies separately: *Trustees v. Insurance Co.*, 12 O. D. (N.P.) 166.

If a property is insured in two insurance companies at the time of the loss in equal amounts each company is liable for one-half of the loss; if in three companies each company is liable for one-third of the loss and so on in like proportions: *Insurance Co. v. Shoemaker*, 22 Bull. 315.

Contribution clauses limiting recovery to the proportion of loss each policy bore to the total insurance, in a lessor's policies on his building, and also in the policies of a lessee of one part of it on his fixtures, issued without the lessor's knowledge, are applicable, and the lessee's policy is subject thereto, though payable to a different person: *Insurance Co. v. Carson*, 10 Dec. Rep. 728, 23 Bull. 224.

If the policy sued on is for \$2,000, and there is other insurance of \$5,000, the recovery on the former is two-sevenths of the loss proved: *Bank v. Insurance Co.*, 4 Dec. Rep. 340, 1 Clev. L. Rep. 339.

Where a building or structure is totally destroyed by fire, the fact that there is more than one policy of insurance on the property, does not prevent the application of the valued policy statute (G. C., §§ 9583 and 9584): *Insurance Co. v. McBee*, 85 O. S. 161 [affirming *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469].

Where a building or structure, is totally destroyed except the foundation walls, the fact that the description in an insurance policy, covering the property, includes the foundation, does not prevent the application of G. C., §§ 9583 and 9584 in the settlement of the loss: *Insurance Co. v. McBee*, 85 O. S. 161 [affirming *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469].

G. SUBROGATION.

When the property destroyed under circumstances which make the company liable therefor is insured, the right of the owner as against the railroad company and the insurer is limited to indemnity for his loss. The ultimate liability for such loss is upon the railroad company, and in an action brought for its enforcement, the owner and the insurer being parties, there should be a recovery for the value of the property destroyed without deduction on account of

payments made to the owner by the insurer in discharge of the obligation imposed by its policy: *Railroad v. Falk*, 62 O. S. 297, IV Longsdorf's Notes, 834.

In an action brought by the owner against the railroad company to enforce such liability an insurer, having before the termination of the action, made payment to the owner on account of such loss, should intervene for the purpose of being subrogated to the rights of the owner to the extent of such payment, and the amount recovered from the railroad company should be adjudged to the owner and the insurer according to their respective interests: *Railroad v. Falk*, 62 O. S. 297, IV Longsdorf's Notes, 834.

Where a loss, partially covered by insurance, is occasioned by a wrongdoer, against whom the assured, after payment of the insurance, recovers judgment for such loss in an action, to the prosecution of which the underwriter refuses on request to contribute, the assured, in a subsequent proceeding against him by the underwriter for reimbursement, is answerable for no more, if for anything, than the surplus of the amount recovered from the wrongdoer, which may remain after full satisfaction of his uncompensated loss, and the expenses of the recovery: *Newcomb v. Insurance Co.*, 22 O. S. 382, III Longsdorf's Notes, 83.

If property which is insured is destroyed by the wrongful act or omission by some person other than the insured, the insurance company upon payment of the loss is subrogated to the rights of the insured against such third person: *Oil Co. v. Insurance Co.*, 15 O. C. C. 355, 8 O. C. D. 145.

Where the insurance company pays a part of the loss it is subrogated to the rights of insured against the one causing the loss; and if the insured and the insurance company agree to sue the one so causing the loss, jointly, the insured has no right to compromise; and if he does so he holds as a trustee for the insurance company: *Insurance Co. v. Stang*, 18 O. C. C. 464, 9 O. C. D. 576.

Where property is destroyed by the negligence of a third person, a contract whereby insurance companies pay part of its value, and the owner agrees to sue such third person for joint benefit, the insurers to pay part of the costs, is supported by sufficient consideration, and the owner is a trustee of the insurers for their share: *Insurance Co. v. Stang*, 18 O. C. C. 464, 9 O. C. D. 576.

If such plaintiff dismisses the action without the company's consent he is liable to it. He can not settle his own interest and leave them to sue, but his settlement is of the

whole action: *Insurance Co. v. Stang*, 18 O. C. C. 464, 9 O. C. D. 576; see also *Insurance Co. v. Railway*, 4 O. N. P. (N.S.) 373, 17 O. D. (N.P.) 113.

The insurance company can not recover on the theory of subrogation if the insured could not have recovered: *Insurance Co. v. Railroad*, 74 O. S. 30, IV Longsdorf's Notes, 1005.

The subrogation of the insurer to the claim of the injured boat against the injuring boat can not obtain when both are owned by the same persons: *Insurance Co. v. Sherlock*, 25 O. S. 50, III Longsdorf's Notes, 210.

Where an owner of a house and lot procures insurance, loss, if any, payable to a mortgagee, and the house burns down, but the mortgage is paid from the sale of the land on foreclosure, the decree on foreclosure subrogating the second mortgagee to the policy, is an assignment to him of the first mortgagee's right, which the company can not dispute, though it was not a party: *Little v. Insurance Co.*, 5 Dec. Rep. 285, 4 Am. L. Rec. 228 [affirmed, on other points, *Little v. Insurance Co.*, 38 O. S. 110, III Longsdorf's Notes, 959].

A policy was effected upon the interest of the insured in lumber in a building which was in process of demolition. The interest of the insured was acquired by a contract with the railroad company by the terms of which the insured was to demolish the building and to release the railroad from all damage by fire caused by the railroad. A clause of the policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation, the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured." It was held that a stipulation such as the latter can only be used to work a forfeiture *strictissime juris*. That clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy: *Ensel v. Insurance Co.*, 88 O. S. 269.

In an action by an insurance company against a railroad company for recovery of the amount paid on a policy of insurance covering a building destroyed by fire through the alleged negligence of the railroad company, an averment that the owner of the property had complied with all the conditions of the insurance contract is a proper

avement: *Insurance Co. v. Railway*, 4 O. N. P. (N.S.) 373, 17 O. D. (N.P.) 113. See also RAILROADS.

H. COVENANTS AND CONTRACTS TO INSURE.

A covenant in a lease to keep the premises insured the proceeds to be used in rebuilding runs with the lease; and is binding upon the assignee of such lease even though the word "assigns" is not used in such lease: *Masury v. Southworth*, 9 O. S. 340, II Longsdorf's Notes, 379.

On the same question, see *Bank v. Building Co.*, 1 Hosea, 518. See also LEASE.

A corporation engaged in the business of storing goods for hire is bound by a stipulation to effect insurance on goods stored with it, the stipulation being incident to a contract of bailment executed in its name by an agent who, though without express authority to stipulate to insure, is by it held out to the public as authorized to make contracts for storage in the conduct of its business, the bailor acting in good faith and without notice of any limitation upon the agent's authority: *Carthage Co. v. Cow*, 74 O. S. 284, IV Longsdorf's Notes, 1009. See also BAILMENT.

I. MONOPOLY.

The provisions of the Valentine anti-trust law include the business of fire insurance, and an indictment which charges the defendants with unlawfully conspiring, combining and agreeing together to restrict the "trade, business and commerce of insuring property," and to fix and increase the premiums therefor and prevent competition, charges a crime under the laws of Ohio: *State, ex rel., v. Ross*, 4 O. N. P. (N.S.) 377, 16 O. D. (N.P.) 704.

The business of soliciting and selling fire, lightning, and tornado insurance is not commerce; contracts of insurance are not commodities; and the carrying on of the insurance business is not a trade within the meaning of G. C., § 6391, known as the Valentine anti-trust law: *State v. Bovee*, 6 O. N. P. (N.S.) 337, 17 O. D. (N.P.) 663.

An association of insurance agents, companies and underwriters for the purpose of regulating the rates of insurance and restricting competition, is not unlawful, and the members thereof are not liable for damages or injunction at the suit of a non-member of the association, for refusing to transact business with him, so long as he remains outside of the association, nor for compelling their members upon penalty of fine or expulsion from the association to refuse to have an office with him, or to recognize him in any way, in the insurance

business: *Runck v. Cloud*, 8 O. N. P. 436, 11 O. D. (N.P.) 119.

J. PAYMENT OF LOSS.

A "loss draft" issued by an insurance company, payable to the order of the insured and containing no conditions, but with a receipt attached, is evidently intended by the company issuing it to be negotiable, and it is a negotiable instrument although the receipt states the nature of the claim for which it was given: *Raum v. Insurance Co.*, 7 O. L. R. 299.

VIII. FIRE INSURANCE.

A. INSURABLE INTEREST.

If the legal title to a dwelling house used as the homestead is in the wife the husband has such an interest therein that the policy may be issued to the husband and wife jointly: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

Where a farm dwelling and farm implements are insured by a fire policy issued to a wife and husband, and the dwelling is used and occupied as a family homestead, and the implements are used on the farm where the dwelling is situate, a representation and warranty in the application that the property is owned by them jointly, should, unless the contrary intent is manifest be construed in the popular, and not in a technical legal sense, and when so construed will not be held to be untrue simply because the title to the dwelling is wholly in the wife and the title to the personalty wholly in the husband: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

A policy of fire insurance is not rendered void by reason of the fact that the application for the insurance, which was signed by an agent of the owners, indicated a joint ownership, instead of ownership in severalty, when it appears that the nature of the ownership was fully understood by the agent of the company at the time the application was signed, and that it was procured by him: *Insurance Co. v. Ward*, 5 O. C. C. (N.S.) 509, 14 O. C. D. 156.

Where an application for or a policy of insurance speaks of the property as belonging to assured "as agent," this is sufficient to notify the insurance company that assured has a principal and that the insurance is for the benefit of such principal; and where the insurance company makes no inquiry as to who is the principal, it can not be heard

to complain that the principal was not disclosed: *Insurance Co. v. Coal Co.*, 13 O. C. D. 191.

While it is a rule of law that an insurable interest in the party who takes out insurance is necessary to the validity of the policy and that such interest must be a direct one, yet a party may take out a policy upon property held as agent, and such policies are binding in favor of the actual owner, though his name is not disclosed: *Insurance Co. v. Coal Co.*, 13 O. C. D. 191; *Insurance Co. v. Wilson*, 6 O. S. 553, 11 Longsdorf's Notes, 258.

The insured party must have an interest, but it may be as agent or trustee, as well as personal: *Graham v. Insurance Co.*, 3 Dec. Rep. 95, 3 Gaz. 170, 13 Dec. Rep. 157, 2 D. 255.

If the insurance is to A, loss payable to G and B, the latter are merely payees of the loss. No insurable interest is shown to be in them, and it can not be shown that A was agent, and G and B were owners of the property, for that would vary the contract. An amendment asking reformation may be had: *Graham v. Insurance Co.*, 3 Dec. Rep. 95, 3 Gaz. 170, 13 Dec. Rep. 157, 2 D. 255.

A mortgagee may recover upon a fire insurance policy containing what is known as the union mortgage clause of the standard policy of New York, New Jersey and Connecticut, for a loss of the property by fire, when neither he nor the mortgagor presented proof of loss within sixty days after loss as required of "the insured" by a condition in the policy: *Insurance Co. v. Krumm*, 12 O. C. C. (N.S.) 364, 21 O. C. D. 409.

The seller of a steamboat reserved in the bill of sale an interest as mortgagee for the credit money, and it was agreed that he should get insurance for all, and a policy was issued to him, for whom it might concern. It was held that he had an insurable interest; and so, though he had pledged the purchase notes: *Williams v. Insurance Co.*, W. 542, I Longsdorf's Notes, 43.

An insured assigned his policy as collateral to a loan on mortgage. The house burned down. The policy provided for the payment to the mortgagee of \$400 or as much thereof as was necessary to satisfy the mortgage after applying the proceeds derived from the mortgage; also that where a policy is issued to a mortgagee, or is held as collateral to a mortgage, the assured can not demand or recover any part until collection of the mortgage. It was contended that "demand or recover" did not prevent action but only stayed execution, especially in view of a six months limita-

tion on the policy; also that G. C., § 9583 prohibited any defense except fraud and increase of hazard. It was held that the petition is not demurrable and action lies though the property has not been sold on foreclosure: *Insurance Co. v. Mirick*, 38 Bull. 172.

Where all homestead and exemption rights are reserved in a deed of assignment and there is a mortgage on the premises against which no exemption can be allowed, and the assured asks an allowance in lieu of a homestead out of the insurance money, such claim is not an insurable interest in lands, but a claim for money: *Insurance Co. v. Waters*, 65 O. S. 157, IV Longsdorf's Notes, 883.

The ownership of an equitable interest in real estate is sufficient to confer an insurable interest in the building standing on said property, notwithstanding the policy issued thereon contained the condition that "this policy shall be void if the interest of the insured in the premises be other than sole and unconditional," and "this policy shall be void if the building insured stands upon ground not owned by the insured in fee simple": *Little v. Insurance Co.*, 9 O. N. P. (N.S.) 377, 20 O. D. (N.P.) 315.

Under a policy which contains a condition that the "policy shall be void if the interest of the insured in the premises be other than sole and unconditional" and also that "this policy shall be void if the building insured stands upon ground not owned by the insured in fee simple" a vendee who has been in possession under a contract of sale for more than twenty years may recover on his policy of insurance although he has not paid the full amount of the purchase price nor has he received a deed for such property: *Little v. Insurance Co.*, 9 O. N. P. (N.S.) 377, 20 O. D. (N.P.) 315.

A vendee in possession of realty under contract of sale and after having paid part of the purchase price has an insurable interest in the realty: *Insurance Co. v. McCulloch*, 21 O. S. 176, III Longsdorf's Notes, 18.

A contract to convey in the future on payment of the purchase money, leaving the insured in possession, and with the legal title, and an equity equal to the whole purchase money, does not destroy his insurable interest: *Trumbull v. Insurance Co.*, 12 O. 305, I Longsdorf's Notes, 610.

A life tenant may insure his interest in the premises; and if he insures the realty to its full value and the insurance company in case of loss pays the amount of the policy to the life tenant, the remaindermen can not recover the difference between the value of the life interest and the amount

thus paid to the life tenant: *Hubbard v. Austin*, 6 O. N. P. 249, 8 O. D. (N.P.) 111.

A, the owner of the ground, contracted with B to make on shares the hay which could be cut therefrom. Thereafter A became insane and his wife was appointed as his guardian. B made the hay, which was stored and insurance taken thereon by B and the wife of A in a joint policy, the wife acting in her individual capacity. The hay burned, and after A had recovered his reason and the guardianship had been discharged the present suit was brought by B and the wife of A on the policy of insurance. It was held that the wife of A having no individual interest in the property destroyed could not recover under the policy, and the action being joint on a joint contract the motion for a directed verdict in favor of the insurance company should be granted: *Nessley v. Insurance Co.*, 10 O. N. P. (N.S.) 159, 20 O. D. (N.S.) 225.

A lessor has an insurable interest in improvements and additions made by the lessee: *Insurance Co. v. Carson*, 9 Dec. Rep. 848, 17 Bull. 357.

One partner has an insurable interest in the firm's merchandise: *Blackwell v. Insurance Co.*, 10 Dec. Rep. 159, 19 Bull. 87 [reversed, on other points, *Blackwell v. Insurance Co.*, 48 O. S. 533, IV Longsdorf's Notes, 428].

A policy issued to the owners of a mill under the firm name of M & Co. was indorsed, on the insurers ascertaining that they did not do business under that name, thus, loss, if any, payable to C E M & J M. It was held that these parties have an insurable interest, either in their own right or as trustees, of which the insurer was aware: *Matthews v. Insurance Co.*, 13 Dec. Rep. 798, 2 C. S. C. R. 109.

Where a firm became incorporated, and conveyed its real estate to the corporation, an insurance obtained by the partners in their own names, though they are the sole stockholders, where the company is a mutual one having by law a lien upon the property insured for its assessments, is void. The partners have no insurable interest in the property; the fee is in a distinct person: *Philips v. Insurance Co.*, 20 O. 174, I Longsdorf's Notes, 904.

The nature or extent of the insured's interest need not generally be stated in the policy (it was partnership property here), and he can recover any insurable interest he proves: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

A full insurable interest in the owner of goods is not prevented by his obligation to account to a third person for part of the

proceeds of them: *Insurance Co. v. Leonard*, 9 O. C. C. 46, 6 O. C. D. 49.

A owning a mill covered by the insurance agreed to exchange it with B for his land, and possession was exchanged, and the deeds were put in escrow to await B's paying off a mortgage on his land. A secretly obtained B's deed and had it recorded, the mill burned down and the insurer refused to pay, claiming that A had no interest in it. B rebuilt the mill, but never paid the mortgage on his land, and A bought this land on foreclosure of it. It was held that A has an insurable interest in the mill, at least to the extent of the mortgage on the B land, and could recover *pro tanto*. That B restored the mill after the insurer's refusal to pay is no defense: *Insurance Co. v. Straehle*, 13 Dec. Rep. 846, 2 C. S. C. R. 186.

Insurance obtained by a person for whom it may concern only includes the parties contemplated and not all who have an interest. But if it is for persons specially named their interest alone is covered: *Insurance Co. v. Rieman*, 12 Dec. Rep. 692, 1 D. 396.

The subject of insurance was described in these words: "On his interest in the lumber in Wabash Elevator No. 4, while on the premises, situated on Middle Ground near the Maumee river, Toledo. It is understood that the building is in process of demolition and said insurance is to cover above described lumber while on the premises." It was held that this advised the underwriters of the nature and extent of his interest as an element of the risk: *Ensel v. Insurance Co.*, 88 O. S. 269.

B. APPLICATION.

A reference in the policy to the application as a part thereof makes it in legal effect a part thereof as much as if it were copied in full: *Byers v. Insurance Co.*, 35 O. S. 606, III Longsdorf's Notes, 812; *Insurance Co. v. McCluckin*, 40 O. S. 42, IV Longsdorf's Notes, 4.

A misrepresentation in the application, if untrue in fact, is a false representation, whether intentionally so or not: *Byers v. Insurance Co.*, 35 O. S. 606, III Longsdorf's Notes, 812.

Unanswered questions in the application are deemed waived: *Insurance Co. v. McCulloch*, 21 O. S. 176, III Longsdorf's Notes, 18; *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177; *Insurance Co. v. Hock*, 8 O. C. C. 341, 4 O. C. D. 553.

Where a policy is in form a new one on a new application, but is in fact a renewal of former policies on the original application, the truth of the application is

to be tested as of the time it was made: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

Where the assured's title is by contract of purchase partly paid, and the answers to questions in the application are: Does the applicant own the property? Yes. Is any other person interested in it? No. Is there any incumbrance? Answer, held by contract, these answers are substantially true: *Insurance Co. v. McCulloch*, 21 O. S. 176, III Longsdorf's Notes, 18.

In the absence of fraud or mistake parol evidence is not admissible to vary the terms of an application for an insurance policy: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

C. MISREPRESENTATION AND FRAUD.

Failure to disclose any matter with reference to the description of the property which is material to the risk renders the policy invalid: *Insurance Co. v. Paver*, 16 O. 324, I Longsdorf's Notes, 766.

Omission to answer questions in an application does not amount to fraud; and if a policy is issued upon such application the failure to answer such question is waived: *Insurance Co. v. McCulloch*, 21 O. S. 176, III Longsdorf's Notes, 18; *Insurance Co. v. Hock*, 8 O. C. C. 341, 4 O. C. D. 553.

If by mistake of the agent of the insurance company the incumbrances upon the property are incorrectly described in the application, equity will grant reformation: *Harris v. Insurance Co.*, 18 O. 116, I Longsdorf's Notes, 839.

Concealment imports knowledge; that is, the assured can not be charged with it by non-disclosure of a fact of which he was ignorant: *Insurance Co. v. Paver*, 16 O. 324, I Longsdorf's Notes, 766; *Insurance Co. v. Insurance Co.*, 5 O. S. 450, II Longsdorf's Notes, 193.

The doctrine of concealment is not confined to marine insurance, but applies to fire insurance, though not to the same extent or with the same strictness and nicety, the insured being merely required not to misrepresent or designedly conceal, unless the fact is of unusual peril, and not discoverable by the insurer: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072; *Insurance Co. v. Insurance Co.*, 5 O. S. 450, II Longsdorf's Notes, 193.

The materiality of a fact concealed is for the jury, and if such fact was a previous fire they can consider its true cause, and not the insured's mere belief that it was incendiarism: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

If the questions in the application are full and specific the assured is justified in believing that no other matter needs disclosure: *Cheever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

A policy on live stock "on farm of assured and on hay on farm" admits parol evidence that hay of the assured on a farm belonging to some one else was pointed out to the agent, with a statement as to the ownership, and thereupon the court will regard the words "on farm" as meaning the other farm, or will regard the misrepresentation in the policy as an act of bad faith on the part of the company, and will disregard it or reform and enforce: *Walrath v. Insurance Co.*, 16 O. C. C. 413, 9 O. C. D. 233.

Plaintiff's interest was acquired from the Wabash Railroad Company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it. The underwriters thoroughly inspected the risk on the premises before they wrote the policy. They did not inquire for the contract nor ask the plaintiff any questions, and he made no statement about it. A clause in the policy avoids it, "if the insured conceals any material fact concerning the insurance or any subject thereof." It was held that it was for the court to say whether his failure to mention the release was a material concealment within the terms of the policy: *Ensel v. Insurance Co.*, 88 O. S. 269.

D. WARRANTIES.

A warranty in insurance is a stipulation or agreement on the part of the insured in the nature of a condition; and a breach thereof renders the policy invalid even if the insured has acted in good faith: *Legler v. Guaranty Co.*, 10 O. N. P. (N.S.) 601, 23 O. D. (N.P.) 98 [circuit court reversed, without opinion, *Legler v. Guaranty Co.*, 88 O. S. —].

A warranty is part of the contract, either on the face of the contract or made part of it by reference, and must be literally true or exactly fulfilled. A representation is a preliminary inducement, and must be substantially true. Thus, if a statement, "the ashes are thrown out," is a warranty; it must be literally fulfilled; but if it is a representation, the fact that the ashes were occasionally left in the building, by accident or for a special purpose, does not avoid the policy: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

In the absence of statutory provisions to the contrary a false statement, whether made intentionally or not, avoids a policy which contains provision that it shall be void in

case any false representation is made as to any material fact which is material to the risk: *Byers v. Insurance Co.*, 35 O. S. 806, III Longsdorf's Notes, 812.

Where the statements in the application are by the policy made warranties, this makes a representation as to title a warranty: *Philips v. Insurance Co.*, 20 O. 174, I Longsdorf's Notes, 904.

Where the company is a mutual one, and by law has a lien upon the property, the representation as to title is a material one: *Philips v. Insurance Co.*, 20 O. 174, I Longsdorf's Notes, 904.

Where conditions on the back of the policy made certain particulars of description and use of the premises in the application a part of the policy and a warranty, other particulars in the application are not warranties, although another clause in the policy makes the application part of the policy. Such other particulars are merely representations, and if not substantially and materially untrue, will not avoid the policy: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

A warranty is never created by construction: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

The policy is construed against the insurer, and conditions are not taken as warranties unless clearly made so: *Insurance Co. v. Schoemer*, 13 Dec. Rep. 1018, 2 C. S. C. R. 474.

Warranties are strictly construed: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613.

E. PREMIUMS.

When nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be presumed that those which were usual and customary were intended: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

An agent authorized to make contracts of fire insurance and issue policies, may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice; and such waiver may be express or implied: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

Where, under an arrangement with the insured by which his insurance was to be kept up to a specified amount by renewals or new policies, it was the custom of the agent to charge the premiums as policies were issued, or renewed, and have periodical settlements with the insured, when the premiums would be paid, a credit for a premium

so charged to the next period of settlement, may be implied: *Machine Co. v. Insurance Co.*, 50 O. S. 549, IV Longsdorf's Notes, 512.

Where a promissory note is given for insurance, it does not constitute payment of the premium, but during the term of the insurance is a mere evidence of indebtedness arising under a contract not yet completed; and where a receiver comes in and takes possession of the property covered by the insurance, he is chargeable with the cost thereof for the remainder of the term the policies have to run: *Koch v. Hotel Co.*, 13 O. C. C. (N.S.) 163, 22 O. C. D. 581.

Where terms of policy provide for forfeiture of policy when any assessment is due and unpaid for thirty days, and insured leaves it to his clerk to pay them, if the latter fails through dishonesty to pay, it will not be unavoidable accident or mistake so far as the association was concerned, for which court would give relief: *Graveson v. Insurance Co.*, 8 O. C. C. 171, 6 O. C. D. 327.

F. CONDITIONS.

1. Construction and Waiver.

Forfeiture is to be construed strictly in favor of the insured and against the insurance company: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

Clauses or provisions of forfeiture in an insurance policy are to be construed strictly, and are not to be encouraged by the courts: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3.

A clause in an insurance policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation, the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured." It was held that a stipulation such as the latter can only be used to work a forfeiture *strictissime juris*. That clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy: *Ensel v. Insurance Co.*, 88 O. S. 269.

A policy of insurance, being drawn by the insurer, is to be construed most strongly against him: *Swander v. Insurance Co.*, 1 O. C. C. (N.S.) 233, 15 O. C. D. 3; *Blackwell v. Insurance Co.*, 48 O. S. 533, IV Longsdorf's

Notes, 428; *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613.

Clauses of forfeiture are strictly construed: *Blackwell v. Insurance Co.*, 48 O. S. 533, IV Longsdorf's Notes, 428.

Policies of insurance should be construed as other written contracts. Reasonable interpretation is all that is required: *Insurance Co. v. Clark*, 2 O. C. C. (N.S.) 585, 14 O. C. D. 33.

The construction of a policy, like other contracts, is to be reasonable, so as not to defeat the intention: *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341.

Ambiguous policies of insurance are always construed in favor of the assured; and where the language used is uncertain in its application, or ambiguous, parol evidence is admissible to aid in its interpretation and application: *State v. Insurance Co.*, 2 O. N. P. (N.S.) 111, 14 O. D. (N.P.) 523.

In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain: *Bank v. Insurance Co.*, 83 O. S. 309.

Where a person or corporation engaged in a particular line of business with the public, prepares or uses printed forms of contract for the purpose of effecting and carrying on that business, and places in such printed form of contract a printed condition of doubtful meaning susceptible of two or more constructions, that construction will be adopted most favorable to those dealing with the person or corporation that prepares or uses the printed form in the conduct of its business: *Bank v. Insurance Co.*, 83 O. S. 309.

While courts have no power to make contracts for parties, yet if the provisions of a contract are ambiguous or conflicting the court must construe the contract as nearly as may be to give effect to the purpose thereof, and to carry out the intention of the parties at the time of the execution of the contract: *Bank v. Insurance Co.*, 83 O. S. 309.

Where there is a conflict between any of the printed provisions of a contract and those inserted in writing at the time the contract is executed the latter will control: *Bank v. Insurance Co.*, 83 O. S. 309.

The construction of a policy is by the same rules and principles as other contracts. The phrase that it is "eminently a contract of good faith" merely refers to the fact that one of the parties is deemed less acquainted with the details of the subject than the

other: *Insurance Co. v. Miller*, 12 Dec. Rep. 165, 1 H. 325 [affirming *Miller v. Insurance Co.*, 12 Dec. Rep. 105, 1 H. 208].

As a contract of indemnity, the policy is to be construed in favor of the assured, and so also are exceptions from the risk. The words of the policy are to be taken in their ordinary sense, unless the context requires a peculiar sense. Effect must be given to every clause, especially where a new clause is put in a contract of established form: *Snapp v. Insurance Co.*, 8 O. S. 458, II Longsdorf's Notes, 358.

If the charter is by the terms of the policy to be used to explain the rights of the parties as to all cases not therein provided for, it can not be used to vary the policy. Accordingly, if by the policy insurance is suspended during non-payment of an installment due by the premium note, an additional penalty can not be added from the charter, making the whole note due on default, for this enlarges the obligation: *Matthews v. Insurance Co.*, 40 O. S. 135, IV Longsdorf's Notes, 13.

Conditions and forfeitures may be waived by the insurance company by its authorized agents: *Insurance Co. v. Baldwin*, 17 O. C. C. 143, 9 O. C. D. 118.

While express waiver in the law of insurance rests upon the intention of the party against whom it is invoked, and estoppel against the misleading conduct, implied waiver may rest upon either, when there is an intention to waive unexpressed but clearly to be inferred from the circumstances, or when there is no such intention in fact but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision in the policy. A waiver need not be based upon a technical estoppel, yet in the absence of an express waiver some of the elements of estoppel must exist: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

An agent having power to waive in writing certain printed provisions of a policy of insurance has authority to write into such policy conditions and provisions in conflict with the printed provisions that he has authority to waive, and such written provision will be held to be a waiver in writing of any such printed conditions in direct conflict therewith: *Bank v. Insurance Co.*, 83 O. S. 309.

Where insurance policy stipulates that the violation of certain of its provisions shall release the company issuing it from all liability thereon, and the agent issuing the policy is advised of acts of the insured claimed to be in violation of such provisions, and such policy is returned to the agent, and the company is notified by the agent of the

act complained of, it is the duty of the company to act within reasonable time and to return either the unearned premium or the policy, and if it fails to instruct its agent within reasonable time with reference thereto and the agent returns the policy to the insured retaining for his principal the unearned premium, the company can not avoid liability for loss thereafter occurring for and on account of the acts in violation of such contract of which it had knowledge before the return of the policy: *Bank v. Insurance Co.*, 83 O. S. 309.

Where an insurance company has given authority to its agent to make, execute and deliver a policy of insurance, but has not given authority to such agent to make a later verbal contract waiving any provision of the policy, a verbal contract undertaking to waive any provision of the policy will not bind the company. But the company will be bound if with knowledge of the facts it ratifies such act of the agent; and this may be done by the company by its direct acts which show such ratification or indirectly by conduct: *Bank v. Insurance Co.*, 83 O. S. 309.

Where it does not appear that a solicitor of fire insurance was authorized to waive the provision of the policy against other insurance, or that the agents who wrote the policy consented to such a waiver or had knowledge that other insurance had been placed on the same property, a petition for a reformation of the policy so as to provide for such waiver will be denied: *McBee v. Insurance Co.*, 11 O. N. P. (N.S.) 75.

The keeping of gasoline in a pint bottle on a shelf near a gasoline engine to be used in starting the engine, the bottle being filled when necessary from a gallon can kept in a separate building, is a keeping of a small quantity for incidental use and not in violation of a policy inhibition against keeping gasoline on the premises, and in view of the fact that it was fully understood when the policy was written that it was used for manufacturing purposes and operated by a gasoline engine the keeping of gasoline in such quantity in the engine room must have been in contemplation: *Gump v. Insurance Co.*, 15 O. C. C. (N.S.) 428, 24 O. C. D. 36 [affirmed, without opinion, *Insurance Co. v. Gump*, 86 O. S. 325].

2. As to Location.

The stipulation in a policy of fire insurance that "this policy shall become void, unless consent in writing is endorsed by the company hereon if any change takes place in the location of the property," may become the subject of construction because of the

variety of senses in which the word "void" is used: *Insurance Co. v. Burget*, 65 O. S. 119, IV Longsdorf's Notes, 882.

The terms of a stipulation as to change of location of the insured property should be construed with reference to its purpose, and, thus construed, it does not exempt the insurer from liability because of a change in the location of insured chattels without consent if the hazards of such location are not operative at time of the loss: *Insurance Co. v. Burget*, 65 O. S. 119, IV Longsdorf's Notes, 882.

The insured may recover upon a policy containing a stipulation against removal of the insured goods without the consent of the company, for the loss of chattels destroyed at a location to which they were removed with the insurer's consent, notwithstanding their previous removal to another location without such consent: *Insurance Co. v. Burget*, 65 O. S. 119, IV Longsdorf's Notes, 882.

Though by the policy change of location of the goods will avoid it unless consented to in writing, and the policy provides that agents are not authorized to waive conditions, yet where the agent who signed the policy, on being applied to for consent, tells the insured to come in later and he will fix it, and the goods are destroyed before this is done, the company is liable: *Insurance Co. v. Burget*, 17 O. C. C. 619, 9 O. C. D. 369.

Where goods insured "while located and contained as described herein, and not otherwise" under a standard form policy, are removed to another location without the written consent of the company to such removal indorsed upon the policy, there can be no recovery under the policy for loss by fire sustained after such removal, notwithstanding the insured notified the agent of the company of the proposed removal, and the agent said he would attend to the matter and see that the proper entries were made so that the insurance would be preserved: *Walsh v. Insurance Co.*, 6 O. C. C. (N.S.) 1, 17 O. C. D. 313 [distinguishing *Insurance Co. v. Burget*, 17 O. C. C. 619, 9 O. C. D. 369].

Under a fire insurance policy which purports to insure certain chattel property "all contained in" a specified dwelling, the insurance company is not liable for the destruction by fire of a toy patrol wagon which at the time of the fire was not within the dwelling but in a yard near the entrance to the cellar: *Bruck v. Insurance Co.*, 17 O. D. (N.P.) 751, 5 O. L. R. 46.

If personal property which is insured is described as situated at a certain place the subsequent change of the place of storage without the consent of the insurance com-

pany avoids the policy: *Insurance Co. v. Vorhis*, 1 O. C. C. 326, 1 O. C. D. 180.

If the insured notifies the insurance company that he is about to change the location of personal property and if he is notified that when such change is made it must be endorsed on the policy, such notice upon the agent or themselves amounts to the assent of the insurance company: *Insurance Co. v. Vorhis*, 1 O. C. C. 326, 1 O. C. D. 180.

Describing the buggy insured as situate in a shed on a named street, warrants its remaining there except when in temporary use, and if it is removed to a livery stable and there burned, the insurance is not recoverable: *Insurance Co. v. Vorhis*, 1 O. C. C. 326, 1 O. C. D. 180.

3. Vacancy.

If the policy contains a provision that the policy shall be void if the building is vacant or becomes unoccupied, such policy becomes void if the tenant moves out and leaves the house vacant although the owner of the house does not know that it is vacant: *Insurance Co. v. Wells*, 42 O. S. 519, IV Longsdorf's Notes, 126.

Where one of the conditions of a fire insurance policy is that if the building insured shall become vacant, unoccupied or uninhabited, without the consent of the insurer, the policy shall be void; and where such building becomes vacant after the policy was issued without knowledge or consent on the part of the insurer, and a fire occur therein while the building is vacant, there can be no recovery under the policy: *Insurance Co. v. Werner*, 76 O. S. 543, IV Longsdorf's Notes, 1027 [reversing *Insurance Co. v. Werner*, 6 O. N. P. (N.S.) 514, 16 O. D. (N.P.) 524, 1 Hosea, 405; approving and following *Insurance Co. v. Wells*, 42 O. S. 519, IV Longsdorf's Notes, 126; overruling *Moody v. Insurance Co.*, 52 O. S. 12, IV Longsdorf's Notes, 580].

The condition in a fire insurance policy was, that the property is "occupied, and to be occupied by tenant as a private dwelling," and to be void if the property should become unoccupied without the assent of the company. The tenant moved out, and the son of the owner slept in the house during the day and worked nights, having only a cot, a chair and an alarm clock in the house; the family of the owner resided next door and obtained their rain water from a cistern in the kitchen of this house, and the owner went through the house every day, the fire occurring late at night. It was held that in legal effect the house was unoccupied, and the court should have so instructed the jury, and then left the question to the jury as to

whether the risk was thereby increased: *Insurance Co. v. Baldwin*, 62 O. S. 368, IV Longsdorf's Notes, 836 [reversing *Insurance Co. v. Baldwin*, 17 O. C. C. 143, 9 O. C. D. 118].

A charge that the jury need not consider whether or not the property was vacant at the time the policy was applied for and issued is not erroneous under the provisions of G. C., § 9583, particularly when the evidence is undisputed that the agent of the company had knowledge of such vacancy: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469.

A condition in a policy of insurance that if the property insured becomes unoccupied without the assent of the company the policy shall be void, is not in conflict with G. C., § 9583, limiting the extent of liability upon policies, provided such condition increases the risk, but the fact that premises are unoccupied does not in itself raise to any degree the presumption of increase of hazard of the risk: *Insurance Co. v. McFarland*, 12 O. C. D. 591 [affirmed, without opinion, *Insurance Co. v. McFarland*, 60 O. S. 617].

Allegations in the answer of an insurance company in an action for indemnity for loss by fire, that the insured suffered the premises to become vacant and unoccupied without defendant's consent, and thereby increased the risk without allegation of fact to show how or in what manner such risk was increased, are not sufficient and do not raise such a presumption as will amount to a defense: *Insurance Co. v. McFarland*, 12 O. C. D. 591 [affirmed, without opinion, *Insurance Co. v. McFarland*, 60 O. S. 617].

That a dwelling has become vacant is not a defense unless the risk was increased, which is a question for the jury: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

Vacancy of a house for a reasonable time while getting another tenant is not a breach of a condition making the policy void if the house becomes vacant: *State v. Tuttgarding*, 8 Dec. Rep. 74, 5 Bull. 464.

Describing the property as "occupied as a hotel and barroom" is mere description and not a warranty that it shall not become vacant, and there may be a recovery, though it has stood vacant a long time: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

Renewal of the insurance while so vacant, with the agent's knowledge, estops the company to claim it is then a misrepresentation: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

Where the condition of manufacturing property as to occupation and operation was the same at the time of loss by fire as

when the policy was written and delivered, recovery thereon can not be defeated by a showing that during the intervening period there had been times when the property was not operated at certain periods of the day or night: *Gump v. Insurance Co.*, 15 O. C. C. (N.S.) 428, 24 O. C. D. 36 [affirmed, without opinion, *Insurance Co. v. Gump*, 86 O. S. 325].

4. Against Alienation.

A total alienation of property insured operates to avoid the policy of insurance, from the time of such alienation: *Manufacturing Co. v. Insurance Co.*, 10 O. S. 347, II Longsdorf's Notes, 441.

Where the assured has contracted to convey the assured premises at a future day, on payment of the purchase money, and, between the date of the contract and the day of payment, the premises are destroyed by fire, this is not such an alienation as would defeat the policy: *Trumbull v. Insurance Co.*, 12 O. 306, I Longsdorf's Notes, 562.

A policy of insurance, issued to a mercantile partnership on a stock of goods owned by the firm, and with which they are carrying on business, which contains no provisions limiting or restricting alienation of the property, is not avoided by a sale by one partner to his co-partners, who continue the partnership business of his interest in the stock: *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341.

When the policy contains a provision that the assignment of the same or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his co-partners, who continue the business, of his interest in the policy, does not avoid it: *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341.

If the clause is against "a sale or transfer" of the property there is no forfeiture unless the entire interest is sold. Taking in a partner is not a sale or transfer of the entire interest. The policy not having been assigned, the insured can sue in his own name for loss to his share of the property: *Blackwell v. Insurance Co.*, 48 O. S. 533, IV Longsdorf's Notes, 428.

A policy of insurance issued to a mortgagee contained a stipulation that the insurance might be terminated at any time at the request of the assured, the company only retaining customary short rates; also, that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property and satisfied the mortgage. It was held that a

subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company: *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614.

A new mortgage to take up and release an old one, but not increasing the amount, except to add in what was borrowed to pay taxes, does not avoid the policy: *Insurance Co. v. Danison*, 56 O. S. 795, 38 Bull. 163.

Mortgaging the property is not a change in the title, interest or possession, and so though such mortgage be by deed absolute with a defeasance on a separate paper: *Sun Fire Office v. Clark*, 53 O. S. 414, IV Longsdorf's Notes, 607.

Insurance to a mortgagee as such is not avoided under a clause against alienation of the subject matter by sale by the mortgagor, otherwise of an insurance to the mortgagor with a clause making the loss payable to the mortgagee: *Mitchell v. Insurance Co.*, 4 O. N. P. 386, 6 O. D. (N.P.) 420.

Where personal property insured against loss by fire in a mutual fire insurance company, is sold by a master in chancery, in pursuance of a decree upon a mortgage given by the assured, and the proceeds of such sale are, by order of the court, applied to the satisfaction, *pro tanto*, of such degree, and the property insured is afterwards burned, the assured can not recover for the loss, although subsequently to such loss and before the commencement of the action on the policy, the sale was, by consent of all parties thereto, set aside by order of the court under whose decree the sale was made: *Manufacturing Co. v. Insurance Co.*, 10 O. S. 347, II Longsdorf's Notes, 441.

A confirmation of a foreclosure sale to the mortgagee being vacated at the same term for want of statutory notice leaves the insurable interest of the mortgagor in possession the same as if there had been no sale: *Insurance Co. v. Sampson*, 38 O. S. 672, III Longsdorf's Notes, 1001.

Where the loss occurred after such confirmation, but before the sale was set aside, such mortgagor's insurable interest was not divested by the unauthorized sale: *Insurance Co. v. Sampson*, 38 O. S. 672, III Longsdorf's Notes, 1001.

Where a policy contains a condition that it shall be void if the property be sold or transferred or any change takes place in the title, such policy is not rendered void by a subsequent mortgage upon the realty: *Ryers v. Insurance Co.*, 35 O. S. 606, III Longsdorf's Notes, 812.

The mere appointment of a receiver over the affairs of a corporation on a default judgment, is not a change of title or possession, or taking into custody under a proceeding: *Insurance Co. v. Bowersom*, 6 O. C. C. 1, 3 O. C. D. 321.

Where an agent of a fire insurance company, who has authority so to do, enters upon the policy the consent of the company to a transfer of the property insured therein, the consent is binding upon the company whether the sale be all for cash, or part cash, with a mortgage securing the balance: *Insurance Co. v. Brown*, 4 O. C. C. (N.S.) 78, 14 O. C. D. 52, 16 O. C. D. 110 [affirmed, without opinion, *Insurance Co. v. Brown*, 68 O. S. 655].

A policy which contains a provision that it shall be void in case of transfer or incumbrance, is rendered void by the conveyance of the property reserving a life estate: *Insurance Co. v. Archer*, 36 O. S. 608, III Longsdorf's Notes, 878.

Under a policy upon a stock of goods which permitted the owner to replenish the stock, but provided that change of ownership of the goods should avoid the policy, a sale of the entire stock by the owner followed by the re-sale to the owner before the loss, was held not to avoid the policy: *Insurance Co. v. Lewis*, 1 O. C. C. 79, 1 O. C. D. 47 [affirmed, without opinion, *Insurance Co. v. Lewis*, 19 Bull. 173].

The transfer by one tenant in common, of his interest to the remaining owners does not avoid a policy which forbids alienation of the property: *Insurance Co. v. Sockman*, 15 O. C. C. 105, 8 O. C. D. 404 [affirmed, without opinion, *Insurance Co. v. Sockman*, 39 Bull. 362].

A policy of fire insurance, containing a provision against alienation of title, is rendered void by the execution of a trust deed covering the property insured for the purpose of paying off mortgage incumbrances the residue to go to the owner who holds the policy: *Insurance Co. v. Black*, 6 O. C. C. (N.S.) 132, 17 O. C. D. 86.

Where a fire insurance policy contains a provision, that, if another insurance shall be made on the property thereby insured, not consented to in writing thereon, or if the property shall be sold, the policy shall be void, it was held that if the property so insured, was, at the time the policy was made, under a mortgage, and the policy, with the assent of the company making same, was assigned to the mortgagee, the delivery of the possession and control of the property to the mortgagee subsequent to the date of the policy, is not such a sale as will invalidate the policy: *Insurance Co.*

v. Hayes, 17 O. S. 432, II Longsdorf's Notes, 842.

To entitle a partnership to recover on a policy of insurance issued to such partnership it must be shown that at the time the policy was issued and at the time the property was destroyed, such property was owned by such partnership: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

A sale of the property for \$75,000, retaining a lien for \$50,000 of the price, avoids the policy under a clause against "transfer or change of interest": *Bates v. Insurance Co.*, 13 Dec. Rep. 851, 2 C. S. C. R. 195 [reversing *Bates v. Insurance Co.*, 13 Dec. Rep. 698, 1 C. S. C. R. 523].

The duty devolves upon the insurer to ascertain, not upon vendee to disclose, the terms and conditions of a sale of personal property covered by its policy of insurance when the insurer, without restriction or qualification, consents to the sale, which consent, together with a transfer of the policy, is entered in writing upon the policy: *Insurance Co. v. Brown*, 4 O. C. C. (N.S.) 78, 14 O. C. D. 52, 16 O. C. D. 110 [affirmed, *Insurance Co. v. Brown*, 68 O. S. 655].

Under a policy of fire insurance containing a clause that if the property insured be sold or transferred "then this policy shall be void," the entering into an agreement between the insured and a third party, by the terms of which the insured agreed to convey to such party the premises insured at an agreed price, and the payment by such party under such contract of a portion of the price and the entering into possession of the premises and occupying them as owner, will avoid the policy: *Lees v. Insurance Co.*, 64 O. S. 593, 45 Bull. 335.

A deed of assignment for the benefit of creditors is a "sale" within the terms of a policy forbidding sale or transfer: *Insurance Co. v. Waters*, 65 O. S. 157, IV Longsdorf's Notes, 883.

The fact that the assignor retains possession of the property at sufferance, will not have the effect to prevent the policy from becoming void: *Insurance Co. v. Waters*, 65 O. S. 157, IV Longsdorf's Notes, 883.

An assignment for benefit of creditors by the assured avoids the policy under a clause against change of title or interest. G. C., § 9583, has no application: *Guenzburger v. Insurance Co.*, 3 O. N. P. 140, 4 O. D. (N.P.) 220.

An assignment of a policy of fire insurance, absolute in form but intended as collateral security for a debt due from the assignor is valid, and does not avoid the

policy where such assignment is not prohibited therein, and no misrepresentation of facts is made to the insurer, its assent being given without inquiry: *Insurance Co. v. Wolf*, 21 O. C. C. 202, 11 O. C. D. 815.

An assignment of a policy of insurance against loss by fire may be proved by parol evidence to have been given and accepted as collateral security for a debt due to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer: *Insurance Co. v. Wolf*, 21 O. C. C. 202, 11 O. C. D. 815.

A stipulation in the policy that the insurer will consent to its assignment within a certain time after sale of the property means only in case he has consented to the sale and does not compel him to give the assent, without which the policy is void by another clause on alienation of the property: *Insurance Co. v. Lindsey*, 28 O. S. 348, III Longsdorf's Notes, 309.

Assent to an assignment of a policy on a mortgagee's interest is presumably on the assumption that the assignee is a buyer of the mortgage, and not of the property. If he is the latter, and this is not disclosed, the policy is void, for the company's right of subrogation to the mortgage security is gone: *Wall v. Insurance Co.*, 7 Dec. Rep. 323, 2 Bull. 113 [not passed on in *Insurance Co. v. Wall*, 31 O. S. 628, III Longsdorf's Notes, 614].

Giving a chattel mortgage on the goods, and agreeing to keep up the insurance for the mortgagee's benefit, is not an assignment of the policy avoiding it, but relates to the future fund: *Prows v. Insurance Co.*, 13 Dec. Rep. 739, 2 C. S. C. R. 14.

5. Against Incumbrances.

Where the charter of a mutual insurance company, consisting of all the parties insured therein, provided that the company should have a lien upon all property insured, and that policies issued upon incumbered property should be void, unless a statement of the incumbrance appeared in the written application for the policy by the party to be insured, it was held that a policy issued without such statement, and upon a written application alleging the insured to be the owner of the property in fee, is void, notwithstanding a verbal notice of the incumbrance, given by the insured to the company's agent for receiving and forwarding the application: *Smith v. Insurance Co.*, 19 O. S. 287, II Longsdorf's Notes, 946.

Under a provision that a policy shall be void if the property is incumbered without

the consent of the insurance company, the execution of a mortgage upon such property without the consent of the insurance company renders the policy void: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704]; *contra Henderson v. Insurance Co.*, 2 O. N. P. 17, 2 O. D. (N.P.) 189.

The provisions in a policy of fire insurance covering chattel property, that the policy is rendered void by the incumbering of the property with a mortgage, consent to which on the part of the company is not indorsed thereon, is a reasonable and binding provision, and in the absence of evidence that the omission of the indorsement was through fraud or mistake, an action for recovery on the policy can not be maintained: *Insurance Co. v. Kneidel*, 11 O. C. C. (N.S.) 193, 20 O. C. D. 677.

The fact that a cognovit judgment is recovered against the owner of insured property and then it becomes a lien upon such property does not render the insurance invalid even though the policy contains a condition that it should be avoided "if the assured shall procure or suffer to accrue any incumbrance covering the property therein specified or any part thereof"; the court holding that under G. C., §§ 9583, *et seq.*, such incumbrance did not invalidate the insurance unless it avoided the risk: *Insurance Co. v. Bowersox*, 5 O. C. C. 444, 3 O. C. D. 321 [affirmed, without opinion, *Insurance Co. v. Bowersox*, 51 O. S. 567].

If a policy contains a provision that it shall be invalid if the property is or shall be "encumbered by mortgage, trust deed, judgment or otherwise" no recovery can be had upon the policy if the property was encumbered by mortgage when the insurance was effected even though the insured made no representations as to the encumbrance and even if the amount of the encumbrance was small in comparison with the value of the property: *Hickey v. Insurance Co.*, 20 O. C. C. 385, 11 O. C. D. 135.

Substituting one mortgage for another without increasing the amount of incumbrance upon the property does not avoid a policy: *Insurance Co. v. Danison*, 38 Bull. 163.

An application for insurance on a building against fire, which, by reference, was made part of the policy, contained certain interrogatories and answers, and among them, the following: "Do you own the land? Is it unincumbered by mortgage or otherwise?" "Yes." Previously to the issuing of the policy, the insured had executed a mortgage deed to a third person, to secure a large sum of money, which deed was then

held by such person, and shortly thereafter, duly recorded. It was held that the unrecorded mortgage was an incumbrance within the meaning and object of the inquiry, and the insured not having disclosed in his answer the existence of such mortgage, the policy was void: *Hutchins v. Insurance Co.*, 11 O. S. 477, II Longsdorf's Notes, 522.

Under a clause avoiding the policy, if the insured thereafter mortgage the property without the insurer's consent, the policy becomes void if such mortgage is made, and the company need not prove that the risk was increased thereby. G. C., § 9583 has no application to such case: *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704.

A policy is to be read as if G. C., § 9583 were a part of it: *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633 [affirmed, without opinion, *Insurance Co. v. Kukral*, 31 Bull. 223].

A clause making the application part of the contract has the effect of embodying it in the policy, so that a condition of avoidance for any false representation of any fact material to the risk applies to material representations in the application, whether false intentionally or otherwise. An understatement of the amount of the incumbrance is material: *Byers v. Insurance Co.*, 35 O. S. 606, III Longsdorf's Notes, 812.

A statement in the application describing incumbrance as \$2,000, when it was \$3,400, is false and material to the risk: *Byers v. Insurance Co.*, 35 O. S. 606, III Longsdorf's Notes, 812.

A widow having a dower right in a house owned by her children as heirs of B, applied and got insurance on it in the name of B's heirs, stating that she occupied it, and that it was not incumbered. It was held that as she had an insurable interest, the combined interest of all was insured, and her dower is therefore not an incumbrance within the clause requiring disclosure of title and incumbrance: *Insurance Co. v. Britton*, 31 O. S. 488, III Longsdorf's Notes, 600.

So where a dowress got insurance in her name "as executrix" intending to cover the combined interest: *Insurance Co. v. Boyle*, 21 O. S. 119, III Longsdorf's Notes, 13.

Where the assured had 58 acres in one quarter section, on which the insured building stood, and 95 acres in the next quarter section, the two appearing to the eye as one tract, and in the application he stated the acreage to be 152 acres, and the mortgage to be \$600, when, in fact, this mortgage was on the 58 acres, but the 95 acres had on it a \$2,000 mortgage, it was held that the answer not clearly showing these facts, the assured may testify that he understood the inquiry

as to mortgages to relate only to the tract containing the house: *Insurance Co. v. Danison*, 56 O. S. 795, 38 Bull. 163.

A policy on real estate and personality in separate amounts but for an aggregate premium is so far a severable contract that breach of warranty (as here, as to encumbrances), as to the one will not bar recovery for the other. *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

A mortgagor of improved premises who stipulates in her mortgage, as a condition thereof, to procure insurance for the benefit of the mortgagee does not thereby become the agent of the mortgagee in procuring the insurance: *Agner v. Insurance Co.*, 2 O. N. P. (N.S.) 254, 14 O. D. (N.P.) 268.

Where the mortgagee is not a party to the procuring of the insurance contract, and had no knowledge of fraud in the procuring of the insurance, an allegation of fraudulent representations and concealments on the part of the mortgagor in the procuring of the insurance does not constitute a defense to the claim of the mortgagee under the policy: *Insurance Co. v. Boland*, 8 O. C. C. (N.S.) 325, 20 O. C. D. 811 [affirming *Agner v. Insurance Co.*, 2 O. N. P. (N.S.) 254, 14 O. D. (N.P.) 268; affirmed, without opinion, *Insurance Co. v. Boland*, 72 O. S. 645, 73 O. S. 393].

Where an insurance company issues a policy of insurance upon mortgaged property in which it unconditionally stipulates to pay the loss thereunder to the mortgagee as her interest may appear, it is no defense to the claim of the mortgagee, who has been made a party to an action commenced on the policy by the mortgagor and has set up her mortgage interest by cross-petition, that the policy was procured by the fraudulent representations and concealments of the mortgagor, when it does not appear that the mortgagee was a party to the insurance contract or had any knowledge of the fraud: *Agner v. Insurance Co.*, 2 O. N. P. (N.S.) 254, 14 O. D. (N.P.) 268.

An insurance company can not be deemed to have waived a condition in a policy of fire insurance rendering it void "if the subject of insurance or any part thereof, or the real estate or any part thereof described in the application as that on which any building insured herein is situated now is, or shall hereafter be incumbered by mortgage or otherwise," unless by agreement endorsed thereon, or added thereto, simply because its agent had notice or knowledge of the existence of a mortgage incumbrance and received premiums, when an agreement as to such mortgage was not endorsed on the policy and where such policy also provided that "No officer, agent or adjuster or

other representative shall have power to waive or alter any of the provisions or conditions of this policy, except such as by the terms of this policy are made subject to an agreement endorsed hereon or added hereto and as to such provisions or conditions, such waiver or alteration, if any, shall only be valid when actually endorsed hereon or added hereto by such officer, agent or adjuster; nor shall any permission or privilege affecting this insurance exist or be claimed by the insured unless so written, endorsed or attached: *Insurance Co. v. Titus*, 82 O. S. 161.

A clause in a policy of fire insurance, covering personal property, to the effect that if the subject of the insurance be or become incumbered by chattel mortgage unless otherwise provided by agreement indorsed thereon, the policy shall be void, admits of no construction, and evidence that assured informed the agent, when the insurance was obtained, that the property was so incumbered, is inadmissible, as varying the terms of the original contract and such facts involve no question of waiver: *Hammel v. Insurance Co.*, 4 O. C. C. (N.S.) 380, 14 O. C. D. 101.

By the insurance policy providing that it may become void if the giving of a chattel mortgage upon the property insured and the agent issuing the policy is advised of acts of the insured claimed to be in violation of such provisions, and such policy is returned to the agent, and the company is notified by the agent of the act complained of, it is the duty of the company to act within reasonable time and to return either the unearned premium or the policy, and if it fails to instruct its agent within reasonable time with reference thereto and the agent returns the policy to the insured retaining for his principal the unearned premium, the company can not avoid liability for loss thereafter occurring for and on account of the acts in violation of such contract of which it had knowledge before the return of the policy: *Bank v. Insurance Co.*, 83 O. S. 309.

A condition requiring property to be unincumbered is waived by giving insurance on an application leaving questions as to liens unanswered: *Insurance Co. v. Hock*, 8 O. C. C. 341, 4 O. C. D. 553.

A clause in an insurance policy provided that: "If the subject of the insurance be or become incumbered by a chattel mortgage the policy shall be void." There was a railroad mortgage by the Wabash company undischarged at the time it sold the lumber in the building to the plaintiff. That mortgage contained the usual proviso that the railroad company might dispose of equipment and material, replacing the same with new, and

the company was doing that thing. It was held that the mortgage lien upon this lumber was discharged. For this and other reasons this defense was properly excluded: *Ensel v. Insurance Co.*, 88 O. S. 269.

6. Other Insurance.

Where a contract for present insurance and for a policy on same risk is made subject to the conditions contained in the printed policy of the insurer, a condition in the printed policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy, does not require that either prior or subsequent insurance should be mentioned in or indorsed on the contract: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

Additional insurance increases the risk necessarily and as a matter of law; and accordingly a condition that additional insurance shall avoid policy is not rendered invalid by G. C., § 9583: *Sun Fire Office v. Clark*, 53 O. S. 414, IV Longsdorf's Notes, 607.

A judgment in favor of the insured was reversed for the reason that there was no evidence to show that the insurance company had consented to the taking of additional insurance; or that it had waived a condition against taking additional insurance: *Insurance Co. v. France*, 51 O. S. 604.

A clause prorating recovery in case of other insurance is not an assent to obtaining other insurance: *Insurance Co. v. Railway Co.*, 28 O. S. 69, III Longsdorf's Notes, 390.

Where policy is conditioned that it shall be void "if assured shall have or hereafter make any other insurance on the property or any part thereof without the consent of the company" if subsequent insurance is procured which covers this specific property merely by virtue of its being a part of insured's general property the policy is avoided: *Insurance Co. v. Railway Co.*, 28 O. S. 69, III Longsdorf's Notes, 390.

The existence of a contract of other insurance without complying with the provisions of the policy of the prior company rendered its policy void at its election and having elected, on first being informed of the facts to treat the contract as void, the company can not be held: *Johnson v. Insurance Co.*, 66 O. S. 6, IV Longsdorf's Notes, 895.

The fact that the lessee of part of a building has taken insurance on part of his fixtures in the name of the lessor, the loss if any being payable to the lessee, does not render the lessor's policy invalid if he did not know or consent to such additional in-

surance: *Insurance Co. v. Carson*, 10 Dec. Rep. 728, 23 Bull. 224.

Other insurance to be a defense must be on the same property, and the liability must be the same. Parol evidence is admissible to show the identity and extent of the property, and prove the policies do not cover the same goods, though the description—bulk sides in a pork-house—would seem to mean the same: *Roots v. Insurance Co.*, 12 Dec. Rep. 535, 1 D. 138.

Other insurance without the consent of the assured or his agents got on behalf of another interest will not avoid the prior policy: *Williams v. Insurance Co.*, W. 542, I Longsdorf's Notes, 43.

Where A buys property and gives his vendor an insurance policy on it to secure deferred payments and then resells to B, who gives him a policy to secure his deferred payments, the latter is not other insurance avoiding the former: *Bates v. Insurance Co.*, 12 Dec. Rep. 698, 1 C. S. C. R. 523 [not reversed on this point, *Bates v. Insurance Co.*, 12 Dec. Rep. 851, 2 C. S. C. R. 195].

Where a fire insurance policy contains a provision, that, if another insurance shall be made on the property thereby insured, not consented to in writing thereon, or if the property shall be sold, the policy shall be void, it was held that if the property so insured, was, at the time the policy was made, under a mortgage, and the policy, with the assent of the company making the same, was assigned to the mortgagee, the delivery of the possession and control of the property to the mortgagee subsequent to the date of the policy, is not such a sale as will invalidate the policy: *Insurance Co. v. Hayes*, 17 O. S. 432, II Longsdorf's Notes, 842.

If the insurance is on goods and the other insurance is on store and goods it is within the requirement of the policy and must be notified: *Harris v. Insurance Co.*, 5 O. 466, I Longsdorf's Notes, 303.

Subsequent as well as prior insurance is covered by a clause requiring notice of any other insurance: *Harris v. Insurance Co.*, 5 O. 466, I Longsdorf's Notes, 303.

The clause against other insurance is not broken if the other insurance was void because obtained by a part owner having no authority to do so and misrepresenting the extent of his interest, and if void, the fact that it was paid does not avoid the policy sued on: *Knight v. Insurance Co.*, 26 O. S. 664, III Longsdorf's Notes, 338.

Other insurance which never took effect by reason of conditions therein, though regarded as valid by the insurers, and though the premium was paid, does not avoid the policy: *Insurance Co. v. Holt*, 35 O. S. 189, III Longsdorf's Notes, 772.

That the existence of other insurance upon the property does not render a policy invalid if it was known to the agent of the company, see *Herbert v. Insurance Co.*, 3 O. C. C. (N.S.) 7, 13 O. C. D. 225.

The required notice of subsequent insurance may be given before delivery of the policy to the agent intrusted with the policy for delivery, and his indorsement of it thereon is an assent of the principal thereto: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

To a defense of other insurance contrary to a clause of the policy that permission must be indorsed a reply that the other insurance was got within the knowledge of the defendant is good against a motion for judgment on the pleadings, for a company can waive. *Aliter* had the reply been of waiver by an agent: *Boehm v. Insurance Co.*, 7 O. N. P. 387, 5 O. D. (N.P.) 161.

If notice to the insurance company of additional insurance is not issued, the insured may offer evidence tending to show that his agent called up the insurance company's office by telephone and notified the person who answered such call that the additional insurance was taken out, and that the person answering such call replied "All right": *Insurance Co. v. Hock*, 8 O. C. C. 341, 4 O. C. D. 553 [affirmed, but this point not considered, in *Insurance Co. v. Hock*, 56 O. S. 735].

A condition in a contract for insurance requiring notice of prior insurance is waived by accepting the risk on an application wherein the question concerning prior insurance is not answered: *Insurance Co. v. Kelly*, 24 O. S. 345, III Longsdorf's Notes, 177.

If the policy is to be void for other insurance not notified to the company and indorsed on the policy, the insured must see that other insurance is indorsed. Notice to the company of it in order to have it indorsed is no compliance. The policy provides for the only evidence: *Fellowes v. Insurance Co.*, 12 Dec. Rep. 584, 13 Dec. Rep. 79, 1 D. 217, 2 D. 128.

Under a clause that the insured must give notice of other insurance and have it indorsed on the policy, the burden is on the insured to show that the notice was given, for such is the contract: *Harris v. Insurance Co.*, W. 544, I Longsdorf's Notes, 43.

Where the charter and by-laws of a mutual insurance company provide that a policy shall be void if there is other insurance on the property, unless the company assent by indorsement signed by the president and secretary, the burden is on the assured to show such assent of the company, and it is error to charge that a director or the secretary

may give such assent: *Insurance Co. v. Hurd*, 19 O. 149, I Longsdorf's Notes, 872.

Refusal to comply with a clause as to notice of "other insurance" is a violation of a condition subsequent: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

A warranty that no other company or association has declined to grant the insured a policy is not broken by the undisclosed refusal of a mutual benefit society to admit him to membership: *White v. Insurance Co.*, 11 Dec. Rep. 857, 30 Bull. 237.

An allegation that an insurance company never before refused to pay losses on the ground of double insurance and is thereby estopped, is evidence, merely, which tends to prove an abandonment of a by-law requiring an indorsement of consent on the policy, but is not a defense to a claim of forfeiture. A motion to strike it out will be granted: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

The requirement to disclose other insurance does not mean a certificate in a mutual benefit society: *Penniston v. Insurance Co.*, 6 Dec. Rep. 362, 8 Am. L. Rec. 361, 7 Dec. Rep. 678, 4 Bull. 935 [affirmed, on other points, by commission, *Penniston v. Insurance Co.*, 11 Bull. 216].

That an insurance company after knowledge of other insurance caused bids to be taken for reconstruction, sent its agents for settlement and made no claim for other insurance, but charged arson, indicates no inconsistency, with a claim of forfeiture by reason of other insurance, and does not make a case of waiver, and, no allegation of trouble, expense, loss or detriment to the plaintiff being made, the defense will be stricken out on motion: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

7. As to Title.

A policy of fire insurance issued by the defendant, which, for a premium in gross insured the plaintiffs to the amount of two hundred dollars on their storehouse, and thirty-eight hundred dollars on their stock of goods therein, contained a condition that, "if the building intended to be insured stands on ground not owned in fee-simple by the assured, the policy shall be void, unless consent in writing by the company be endorsed thereon." Within the period covered by the policy, the house and goods were destroyed by fire; and, it appeared that the plaintiffs did not own in fee-simple, the ground on which the building stood. In an action on the policy it was held that the contract is severable, and that the breach of the condition as to the title to the land, does not defeat the plaintiffs' right to recover for the

loss of the stock of goods insured by the policy: *Coleman v. Insurance Co.*, 49 O. S. 310, IV Longsdorf's Notes, 456.

A policy of insurance containing a provision, that if any change take place in the title, interest or possession of the property insured, by sale, transfer or conveyance, without the consent of the insurer, the policy shall become void, is not invalidated by the making of a mortgage. The words "title" or "possession," as here used, mean an actual change in law and equity, and the word "interest" means a change in the insurable interest of the owner of the property, neither of which is affected by the execution of a mortgage: *Sun Fire Office v. Clark*, 53 O. S. 414, IV Longsdorf's Notes, 607.

Ownership of an equitable interest in real estate is sufficient to confer an insurable interest in the building standing on a property, notwithstanding the policy issued thereon contained the condition that "this policy shall be void if the interest of the insured in the premises be other than sole and unconditional," and "this policy shall be void if the building insured stands upon ground not owned by the insured in fee simple": *Little v. Insurance Co.*, 9 O. N. P. (N.S.) 377, 20 O. D. (N.P.) 315.

A fire insurance policy contained a condition that the "entire policy, unless by agreement endorsed hereon or added hereto, shall be void * * * if the subject of the insurance be a building on ground not owned by the insured in fee simple," and also a provision that no officer, agent or representative of the company should have power to waive any of the provisions or conditions of the policy "unless such waiver, if any, shall be written upon or attached to" the policy. It was held that unless reformed, such a policy can not, in the absence of agreement or waiver endorsed thereon, be enforced as covering a building located on ground not owned in fee simple by the insured; and, in an action on such policy, parol evidence is not admissible to show that the facts as to title of the property were known to the agent of the insurer when he accepted the application for the insurance, delivered the policy and received the premium: *Agricultural Society v. Insurance Co.*, 9 O. N. P. (N.S.) 49, 19 O. D. (N.P.) 664.

An assignment for the benefit of creditors is to change any interest, title or possession within the meaning of a condition against such change; and G. C., § 9583, does not render such condition invalid, such change not being a physical change: *Guenzburger v. Insurance Co.*, 3 O. N. P. 140, 4 O. D. (N.P.) 220.

A policy of fire insurance was issued by the plaintiff on a dwelling-house "to B's

heirs," who were the owners thereof subject to an unassigned dower interest therein of their mother, the widow of B. The application, which was made part of the policy, was made by the widow, and contained a representation that the property was in the occupancy of the applicant, and was not incumbered. It was stipulated in the policy, that, "if the premises insured herein be incumbered in any way, this policy shall be void, unless the true title of the assured, and the incumbrance on the premises, be expressed in the application." In an action by said heirs upon the policy, to recover the loss insured against, the property having been consumed by fire, the company claimed that the dower interest of the widow was an incumbrance that avoided the policy. It was held that whether the dower right of the widow was an incumbrance or not, within the above stipulation, she having an insurable interest in the property, the application is to be regarded as referring to that interest, as well as to the interest of the heirs of B, and, hence, that the representation in the application, that the property was not incumbered was true: *Insurance Co. v. Britton*, 31 O. S. 488, III Longsdorf's Notes, 600.

One having no individual interest in property destroyed by fire, can not recover under a policy of insurance made jointly with one having such interest, and the action being joint on a joint contract, a motion for a directed verdict in favor of the insurance company should be granted: *Nessley v. Insurance Co.*, 10 O. N. P. (N.S.) 59, 20 O. D. (N.P.) 625.

A joint interest in husband and wife being represented in the application and policy on a house of the wife, but used by both as a homestead, does not prevent the policy attaching, but the husband's interest in such homestead will support a joint recovery. The word "joint" was used in a popular sense, meaning that no other person was interested: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613.

The object of requiring an exact statement of title is to prevent wagering contracts or a temptation to the insured to a negligent or intentional fire. This is satisfied by describing the wife's house as jointly owned by her and her husband, when both occupy it as a homestead, especially where implements insured in the same policy belong to him: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming, *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

That the policy "shall be void if the interest of the assured be other than unconditional and sole ownership" is not a condi-

tion precedent but a warranty, and to be set up in defense if relied on. Void means voidable: *Insurance Co. v. Leonard*, 9 O. C. C. 46, 6 O. C. D. 49.

If after a retiring partner has conveyed his interest in the firm and its policies to the continuing partners, a loss occurs, the latter may, as the real parties in interest, sue on the policies and may recover the whole loss and not merely a proportion: *West v. Insurance Co.*, 27 O. S. 1, III Longsdorf's Notes, 341.

A part owner of a vessel has no authority to procure insurance on the other interests, and to that extent the policy is void, if not authorized or ratified: *Knight v. Insurance Co.*, 26 O. S. 664, III Longsdorf's Notes, 338.

If thus partly void the insurer is only liable for such proportion of the sum insured as the part owner's interest bears to the whole: *Knight v. Insurance Co.*, 26 O. S. 664, III Longsdorf's Notes, 338.

A lessee who has erected buildings with power to remove them at the end of the term, or at the landlord's option to receive their value, may insure them as his own to their full value, and may truthfully answer that no one else is "interested in the property." The landlord's reserved lien for rent is an incumbrance on and not an interest in the property: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

Buying the goods on credit and still owing for them does not violate a clause requiring the assured's interest to be absolute: *Cochran v. Insurance Co.*, 7 Dec. Rep. 276, 2 Bull. 54.

Where machines are purchased at a stipulated price, but with the provision that a certain specified sum shall be paid to the patentee for the use of the machines each day they are used during the life of the patents, and at the expiration of the patents the purchaser shall become the sole owner, the contract not to be construed in the meantime, as a transfer of ownership, the purchaser does not become the owner within the provisions of a policy of fire insurance requiring that the interest of the insured in the property covered by the policy shall be that of unconditional and sole ownership: *State v. Insurance Co.*, 2 O. N. P. (N.S.) 111, 14 O. D. (N.P.) 523.

The owner of a factory having made payments on the machines contained therein, acquired an insurable interest in them, notwithstanding the contract with the patentee, and the machines were therefore covered by a policy covering the factory, and by the insurance for which it provided, and the insured having by reason of the presence of these machines less than an absolute ownership in the property covered by the policy.

the policy is entirely void: *State v. Insurance Co.*, 2 O. N. P. (N.S.) 111, 14 O. D. (N.P.) 523.

A defense that the whisky insured had been forfeited to the U. S. by illicit distilling can only be sustained if there is a certified record of proceedings to forfeit: *Cochran v. Insurance Co.*, 7 Dec. Rep. 276, 2 Bull. 54.

If the insured is a lessee and the company relies on forfeiture of the lease for nonpayment of rent, it must prove that the lessor complied with every condition of forfeiture strictly, else the question of forfeiture does not affect the case: *Insurance Co. v. Frick*, 7 Dec. Rep. 247, 2 Bull. 16 [reversed on another point, *Insurance Co. v. Frick*, 29 O. S. 466, III Longsdorf's Notes, 489].

Issuing a policy on the recommendation of an agent carries proof that he is authorized to make contracts. Accordingly, if he knows that the insured has only a dower interest a clause of avoidance, if the assured is not sole owner, is not binding: *Hilliard v. Insurance Co.*, 7 O. N. P. 561, 5 O. D. (N. P.) 576.

Insurance was effected on the insured's interest in lumber in a building which was in process of demolition. A clause provided that the policy should be void "if the subject of the insurance be a building on ground not owned by the assured in fee simple." The building was upon the ground described in the policy but the fee simple title to the land was not in the plaintiff. It was held that the property insured was not part of the real estate but lumber in a building in process of demolition. Therefore this clause of the policy has no application to this case: *Ensel v. Insurance Co.*, 88 O. S. 269.

8. Iron Safe Clause.

The fact that a cash book of a country store had not been placed in the safe at 10 o'clock at night, and can not be produced because destroyed by a fire occurring at that hour, does not afford a defense under a clause requiring the books to be locked in a fire proof safe at night, and at all times when the store is not actually opened for business, where a lunch counter connected with the store was still in operation at that hour: *Insurance Co. v. Kistner*, 5 O. C. C. (N.S.) 165, 16 O. C. D. 569 [reversed on other grounds, *Insurance Co. v. Kistner*, 75 O. S. 374, IV Longsdorf's Notes, 1017].

The requirement of "the iron safe clause" that the insured shall keep a set of books showing a complete record of the business transacted, does not make it necessary that the insured shall keep a scientific set of books, but it is sufficient if he keep such books as made it possible to fairly ascertain

the amount of goods on hand at the time of the fire: *Insurance Co. v. Kistner*, 5 O. C. C. (N.S.) 165, 16 O. C. D. 569 [reversed on other grounds, *Insurance Co. v. Kistner*, 75 O. S. 374, IV Longsdorf's Notes, 1017].

Where the books of account kept by the proprietor of a country store are such as would fairly show to a man of ordinary intelligence the business transacted, including the stock he owned and the purchases and sales made, the provision known as the "iron safe clause" in a policy of insurance covering the stock is satisfied: *Insurance Co. v. Clark*, 2 O. C. C. (N.S.) 585, 14 O. C. D. 33.

9. Appraisalment.

(a) Necessity.

A covenant which provides for an appraisalment to ascertain the losses as a condition precedent to the action by the insured is valid except as modified in the case of a total loss, G. C., § 9583: *Fire Association v. Appel*, 76 O. S. 1, IV Longsdorf's Notes, 1021 [affirming, *Fire Association v. Appel*, 4 O. N. P. (N.S.) 41, 16 O. D. (N.P.) 529, 1 Hosea, 369]; *Graham v. Insurance Co.*, 75 O. S. 374, IV Longsdorf's Notes, 1017; *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856.

The provisions of a policy of insurance that impose a duty on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers do not constitute a condition precedent, unless there is a disagreement as to the amount of the loss, and when in a suit to recover under a policy the insured avers that there was no disagreement as to the amount of the loss, and further avers that he has performed all the conditions on his part to be performed, such provisions are not put in issue by a general denial, but to make them an issue and to place upon the insured the burden of proving a waiver of them, they should be pleaded by the insurer: *Insurance Co. v. Titus*, 82 O. S. 161.

When a policy of fire insurance contains stipulations that in the event of a disagreement between the insurer and the insured as to the amount of loss or damage the same shall be ascertained by appraisers in the manner provided in the policy; and that the amount of loss or damage having been "thus determined," the loss shall not become payable until sixty days after the notice, ascertainment and satisfactory proof of the loss required in the policy have been received by the insurer, "including an award by appraisers when appraisal has been required"; and when the said policy contains the further condition that, "No suit or action

on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements," such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss except as such condition is modified as to a total loss by G. C., § 9583; and in a suit to recover on such a loss, in the absence of an award of appraisers and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown: *Graham v. Insurance Co.*, 75 O. S. 374, IV Longsdorf's Notes, 1017 [reversing *Insurance Co. v. Kistner*, 5 O. C. C. (N.S.) 165, 16 O. C. D. 569, and overruling, *Insurance Co. v. Finn*, 60 O. S. 513, IV Longsdorf's Notes, 793].

A condition in a policy of insurance against fire, that in case of loss and a disagreement or difference between the parties as to the amount of the loss, that amount shall be ascertained by arbitration or appraisal, is a proper and valid condition; and where it is also provided that the condition as to arbitration or appraisal must be complied with before a suit can be brought against the insurer, the condition is thereby made a condition precedent, and to entitle the insured to maintain an action to recover under the policy, he must show that he has either performed the condition or has a legal excuse for nonperformance thereof: *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856.

Where, upon receiving proofs of loss from the insured, the insurer disputes the amount as therein claimed by the insured, and demands an arbitration or appraisal, as provided in the policy, to ascertain the amount of the loss, there is a disagreement or difference such as will be the foundation for such arbitration or appraisal: *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856.

Where the insured had refused to submit to arbitration which they should have done in case of partial loss, and the verdict of jury shows partial loss only, the company's means of taking advantage of this is by motion for new trial: *Insurance Co. v. Broton*, 2 O. N. P. (N.S.) 185.

If the parties disagree as to the amount of loss and as to the amount of salvage an appraisal is necessary if the policy provides therefor: *Everett v. Insurance Co.*, 9 O. N. P. (N.S.) 241, 20 O. D. (N.P.) 171.

The insured can not give his reasons for not demanding an appraisal: *Everett v. Insurance Co.*, 9 O. N. P. (N.S.) 241, 20 O. D. (N.P.) 171.

A covenant for appraisal for the purpose of fixing the amount of the loss is valid; but a provision for submitting the question of the liability of the insured to appraisal is not valid: *Coffin Co. v. Insurance Co.*, 8 Dec. Rep. 422, 7 Bull. 342.

In *Brown v. Insurance Co.*, 12 O. D. (N. P.) 358, it was said that a covenant for appraisal as a condition precedent was invalid whether the loss was partial or total.

It was said in *Insurance Co. v. Packet Co.*, 6 O. N. P. 173, 7 O. D. (N.P.) 571, that if an appraisal was set aside by the court and the insured refused to submit to a second appraisal the court had power to determine the loss and to assess the damages.

Where the policy provides for an appraisal of the amount of loss on demand of either party, and also provides that no action shall be brought until compliance with all requirements, the requirement of an appraisal is not a covenant but a condition precedent to recovery: *Hamilton v. Insurance Co.*, 11 Dec. Rep. 784, 29 Bull. 209.

Where in a policy of insurance it is made a condition precedent that in case of disagreement as to the amount of loss, it shall be determined by appraisal the insured may bring suit upon the policy, averring in his petition the performance of all conditions on his part, and when the insurer pleads in its answer the disagreement and the determination of the amount by appraisal, and the provisions of the policy as to concurrent insurance, the amount the plaintiff may recover is limited to a proportionate amount of the loss so determined, and he can not recover a larger amount unless the appraisal is void or is set aside. If it is void, he may plead its invalidity in his reply, but if it is only voidable, he should in his petition unite a cause of action to set it aside: *Insurance Co. v. Ries*, 80 O. S. 272, IV Longsdorf's Notes, 1051.

Under the clause giving a right to an appraisal, the assured can not insist that the company consent in advance to define the powers and duties of the appraisers, nor can he refuse to appoint an appraiser because of oral claims by the company as to the appraiser's powers: *Hamilton v. Insurance Co.*, 11 Dec. Rep. 761, 29 Bull. 106; *Hamilton v. Insurance Co.*, 11 Dec. Rep. 784, 29 Bull. 209.

(b) Award Binding on Mortgagee.

A "mortgage clause" attached to a fire insurance policy at the time the same is exe-

cuted, which clause makes the loss, if any, under the policy, payable to the mortgagee as his interest may appear, is not an assignment of the policy to such mortgagee, and, in the absence of fraud or collusion, he is bound by the award of appraisers provided for and required by the terms of the policy in the event of a disagreement between the insured and the insurance company as to the amount of the loss, although the mortgagee was not a party to and had no notice of the appraisalment and award: *Brewing Co. v. Insurance Co.*, 81 O. S. 1, IV Longsdorf's Notes, 1055 [reversing, *Insurance Co. v. Brewing Co.*, 11 O. C. C. (N.S.) 28, 20 O. C. D. 390, on this point of law but affirming the judgment on other grounds].

(c) Total Loss.

Where there is a total loss, refusal to submit to an appraisalment is proper, since the company must pay the policy in full under G. C., § 9583, and this whether there are one or more policies: *Insurance Co. v. Fish Co.*, 14 O. C. C. 160, 7 O. C. D. 468 [affirmed, without opinion, *Insurance Co. v. Fish Co.*, 61 O. S. 643].

Where the building, exclusive of the foundation, is a total loss, a disagreement as to the amount of the loss is unimportant and the necessity for an appraisalment does not exist: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469 [affirmed, with opinion, *Insurance Co. v. McBee*, 85 O. S. 161].

For goods totally destroyed no appraisalment can be demanded, because this would require the appraisers to call witnesses and thus become referees or arbitrators: *Insurance Co. v. Carnahan*, 10 O. C. D. 186; s. c. as *Insurance Co. v. Carnahan*, 19 O. C. C. 114 [reversed on other grounds, *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856].

Where a policy provides for an appraisalment of the loss, stating separately sound value and damages, and some of the goods were wholly destroyed, or so much so that inspection by the appraisers could disclose nothing as to value, an appraisalment of the loss by mere inspection without consulting the books or invoices or hearing witnesses is not a valid appraisalment: *Insurance Co. v. Romeis*, 15 O. C. C. 697, 8 O. C. D. 633.

If the insurance company alleges that arbitration was had, the insured can nevertheless recover on the policy regardless of such arbitration in case of a total loss; and in such case the only question to be submitted to the jury was whether the loss was total or not: *Insurance Co. v. Gray*, 2 O. C. C. (N.S.) 265, 14 O. C. D. 268 [affirmed,

without opinion, *Insurance Co. v. Gray*, 69 O. S. 542].

(d) Residence of Arbitrators.

A former statute (R. S., § 3643b), which provided that arbitrators in an insurance policy must be residents of the county in which the loss occurred for at least one year prior to such loss, was held to be valid and constitutional, in *Insurance Co. v. Packet Co.*, 6 O. N. P. 173, 7 O. D. (N.P.) 571.

Under R. S., § 3643b, repealed 95 v. 341, providing that arbitrators and umpires, selected to determine the total amount of loss by fire under an insurance policy, must be residents of the county in which the loss occurred, for not less than one year, the waiver by the insured at the request of the company of this provision as to residence of the arbitrator chosen by the company and the umpire does not defeat the award made by them nor preclude recovery thereon by the insured, the matter of selection not being a matter in which the public is interested, as in the case of waiver or violation of the co-insurance clause provided for by R. S., § 3643a, repealed 95 v. 341: *Trustees v. Insurance Co.*, 12 O. D. (N.P.) 166, 1 Dayton Term Rep. (Iddings) 19.

The requirement of R. S., § 3643b (repealed 95 v. 341), that the arbitrators shall be residents of the county can be expressly and impliedly waived: *Margolis v. Insurance Co.*, 12 O. D. (N.P.) 166, 1 Dayton Term Rep. (Iddings) 19.

If the insured agrees that the insurance company may choose an arbitrator who does not reside in the county; he is bound by such waiver and can not subsequently attack the award on the ground that the arbitrator was not qualified: *Margolis v. Insurance Co.*, 12 O. D. (N.P.) 166, 1 Dayton Term Rep. (Iddings) 19.

(e) Duty of Arbitrators to Hear Evidence.

The provision in a standard fire insurance policy that "in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally all the expenses of the appraiser and umpire,"

is a provision for an appraisalment and not for an arbitration, and such submission is not to be judged by the strict rules applicable to arbitration and award, and where the appraisers and umpire have before them a list of the property destroyed, and the insured's statement in detail in respect to his loss, it is not ground for setting aside the appraisalment that they refuse to hear evidence: *Insurance Co. v. Ries*, 80 O. S. 272, IV Longsdorf's Notes, 1051.

See however, *Insurance Co. v. Romeis*, 15 O. C. C. 697, 8 O. C. D. 633, in which was said that the appraisers could not make a satisfactory appraisalment of the loss by merely inspecting part of the stock which was not destroyed, without consulting the books or papers, and without hearing witnesses upon the value of the articles destroyed.

(f) *Actions on Awards.*

If an action is brought to impeach an award on the ground of fraud, equity has jurisdiction thereof; and the parties who, by the terms of the award, are to contribute, are made parties to such suit: *Insurance Co. v. Michael*, 17 O. D. (N.P.) 105, 3 O. L. R. 544, 1 Hosea, 19, 1 Hosea, 423.

When in the event of a disagreement as to the amount of a loss, a fire insurance company and the insured have entered into an agreement to determine the amount of loss by appraisers, and appraisers are chosen thereunder, who also select an umpire, all of whom enter upon the work of appraisalment, if such appraisalment is brought to a close before completion, or the final award is made invalid by the default of one of the parties to such agreement, the other party is not bound to enter into a new appraisalment, there being no stipulation therefor in the policy: *Fire Association v. Appel*, 76 O. S. 1, IV Longsdorf's Notes, 1021 [affirming, *Fire Association v. Appel*, 4 O. N. P. (N.S.) 41, 16 O. D. (N.P.) 529, 1 Hosea, 369].

An appraisalment made under a clause in the policy need not be attacked by separate action, but may be attacked in an action on the policy. In such case the attack need not be made in the petition, but it is correct to sue for the whole amount claimed, and where the appraisalment is set up in defense to attack it in the reply: *Insurance Co. v. Romeis*, 15 O. C. C. 697, 8 O. C. D. 633.

When each of several fire insurance policies on the property of insured, provides that an award may be had to determine a loss thereon, the submission thereof to arbitrators merely carries out the contract for insurance. Each policy is a separate contract,

for the recovery of which separate proceedings must be brought on each policy for a *pro rata* share of the award under G. C., § 9584, and a joinder of all the companies in an action for the whole award would be improper: *Trustees v. Insurance Co.*, 12 O. D. (N.P.) 166, 1 Dayton Term Rep. (Iddings) 19.

In an action on a policy of fire insurance providing for arbitration, to recover the award of damages returned by the arbitrators in accordance with terms of the policy, it is necessary that the petition set out the terms of the policy providing for the award: *Trustees v. Insurance Co.*, 12 O. D. (N.P.) 166, 1 Dayton Term Rep. (Iddings) 19.

An action on an award under several policies is not against all the companies for the gross amount awarded, but each company must be separately sued for its share. The petition must set out the stipulation providing for arbitration: *Margolis v. Insurance Co.*, 1 Dayton Term Rep. (Iddings) 19.

An action by a number of fire insurance companies to set aside an appraisalment and award, and incidentally to cancel the policies, on the ground that the loss as returned was excessive by reason of fraudulent representations as to the amount of goods destroyed, is not several, and there is no misjoinder of plaintiffs, notwithstanding the fact that the interests of the companies in such policies were several, and that the policies were of different classes and issued for separate considerations: *Michael v. Insurance Co.*, 6 O. N. P. (N.S.) 401, 18 O. D. (N.P.) 530.

Where an arbitration is invalid and the insurer refuses the offer of the insured to resubmit the loss, the court has the right to entertain an action on the policy: *Insurance Co. v. Packet Co.*, 6 O. N. P. 173, 7 O. D. (N.P.) 571.

The damages fixed by appraisers and returned in their award are conclusive and can not be opened up upon submission to a jury in an action for loss upon a fire policy: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

(g) *Effect of Valuation in Policy.*

Where the insurer has some interest at risk, and there is no fraud, a valuation of the subject insured in the policy is held conclusive upon the parties at law and in equity: *Insurance Co. v. Russell*, 65 O. S. 230, IV Longsdorf's Notes, 885.

G. C., § 9583, holding the company to the valuation fixed in the policy, abrogates a.

clause in the policy, that no suit shall be brought until the amount of loss is appraised, if there is but one policy; but not if there are two or more policies: *Coffin Co. v. Insurance Co.*, 8 Dec. Rep. 422, 7 Bull. 342.

An overvaluation of the land on which the insured building stands does not violate a clause against overvaluation, especially if there is no bad faith nor prejudice: *Insurance Co. v. Bowerson*, 6 O. C. C. 1, 3 O. C. D. 321.

(h) *Demand.*

In a policy the words "including an award by appraisers when appraisal is required," do not impose any obligation on the insurer to demand an appraisal; but in the event of a disagreement between the insurer and the insured as to the amount of the loss, an appraisal is required by the terms of the contract, and in a suit on the policy the burden lies upon the insured to show that he has, on his part, performed, or offered to perform, the condition as to the appraisal: *Graham v. Insurance Co.*, 75 O. S. 374, IV Longsdorf's Notes, 1017 [reversing *Insurance Co. v. Kistner*, 5 O. C. C. (N.S.) 165, 16 O. C. D. 569, and overruling *Insurance Co. v. Finn*, 60 O. S. 513, IV Longsdorf's Notes, 793].

A letter from an insurance company to assured, upon receipt of notice of loss, demanding a compliance with the conditions of the policy in regard to notice of loss, the amount, etc., and reciting that "in case differences shall arise" touching such loss, the matter shall be submitted to appraisers, does not amount to a demand for appraisement: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

The privilege to demand an arbitration must be exercised within a reasonable time after the right thereto arises: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

A demand by the company for an appraisement must be explicit, and if ambiguous will be construed most strongly against the insurer: *Insurance Co. v. Finn*, 60 O. S. 513, IV Longsdorf's Notes, 793.

Notice to preserve the property "until the loss has been determined in the manner stipulated in the policy," and that the insurer would not pay any amount until 60 days after it "has been determined in the manner stipulated in the policy," is not sufficient to constitute a demand for an appraisement. The demand must be made in good

faith within a reasonable time after proofs of loss are furnished: *Insurance Co. v. Finn*, 60 O. S. 513, IV Longsdorf's Notes, 793.

Provisions requiring appraisement in case of disagreement as to amount of loss, and that the loss shall not be payable until 60 days after proofs "including an award when appraisal is required," and that no action lies until full compliance with the foregoing requirements, does not make an appraisement or demand for it by the insured a condition precedent to the right to sue. Either party may demand an appraisement within a reasonable time after proofs of loss, and, if not demanded, the requirement is no obstacle to the action: *Insurance Co. v. Finn*, 60 O. S. 513, IV Longsdorf's Notes, 793.

A demand for appraisement by the company is not in good faith when not accompanied by any offer to do anything, as by designating an appraiser or person to act, and demanding that assured name his appraiser, and made after the companies' adjusters had notified assured that the defense of arson would be insisted upon: *Insurance Co. v. Carnahan*, 10 O. C. D. 186; same case as *Insurance Co. v. Carnahan*, 19 O. C. C. 114 [reversed, on other grounds, *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856].

Notice that the defense of arson will be insisted upon waives the right to demand appraisement: *Insurance Co. v. Carnahan*, 10 O. C. D. 186; same case as *Insurance Co. v. Carnahan*, 19 O. C. C. 114 [reversed on other grounds, *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856].

A demand for an appraisement by the insured after he has sold and scattered the property is invalid: *Hamilton v. Insurance Co.*, 11 Dec. Rep. 761, 29 Bull. 106.

A week's delay by the company in demanding appraisal after negotiations for a settlement had ended is not unreasonable if awaiting answer to a letter on the subject to the assured, and the plaintiff has not been prejudiced, and it is the duty of the court so to declare: *Hamilton v. Insurance Co.*, 11 Dec. Rep. 784, 29 Bull. 209.

(i) *Waiver.*

A letter from a fire insurance company stating that "from the information before us we believe the entire loss and damage to have been caused by a cyclone and not by lightning," is not a denial of liability under a policy written by the company on the property referred to as damaged; and it is not error in such a case for the court to determine the question of liability itself, instead of submitting it to the jury: *Everett v. Insurance Co.*, 9 O. N. P. (N.S.) 690, 21

O. D. (N.P.) 258 [affirmed, without opinion, *Everett v. Insurance Co.*, 81 O. S. 573].

In an action on an insurance policy in the absence of evidence reasonably causing the insured to believe that the company had waived any of the provisions of the policy, it is not competent for the insured to give his reasons for not demanding an appraisal: *Everett Co. v. Insurance Co.*, 9 O. N. P. (N. S.) 241, 20 O. D. (N.P.) 171 [affirmed, without opinion, *Everett Co. v. Insurance Co.*, 81 O. S. 573].

Whether conduct and statement of an insurance company, under the circumstances, caused the insured to believe that the defendant had waived the condition of a policy for an appraisal or not, is a question for the court and not for the jury where there is no dispute about what passed between the parties: *Everett Co. v. Insurance Co.*, 9 O. N. P. (N.S.) 241, 20 O. D. (N.P.) 171 [affirmed, without opinion, *Everett Co. v. Insurance Co.*, 81 O. S. 573].

When one of the appraisers withdraws from the appraisal, without the fault of either party, and refuses to proceed with the appraisal, such conduct on his part does not revoke the appraisal; and it is the right and duty of the party who appointed such appraiser to choose another in his place, and where in such case the insurer refuses to choose another appraiser or to proceed further with the appraisal and demands and insists upon a new appraisal instead, such conduct of the insurer amounts to a waiver of the condition in the policy: *Fire Association v. Appel*, 76 O. S. 1, IV Longsdorf's Notes, 1021 [affirming *Fire Association v. Appel*, 4 O. N. P. (N.S.) 41, 16 O. D. (N.P.) 529, 1 Hosea, 369].

An implied promise to pay arises from an agreement between the insured and the company fixing the amount of the loss, and an action lies on this promise independent of the policy. But where this agreement provides that it is binding only as to the amount and does not waive proofs of loss or any conditions, it excludes any implied promise to pay, and no action will lie upon it, nor upon a prior oral promise to pay if this agreement is entered into: *Insurance Co. v. Garvey*, 14 O. C. C. 657, 8 O. C. D. 86.

10. Examination Under Oath.

If a covenant in a policy secures to the insurance company the right to examine the insured under oath, such examination if demanded by the insurance company is a condition precedent to an action on the policy: *Mahoney v. Insurance Co.*, 3 O. N. P. (N.S.) 246, 16 O. D. (N.P.) 131 [affirmed,

without opinion, *Mahoney v. Insurance Co.*, 74 O. S. 503].

Notice of the intention of the company to have an examination is sufficient, when it states the time and place of the examination and the name of the person who is to conduct it: *Mahoney v. Insurance Co.*, 3 O. N. P. (N.S.) 246, 16 O. D. (N.P.) 131 [affirmed, without opinion, *Mahoney v. Insurance Co.*, 74 O. S. 503].

A plaintiff who has alleged that he "has duly kept, observed and performed all the requirements and conditions contained in said policy," is not a position to avail himself of a waiver of the provision as to an examination under oath, even if the conduct of the company had been such as to constitute a waiver: *Mahoney v. Insurance Co.*, 3 O. N. P. (N.S.) 246, 16 O. D. (N.P.) 131 [affirmed, without opinion, *Mahoney v. Insurance Co.*, 74 O. S. 503].

The false swearing must be in a material matter, if it is that other property, not covered by the policy, was also lost, a recovery is not defeated: *Cochran v. Insurance Co.*, 7 Dec. Rep. 276, 2 Bull. 54.

False swearing, as to the amount of loss, must, to avoid the policy, be willful and not merely inadvertent or negligent: *Bank v. Insurance Co.*, 4 Dec. Rep. 340, 1 Clev. L. Rep. 339.

If the sworn preliminary proofs give an amount and value to the goods over double what the jury find, and no explanation is attempted, such finding is so far proof of a defense of false swearing that the court will set aside the verdict: *Ferris v. Insurance Co.*, 9 Dec. Rep. 634, 16 Bull. 6.

One to whom the loss, if any, is payable, is in no better position than the assured, and is defeated by any fraud or false swearing of the latter, as he would be: *Bank v. Insurance Co.*, 4 Dec. Rep. 340, 1 Clev. L. Rep. 339.

11. Proof of Loss.

A policy of fire insurance, containing a provision that proof of loss must be presented to the company within sixty days of the occurrence of a fire, is rendered void by failure to present the proofs within the time limit: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

Although an answer in a proof of loss may be wrong and fail to give the information it was intended to draw out, yet if it is not misleading, nor in any way harmful to the company, and the information which was sought and which the insured was bound to give was elsewhere incorporated in the proof of loss, such proof must be regarded as suf-

ficient: *Insurance Co. v. Strong*, 1 O. C. C. (N.S.) 502, 15 O. C. D. 101 [affirmed, without opinion, *Insurance Co. v. Strong*, 68 O. S. 708].

Where an insurance policy stipulates that proofs of loss must be forwarded within a reasonable time, but provides no penalty except that payment on the policy will be delayed until the proofs are furnished, the right to recover on the policy does not depend upon the time when the proofs are furnished: *Insurance Co. v. Gray*, 2 O. C. C. (N.S.) 265, 14 O. C. D. 268.

The burden is on the plaintiff to show notice and proofs of loss required by the policy sixty days before suit: *Harris v. Insurance Co.*, W. 548, I Longsdorf's Notes, 43.

The requirement of proofs of loss "forthwith," means in a reasonable time, which is for the jury, and defendant may show that all his papers and books, including forty or fifty policies, were destroyed in the fire, causing him to forget this policy for a year: *Kirk v. Insurance Co.*, 8 Dec. Rep. 182, 6 Bull. 200 [affirmed, by supreme court commissioners, without opinion, and two judges dissenting, *Insurance Co. v. Kirk*, 11 Bull. 228].

If the bill of exceptions does not show that delay of proofs works a forfeiture, this will not be assumed, but only that payment is not due until then: *Insurance Co. v. Frick*, 2 Bull. 16 [reversed on other grounds, *Insurance Co. v. Frick*, 20 O. S. 466, III Longsdorf's Notes, 489].

The words "forthwith" or "immediately" when used in reference to the notice of loss in a policy of insurance, means within a reasonable time considering the circumstances of each case and ordinarily the question is not one to be determined by the jury under proper instructions from the court: *Crane v. Insurance Co.*, 4 O. N. P. 309, 6 O. D. (N.P.) 118.

While a denial of liability may waive a proof of loss, a letter from the insurance company which states that as often advised they believe that the loss was due to a tornado, which was a risk not included in the policy, does not waive proofs of loss: *Everett v. Insurance Co.*, 9 O. N. P. (N.S.) 690, 21 O. D. (N.P.) 258 [affirmed, without opinion, *Everett v. Insurance Co.*, 81 O. S. 573].

The court has power to determine on a motion for nonsuit whether a letter written by an insurance company is in effect a denial of liability so as to waive proof of loss: *Everett v. Insurance Co.*, 9 O. N. P. (N.S.) 690, 21 O. D. (N.P.) 258 [affirmed, without opinion, *Everett v. Insurance Co.*, 81 O. S. 573].

Under a clause in an insurance policy requiring proof of loss to be filed within sixty days, proofs of loss prepared and mailed so that they do not reach the office of the company until the sixty-first or sixty-second day are not in time: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

A mortgagee may recover upon a fire insurance policy containing what is known as the union mortgage clause of the standard policy of New York, New Jersey and Connecticut, for a loss of the property by fire, when neither he nor the mortgagor presented proof of loss within sixty days after loss as required of "the insured" by a condition in the policy: *Insurance Co. v. Krumm*, 12 O. C. C. (N.S.) 364.

Objections to the preliminary proofs as to loss will be considered waived, if not made when the proofs are presented, and the insured is informed by the underwriter that the claim is rejected entirely on other grounds: *Insurance Co. v. Boyle*, 21 O. S. 119, III Longsdorf's Notes, 13.

Waiver of a proof of loss may be made after the time for filing such proof: *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633.

Waiver of the proof of loss may waive a condition limiting the time for bringing an action upon the policy: *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633.

A denial by an insurance company of any liability upon a policy is a waiver of the requirement of written notice of and proof of loss if made within the time when such notice and proof are required by the policy to be made: *Stacy v. Insurance Co.*, 1 O. C. C. (N.S.) 441, 15 O. C. D. 67; *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N. P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

Where an agent entrusted to carry on the business makes an investigation of a fire, and finds the loss is total and there are no suspicious circumstances, and some time thereafter informs the policy holder that he fears trouble as the company denies all liability, and the policy holder, influenced by this statement, submits no formal notice of the fire or proofs of loss, the company is estopped from claiming that the agent was without authority to act after the occurrence of the fire, or from denying that the statement of the agent was a waiver of written notice and proofs of loss: *Stacy v. Insurance Co.*, 1 O. C. C. (N.S.) 441, 15 O. C. D. 67.

It is error, therefore, to direct a verdict under such circumstances in favor of the company, on the ground that no formal no-

tice or proofs of loss were submitted; but the evidence as to whether the company had waived these requirements should be submitted to the jury: *Stacy v. Insurance Co.*, 1 O. C. C. (N.S.) 441, 15 O. C. D. 67.

No officer or agent of an insurance company has authority to waive any of the stipulations of a policy, except in the manner provided therein; and a provision requiring that, in case of loss, the insured shall file a sworn statement thereof within sixty days, can not be waived verbally by an agent of the company, where the conditions of the policy require that the waiver be in writing endorsed on the policy or attached thereto: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

An insurance adjuster upon visiting plaintiff after the burning of his store and learning that the books of account had been destroyed, directed plaintiff to get duplicate bills, which he thought would require ten days, and have them ready for his inspection. Plaintiff inferred from this direction that the adjuster intended to return, and awaited his return until the sixty days allowed for filing proofs of loss had expired. It was held that what the adjuster said can not be construed as a waiver by the company of the provision in the contract of insurance that proofs of loss should be filed within sixty days: *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387.

A provision requiring that, in case of loss, the insured shall file a sworn statement thereof within sixty days, can not be waived verbally by an agent of the company where the conditions of the policy require that the waiver be in writing endorsed on the policy or attached thereto: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

Assured notified the soliciting agent, from whom he received the policy, of the fire, and the latter came and said all right, and that an adjuster would come. A person calling himself adjuster came and inspected the ruins, but refused to adjust because of a mortgage. The policy stated that no agent had a right to waive any condition therein. Contended that G. C., § 9586, coupled with the fact that the agent's name was stamped on the policy when delivered, showed that the solicitor was still an agent and that absence of notice and proof of loss was not a defense. Verdict for plaintiff sustained: *Insurance Co. v. Danison*, 56 O. S. 795, 38 Bull. 163.

Objections to the preliminary proofs are waived if not pointed out, and the insured is informed that the claim will be considered on the merits and is rejected on the ground of nonliability in any event: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

Where the adjuster on receiving proofs of loss objected that the cause of loss was not stated, but promised that after making his report he would write, and the insurer notified the plaintiff that it was not liable, but stated no reason, and the adjuster did not write, it was held that whether there was a waiver as to the proofs is a question for the jury: *Insurance Co. v. Parisot*, 35 O. S. 35, III Longsdorf's Notes, 753.

If the company refuse blanks on which to make formal proofs, which blanks the policy promises to furnish, the proofs are waived: *Indemnity Co. v. Fletcher*, 5 O. C. C. 633, 3 O. C. D. 308.

Refusal of the company to furnish blanks for proof of loss without assigning a reason therefor, shows an excuse for not averring that proofs were furnished: *Coldham v. Casualty Co.*, 8 O. C. C. 620, 4 O. C. D. 548.

Proofs of loss are waived if the company notify the insured they will not pay in any event: *Wilson v. Insurance Co.*, 6 Dec. Rep. 708, 7 Am. L. Rec. 480; *Insurance Co. v. Strachle*, 13 Dec. Rep. 846, 2 C. S. C. R. 186; *Smith v. Insurance Co.*, 7 Dec. Rep. 188, 1 Bull. 284.

Where the insurer's agent takes exclusive possession of and removes the property immediately after the fire, and does not restore it to the owner, this waives proofs of loss and appraisal: *Hobson v. Insurance Co.*, 2 O. N. P. 296, 2 O. D. (N.P.) 475.

Where proofs of loss are made and mailed but never received, and the general agent shortly after the fire tells the insured that the company is not liable, this denial of liability dispenses with proof of loss: *Insurance Co. v. Burget*, 17 O. C. C. 619, 9 O. C. D. 369.

A defense of failure to furnish proof of loss in the time required by the policy is not waived by relying on other defenses not inconsistent therewith: *Insurance Co. v. Frick*, 29 O. S. 466, III Longsdorf's Notes, 489 [overruling *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336, and reversed *Insurance Co. v. Frick*, 7 Dec. Rep. 247, 2 Bull. 16].

That an investigation by the company without waiting for proofs of loss will dispense with them: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

Receiving the proofs after a year without objection, and conversing about them, with-

out knowing that that was not as soon as possible, is not a waiver of the delay, for there can be no intention to waive without knowledge: *Express Co. v. Express Co.*, 7 Dec. Rep. 51, 1 Bull. 85.

If an insurance company waived proof of loss, it can not afterwards recall or reclaim such waiver and demand such proofs: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

The requirement of preliminary proofs of loss is a formal condition, inserted in the policy of insurance solely for the benefit of the insurer, and it may waive such proofs in whole or in part, either by direct action of the insurer, or his general agent by virtue of his authority and such waiver may be expressed or implied: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

Mere silence on the part of an insurance company, or sending agents to make inquiry or investigation into the matter of the loss, or an attempt to compromise, do not amount to a waiver of proofs of loss: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

Waiver of the proof of loss by the company does not make the claim due at once, but the company will still be entitled to the sixty days after the waiver to investigate and for other proper purposes unless it notifies the insured that it will not pay in any event: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

If an insurance company, by its adjuster, proceeds to investigate a loss on its merits, and by what it does causes the insured to believe, and if a man of ordinary judgment under the circumstances would have so believed, that it was only the amount of loss in dispute, and nothing else, that will amount to a waiver of proofs of loss: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

A notice of the loss given immediately after the fire, or as soon thereafter as can be done with reasonable diligence, to the agent of the company, at the place where the fire occurred, or to the company, is a sufficient compliance with the condition of the policy requiring notice of the loss to be given to the company: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

Requiring proofs of loss after expiration of the time limited in the policy for bringing suit waives the same: *Behymer v. Insurance Co.*, 3 O. N. P. 183, 4 O. D. (N.P.) 266.

Though the insured, a corporation, is in the hands of a receiver, it is proper for its officers to make the preliminary proofs: *Insurance Co. v. Boicerson*, 6 O. C. C. 1, 3 O. C. D. 321.

If a third person, to whom loss, if any, is made payable by the policy, sues on it, he can tender the proofs of loss as part of his right to collect, but as to other conditions he should aver performance by the assured and not by himself, else demurrer lies and no amendment in the reviewing court can be made: *Insurance Co. v. Carson*, 9 Dec. Rep. 848, 17 Bull. 357.

Proof of loss by fire may be made out and verified by an attorney for a nonresident client for whom he had negotiated the policy in question: *Gump v. Insurance Co.*, 15 O. C. C. (N.S.) 428, 24 O. C. D. 36 [affirmed, without opinion, *Insurance Co. v. Gump*, 86 O. S. 325].

The general averment of performance under G. C., § 11330, is sufficient for a requirement in a policy that notice of loss shall be immediately given. Such requirement is a condition precedent: *Insurance Co. v. McGookey*, 33 O. S. 555, III Longsdorf's Notes, 688. See also CONTRACTS.

The presumption that mail matter reaches its destination is overcome by the addressee's testimony that he never received it. So held of objections to the proofs of loss mailed by the insurance company to the insured: *Hobson v. Insurance Co.*, 2 O. N. P. 296, 2 O. D. (N.P.) 475. See also NOTICE.

The provision in a policy of fire insurance that proofs of loss must be presented to the company within sixty days after the occurrence of a loss by fire in the premises insured, does not render the policy void by reason of failure to file proofs within the prescribed time, where there is no provision in the policy which renders it void by reason of such failure: *Trust & Safe Deposit Co. v. Insurance Co.*, 1 O. C. C. A. 97, 24 O. C. D. 218.

The violation of conditions of a policy such as that proofs of loss were not filed within sixty days do not release the company from liability to a mortgagee whose interest in the property was obtained by virtue of a slip of paper attached to and made a part of the policy, making loss, if any, payable at the request of the insured to the party therein named as his interest may appear unless expressly made applicable to said mortgage by reference in said mortgage clause or by being written upon, attached

or appended to said policy notwithstanding the contract as between the owner of the property and the insurance company might be invalidated by reason of such disregard of the conditions of the policy: *Trust & Safe Deposit Co. v. Insurance Co.*, 1 O. C. C. A. 97, 24 O. C. D. 218.

12. Time of Bringing Suit.

The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the limit of limitation fixed be not unreasonable: *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022 [affirming, *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 499, 1 Hosea, 270].

A provision in a policy of fire insurance that, "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire," is unambiguous, and in a suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit: *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022 [affirming, *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 499, 1 Hosea, 270].

Where a policy of fire insurance contains the provision, that no suit or action shall be sustained thereon unless commenced within six months next after the fire, the period of limitation begins to run from the date of the fire, notwithstanding the policy also contains the provision "that the loss shall not be payable until sixty days after proofs of loss have been received by the company": *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022 [affirming, *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 449, 1 Hosea, 270].

A covenant restricting the right to maintain an action on the policy to twelve months after the loss, means twelve months from the time of the fire and not twelve months from the time the loss is first payable: *Meyer v. Insurance Co.*, 6 O. N. P. 34, 7 O. D. (N.P.) 573.

A clause against suing unless within twelve months from time of loss, means from time of fire and not from furnishing proofs of loss and is valid: *Insurance Co. v. Schwan*, 1 O. C. C. 192, 1 O. C. D. 105.

A clause requiring suits within a year from loss where the loss is payable sixty days

after proofs are furnished, means that time begins not from loss, but from proofs, if furnished in a reasonable time: *Kirk v. Insurance Co.*, 8 Dec. Rep. 182, 6 Bull. 200 [affirmed by supreme court commissioners, without opinion, two judges dissenting, *Insurance Co. v. Kirk*, 11 Bull. 228].

That a covenant restricting the time of bringing suit upon an insurance policy would be invalid if it did not give the insured a reasonable time in which to sue, see *obiter* in *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022 [affirming, *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 499, 1 Hosea, 270].

That the insurer will not be permitted to use a covenant restricting the time for bringing action upon a policy in such a way as to prevent the insured from having a fair opportunity to sue, see *obiter* in *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022 [affirming, *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 499, 1 Hosea, 270].

When a policy of fire insurance contains stipulations that in the event of a disagreement between the insurer and the insured as to the amount of loss or damage the same shall be ascertained by appraisers in the manner provided in the policy; and that the amount of loss or damage having been "thus determined," the loss shall not become payable until sixty days after the notice, ascertainment and satisfactory proof of the loss required in the policy have been received by the insurer, "including an award by appraisers when appraisal has been required;" and when the said policy contains the further condition that, "No suit or action on this policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements," such provisions constitute a condition precedent, which imposes an obligation on the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, or to show a legal excuse therefor, before he can maintain a suit on the policy to recover the loss, except as such condition is modified as to a total loss by G. C., § 9583; and in a suit to recover on such a loss, in the absence of an award of appraisers and of a demand for such appraisal by either the insured or the insurer, no cause of action is shown: *Graham v. Insurance Co.*, 75 O. S. 374, IV Longsdorf's Notes, 1017 [overruling, *Insurance Co. v. Fine*, 60 O. S. 513, IV Longsdorf's Notes, 793, and reversing, *Insurance Co. v. Kistner*, 5 O. C. C. (N.S.) 165, 16 O. C. D. 569].

A policy of fire insurance, containing a provision that proof of loss must be pre-

sent to the company within sixty days of the occurrence of a fire, is rendered void by failure to present the proofs within the time limit: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming, *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

If an insurance policy requires proof of loss to be filed within sixty days, proof of loss prepared and mailed so that they do not reach the office of the company until the sixty-first or sixty-second day are not filed in compliance with such provision: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming, *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

No officer or agent of an insurance company has authority to waive any of the stipulations of a policy, except in the manner provided therein; and a provision requiring that, in case of loss, the insured shall file a sworn statement thereof within sixty days, can not be waived verbally by an agent of the company, where the conditions of the policy require that the waiver be in writing endorsed on the policy or attached thereto: *Billings v. Insurance Co.*, 6 O. C. C. (N.S.) 567, 17 O. C. D. 552 [affirming, *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387].

That the waiver of a covenant limiting the time for filing proofs of loss may also waive a covenant restricting the time in which suit is to be brought, see *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633.

An action to recover upon a policy of fire insurance, though transitory, when brought in this state upon a cause arising in another state is, by virtue of G. C., § 11234, limited to the time fixed by the statute of that state: *Hunter v. Insurance Co.*, 73 O. S. 110, IV Longsdorf's Notes, 999.

The limitation of time in the charter of the defendant company—that the directors shall determine the amount of a loss, and if the assured is not satisfied he may bring a suit at the next term of court not held within sixty days—applies to a claim for loss wholly disallowed by the directors, and excludes a right to sue at any other time. This limitation is not a disabling clause to be strictly construed, but unlike an ordinary limitation is a condition precedent to the right to sue at all: *Insurance Co. v. West*, 6 O. S. 599, II Longsdorf's Notes, 261.

A limitation clause forbidding suit, unless begun within twelve months from loss, is not violated by a petition in time and summons naming another company in the body as defendant, though properly entitled in the indorsement and served, but which on defendant's motion after the year to strike the petition from the

files was allowed to be amended: *Burton v. Insurance Co.*, 26 O. S. 467, III Longsdorf's Notes, 320.

Bringing an action within the time, though it is afterwards dismissed, and another immediately brought, in which the nominal plaintiffs are not the same, is a compliance with a condition requiring action within a certain time: *Fellowes v. Insurance Co.*, 13 Dec. Rep. 79, 2 D. 128 [affirming *Insurance Co. v. Fellowes*, 12 Dec. Rep. 584, 1 D. 217].

Insured assigned his policy to M as collateral to a loan on mortgage. The house burned down. The policy provided to pay the mortgagee \$400, or as much thereof as was necessary to satisfy the mortgage after applying the proceeds derived from the mortgage; also that where a policy is issued to a mortgagee, or is held as collateral to a mortgage, the assured can not demand or recover any part until collection of mortgage. It was contended that "demand or recover" did not prevent action, but only stayed execution, especially in view of a six months' limitation on the policy; also that G. C., § 9392, prohibited any defense except fraud and increase of hazard. It was held that the petition is not demurrable, and action lies though the property had not been sold on the foreclosure: *Insurance Co. v. Mirick*, 56 O. S. 730, 38 Bull. 172.

Where a policy required action to be brought within six months, but it was not brought until thirteen months, and the jury found for the plaintiff, it was held that a reviewing court will not reverse for the purpose of allowing a second chance to insist on a harsh defense merely because not supported by the weight of evidence: *Insurance Co. v. Gierl*, 16 O. C. C. 294, 9 O. C. D. 162 [affirmed, without opinion, *Insurance Co. v. Gierl*, 57 O. S. 671].

A petition filed later than the time stipulated in the policy, which was made part of the petition, and showing no cause for the delay is demurrable: *Minerick v. Insurance Co.*, 4 Dec. Rep. 228, 1 Clev. L. Rep. 217.

G. EXCEPTED RISKS.

A policy of insurance against fire excepted from the risk any loss by an explosion. In an action upon the policy it appeared that an explosive mixture of whisky vapor and atmosphere had come in contact with the flame of a gas-jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the insured property. It was held that in such case it can not be said that the destruction was caused by a fire within the meaning of the policy, but, on the contrary, that the loss was by fire, occasioned by the explosion: *Insurance Co. v.*

Foote, 22 O. S. 340, III Longsdorf's Notes, 80.

In construing a policy wherein the exception embraces "any loss or damage occasioned by, or resulting from any explosion whatever," the exception must be taken and held to include all loss and damage occasioned by any fire of which an explosion was the efficient cause: *Insurance Co. v. Foote*, 22 O. S. 340, III Longsdorf's Notes, 80.

Where an exception provided that the underwriter would not be liable for "any loss or damage occasioned by, or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against and special premium paid therefor," and the property insured is destroyed by fire occasioned by the explosion of one of the explosive substances named, and notwithstanding it is made to appear that at the time of taking the risk, such explosion, from the nature of the property insured, was in the contemplation of the parties, such loss falls within the purview of the exception, unless the particular peril by which the property was destroyed was expressly insured against, and a special premium paid therefor: *Insurance Co. v. Foote*, 22 O. S. 340, III Longsdorf's Notes, 80.

A policy of insurance against loss or damage by fire contained a condition that the company would not be liable "for damage to property by lightning, aside from fire, * * * nor for damages occasioned by the explosion of a steam boiler, nor for damages by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances." It was held that the company was not exempted by this clause from liability for damage by fire resulting from an explosion of gas, but was thereby exempted from damage occasioned by the explosive force of the gas without communicating fire to the insured property: *Insurance Co. v. Parker*, 23 O. S. 85, III Longsdorf's Notes, 113 [distinguishing, *Insurance Co. v. Foote*, 22 O. S. 340, III Longsdorf's Notes, 80].

A fire insurance policy on a house and contents contained, in the printed portion, a provision that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only," and had attached thereto a special clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." There was stored in a certain powder house

situate across the street from the building insured and seventy-one feet distant therefrom, over which house neither party had any control, two tons of powder. The powder house was struck by lightning causing an explosion of the powder, by force of which explosion the insured house and contents were totally destroyed. It was held that within the meaning of the clause recited, the loss was occasioned by explosion which was not included in the risk, and that the company was not liable: *Insurance Co. v. Roost*, 55 O. S. 581, IV Longsdorf's Notes, 673.

Under a covenant which forbids the use of gasoline or petroleum products for lighting the policy was not rendered invalid by the use of gas which was generated from gasoline but in a tank more than thirty feet distant from the building insured: *Insurance Co. v. Sinclair*, 1 O. C. C. 496, 1 O. C. D. 276 [affirmed, without opinion, *Insurance Co. v. Sinclair*, 25 Bull. 153].

A fire policy on a hotel was to be void if gasoline was kept or used in the building, unless consent was endorsed. It was held to be error to exclude evidence that the agent was told that gasoline might be needed for cooking, and that he afterwards repeatedly saw it so used there, and such evidence must go to the jury on the question of waiver: *Insurance Co. v. Hosmer*, 22 Bull. 290 [without opinion in supreme court].

The exemption clause in a policy of fire insurance, providing absolute indemnity from loss by fire, except that the company "shall not be liable for loss caused directly or indirectly by riot," exempts from all loss due to riot, whether from fire or otherwise. Accordingly, the loss sustained by W. from the burning of a building in the city of A. by a fire which had spread from another building set on fire by rioters, is not covered by a policy containing such an exemption clause: *Insurance Co. v. Whitelaw*, 1 O. C. C. (N.S.) 412, 15 O. C. D. 197.

An insurance policy which contains a stipulation that "this entire policy shall be void" on certain named conditions, is not a severable risk, although the amount of insurance is distributed among different classes or articles of property: *Insurance Co. v. Schild*, 69 O. S. 136, IV Longsdorf's Notes, 954 [distinguishing *Coleman v. Insurance Co.*, 49 O. S. 310, IV Longsdorf's Notes, 456].

The keeping of gasoline in a pint bottle on a shelf near a gasoline engine to be used in starting the engine, the bottle being filled when necessary from a gallon can kept in a separate building, is a keeping of a small quantity for incidental use and not in violation of a policy inhibition against keeping gasoline on the premises, and in view of the

fact that it was fully understood when the policy was written that it was used for manufacturing purposes and operated by a gasoline engine the keeping of gasoline in such quantity in the engine room must have been in contemplation: *Gump v. Insurance Co.*, 15 O. C. C. (N.S.) 428, 24 O. C. D. 36 [affirmed, without opinion, *Insurance Co. v. Gump*, 86 O. S. 325].

H. AMOUNT AND EXTENT OF LIABILITY.

1. What is Structure.

G. C., § 9583, is not applicable to personal property: *Henderson v. Insurance Co.*, 2 O. N. P. 17, 2 O. D. (N.P.) 189.

A boiler, engine and apparatus insured in a certain sum as contained in the building, if they were built on permanent foundations and the boiler enclosed by a brick wall, may be a "structure" under G. C., § 9583, so as to require the company to pay the full amount on total loss and a verdict therefor will not be disturbed. Probably the court could have decided without a jury. Fixture and structure are not synonymous: *Insurance Co. v. Luce*, 11 O. C. C. 476, 5 O. C. D. 210 [affirmed, without opinion, *Insurance Co. v. Luce*, 59 O. S. 609].

G. C., § 9585, does not prohibit the insurance of the cellar and foundation walls under a building or structure, but does provide, that such walls shall not be included or considered a part of the "building or structure" in settling losses, and where the building or structure is also insured in the same policy, the cellar and foundation walls must be insured for a specific sum, and described separately from the building or structure: *Insurance Co. v. McBee*, 85 O. S. 161 [affirming, *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469].

2. Examination by Agent.

G. C., § 9583, requires the agent of the insurance company to ascertain the amount of the insurable interest of the applicant in the property insured, and the value thereof: *Henderson v. Insurance Co.*, 2 O. N. P. 17, 2 O. D. (N.P.) 189.

The failure or omission of the agent of the insurance company to make a proper examination of the property insured, or to fix the value thereof, can not prevent the insured from recovering the amount of the policy in case of total loss: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382.

Any situation or condition of the property, which the agent would reasonably have discovered had he made the examination required by G. C., § 9583, can not defeat a

recovery on the policy if there has been no intentional fraud by the assured. And statements in the application as to such condition or value are immaterial and can not be fraudulent: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382.

G. C., § 9583, applies to all policies issued since they went into effect. They are founded on considerations of public policy and do not confer a mere personal privilege on the insured, which he can waive by agreement. Conditions in the policy requiring a different rule of liability are without binding force. Of such kind are those that the loss shall be estimated by the actual value, and that no action shall be begun until after an award of arbitrators is made: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382. *Kreisser v. Gas Light Co.*, 2 O. C. C. (N.S.) 597, 14 O. C. D. 313.

The examination by the agent herein provided, relates to the physical condition of the property and not to incumbrances thereon: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming, *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

3. What is Total Loss.

Where a building is so far destroyed by fire as to lose its identity and specific character as a building, and the parts that remain can not be utilized to advantage in its reconstruction, there is a total loss within the meaning of G. C., § 9583: *Insurance Co. v. Drackett*, 63 O. S. 41, IV Longsdorf's Notes, 848.

The building may be a total loss, although a part of it is not consumed by fire, if the cost of removal of debris and replacing the remaining portions in a new structure fit for occupancy would exceed the cost of new material. Whether a loss is total or partial is a question of fact for the jury: *Insurance Co. v. Fish Co.*, 14 O. C. C. 160, 7 O. C. D. 468 [affirmed, without opinion, *Insurance Co. v. Fish Co.*, 61 O. S. 643]; *Insurance Co. v. Gray*, 2 O. C. C. (N.S.) 265, 14 O. C. D. 268 [affirmed, without opinion, *Insurance Co. v. Gray*, 69 O. S. 542].

Notwithstanding the insurable interest which the owner of a building has in the foundation upon which it rests, he can not recover for the foundation even where the policy includes it as a part of the building: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469 [affirmed, *Insurance Co. v. McBee*, 85 O. S. 161].

Where it is undisputed that the loss was total, a failure on the part of the court to qualify the definition of "total loss" in the charge to the jury does not constitute error;

and where the building exclusive of the foundation is a total loss, a disagreement as to the amount of the loss is unimportant and the necessity for an appraisement does not exist: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469 [affirmed, *Insurance Co. v. McBee*, 85 O. S. 161].

Whether an establishment, though parts were built at different times, is one structure or more, and hence whether a destruction of all except some part is a total or partial loss is a question for the jury. It is not necessary that the whole be reduced to smoke and ashes to constitute a total loss. If the cost of using the unburned part in rebuilding would exceed its value, and it is of no use as it stands, the loss is total: *Insurance Co. v. Fish Co.*, 14 O. C. C. 160, 7 O. C. D. 468 [affirmed, without opinion, *Insurance Co. v. Fish Co.*, 61 O. S. 643].

4. Increase of Risk.

The phrase "change increasing the risk" refers to a physical change, and not to a change by encumbrance: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming, *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704].

A change of condition arising since the policy will not avoid it unless the risk is increased, and the burden to show this is on the defendant: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

The words "any change increasing the risk," which occur in G. C., § 9583, refer only to change in the insured building or structure itself, and were not intended to include or apply to anything distinct from, or accidentally related to, the *corpus* of the insured building or structure. Where one of the conditions of a fire insurance policy is that if the building insured shall become vacant, unoccupied or uninhabited, without the consent of the insurer, the policy shall be void; and where such building becomes vacant after the policy was issued, without knowledge or consent on the part of the insurer, and a fire occurs therein while the building is vacant, there can be no recovery under the policy: *Insurance Co. v. Werner*, 76 O. S. 543, IV Longsdorf's Notes, 1027 [reversing, *Insurance Co. v. Werner*, 6 O. N. P. 514, 16 O. D. (N.P.) 524, 1 Hosea, 405].

The condition in a policy which provides that it shall be void if it is incumbered by the insured without the consent of the insurance company is valid and is not affected by G. C., § 9583: *Webster v. Insurance Co.*, 53 O. S. 558, IV Longsdorf's Notes, 613 [affirming, *Insurance Co. v. Webster*, 7 O. C. C. 511, 4 O. C. D. 704]. *Contra*, *Hender-*

son v. Insurance Co., 2 O. N. P. 17, 2 O. D. (N.P.) 189.

In *Hickey v. Insurance Co.*, 20 O. C. C. 385, 11 O. C. D. 135, it was held that a policy which contained a condition that it should be avoided if the realty were encumbered was void by an encumbrance upon the realty although the property owner made no representations as to the existence of the encumbrance.

In *Insurance Co. v. Bowersox*, 5 O. C. C. 444, 3 O. C. D. 218 [affirmed, without opinion, in *Insurance Co. v. Bowersox*, 51 O. S. 567], it was held that a policy which contained a provision that it should be void if "the assured should procure, or suffer to accrue any encumbrance covering the property therein specified or any part thereof," it was not rendered void by a cognovit judgment which became a lien upon the property insured, it being held that under G. C., § 9583, such judgment would not avoid such policy unless it increased the risk.

Whether a change increases the risk is said in *Insurance Co. v. Danison*, 1 O. S. 653, to be a question of fact for the jury.

Levy of execution on goods under a clause avoiding a policy therefor means a legal levy, and not a mere trespass; accordingly, if the insurance is to a married woman on her goods, and the execution is against her husband, there is no forfeiture: *Insurance Co. v. Stanhope*, 6 Dec. Rep. 983, 9 Am. L. Rec. 378.

Change of use of other and adjoining property belonging to the assured increasing the risk and causing the loss is no defense in absence of condition or misrepresentation or fraud or guilt: *Insurance Co. v. Miller*, 12 Dec. Rep. 165, 1 H. 325 [affirming, *Miller v. Insurance Co.*, 12 Dec. Rep. 105, 1 H. 208].

A condition not being a warranty requiring the insured to give notice of increase of risk by neighboring building, or uses thereof, does not apply if the assured does not know of such changes. If the recited object of the condition is to enable the insurer to cancel the policy and he obtains the information from other sources and does not cancel, the purpose is accomplished, and he is liable for a loss: *Insurance Co. v. Schoemer*, 13 Dec. Rep. 1018, 2 C. S. C. R. 474.

If the occupancy was represented to be as a dwelling house and a saloon, but one story was a dance hall and the agent knew it, and there was no fraud, this is no defense under G. C., § 9583: *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633 [affirmed, without opinion, *Insurance Co. v. Kukral*, 31 Bull. 223].

Describing the property as a warehouse implies a warranty that it shall continue

to conform to that description. Parol evidence of notice of an intended change given when the policy was issued is not admissible to vary it: *Elsner v. Insurance Co.*, 12 Dec. Rep. 703, 1 D. 412.

The company is not prevented by the classes of hazards in the policy from showing that using the store as a night auction was an increase of hazard, and the silence of the classes of hazards in the policy may be shown in rebuttal: *Harris v. Insurance Co.*, W. 548, I Longsdorf's Notes, 43.

A policy on a planing mill, which is "specially hazardous," forbade using the property for any use denominated hazardous, extra or specially hazardous. It was held that, allowing a carpenter shop on the premises, though it is of the same class as a planing mill, viz., specially hazardous, avoids the policy, whether it increased the risk or not: *Matthews v. Insurance Co.*, 13 Dec. Rep. 789, 2 C. S. C. R. 109.

A clause that the insurance shall cease while any extra hazardous business is carried on, means a habitual and regular use, and not a temporary one, connected with the preservation of the premises; accordingly, a carpenter's occupancy for purposes of repairing will not affect a recovery: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

A policy describing the property as occupied by a tenant was to be void if the premises were appropriated or used to exercise any trade other than specified; the tenant had a small printing office in his rooms. It was held that it is a question for the jury whether the premises were appropriated to this trade: *Insurance Co. v. Meyer*, 25 Bull. 233 [notes of supreme court cases not reported].

A policy on a steam flouring mill prohibited use of insured property for hazardous purposes, and among those called hazardous in the policy were operations requiring fire-heat. The insured used a kiln-drying corn meal mill requiring fire-heat. It was held that whether a fire-kiln or a corn meal mill was an incident to the ordinary business of a steam flouring mill was a question for the jury. If it was not a known or usual incident its use was not a breach of the policy. Usual and appropriate mechanical operations are deemed contemplated, but not new improvements not in common use which materially increase the risk: *Insurance Co. v. Insurance Co.*, 5 O. S. 450, II Longsdorf's Notes, 193 [reversing, *Insurance Co. v. Insurance Co.*, 12 Dec. Rep. 90, 1 H. 181].

Appropriating the building to a trade forbidden by the policy avoids the insurance, though not carried on so long as to be permanent or habitual, although it seems that

such use temporarily or for ordinary repairs or family use would not avoid it: *Harris v. Insurance Co.*, 4 O. S. 285, II Longsdorf's Notes, 92.

A policy on a country store forbidding the using of the premises for storing or retailing of gunpowder is not broken by keeping a keg of powder and retailing it in quantities usual in country stores; the store is not used or appropriated for the forbidden purpose: *Insurance Co. v. Corey*, 1 Dec. Rep. 379, 8 W. L. J. 470 [supreme court].

Retaining a small amount of gunpowder, formerly for sale but not offering to sell it, does not break a condition against keeping gunpowder for sale or on storage: *Insurance Co. v. Harmer*, 2 O. S. 452, I Longsdorf's Notes, 1072.

Keeping gunpowder or petroleum, being forbidden in a policy on a "general stock of hardware and agricultural implements" in an Ohio village, the insured can not show a custom among hardware dealers in Ohio villages to keep such articles for sale in limited quantities as part of the stock, to recover loss: *Beer v. Insurance Co.*, 39 O. S. 109, III Longsdorf's Notes, 1011.

A gas-pipe for lighting by conveying the vapor of gasoline kept in an under ground tank thirty-five feet from the house does not violate a clause against gasoline or any products of petroleum being deposited or used for light in the premises. The policy means liquid gasoline and the primary products of petroleum, and not the secondary or sub-products: *Insurance Co. v. Sinclair*, 1 O. C. C. 496, 1 O. C. D. 276 [affirmed, without opinion, *Insurance Co. v. Sinclair*, 25 Bull. 153].

A clause against use of the premises for any illicit vocation in a policy on whisky in a U. S. bonded warehouse, at one end of a distillery, is not violated by illicit distilling in a separate part of the building: *Cochran v. Insurance Co.*, 7 Dec. Rep. 276, 2 Bull. 54.

A policy on apparel, furniture and stock in a grocery will not cover stock smuggled into the country for clandestine sale and not exhibited to the insurer when inspecting the stock before issuing the policy. A watch is a memorandum article and not covered by such policy: *Clary v. Insurance Co.*, W. 227, I Longsdorf's Notes, 20.

5. Fraud.

If a policy of insurance is issued by a mutual company whose by-laws provide that the policy shall be invalid in case of over-valuation, such policy is not rendered invalid if the insured in good faith gave the correct valuation for his buildings and machinery,

but the land was over valued, and by a mistake of the agent in giving the valuation the total value, is rendered excessive: *Insurance Co. v. Boicerson*, 6 O. C. C. 1, 3 O. C. D. 321.

The fact that the insured premises are encumbered by mortgage does not prevent recovery in the absence of fraud: *Insurance Co. v. Kukral*, 7 O. C. C. 356, 4 O. C. D. 633 [affirmed, without opinion, *Insurance Co. v. Kukral*, 51 O. S. 609].

A false statement in the application as to the incumbrances upon the property insured does not avoid the insurance, if the facts were stated correctly to the agent of the insurance company who prepared the application himself: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

Under a provision that fraud, either before or after loss should avoid a policy, the insured can not recover if he has presented a fraudulent over-statement of the loss sustained, even though the actual loss was equal to the amount of insurance: *Insurance Co. v. Beverly*, 14 O. C. C. 468, 8 O. C. D. 37.

Fraud in obtaining the policy or negligence in causing the fire is a defense: *Clary v. Insurance Co.*, W. 227, I Longsdorf's Notes, 20.

6. Amount Recoverable in Case of Total Loss.

G. C., § 9583, applies to all policies which have been issued in this state upon property therein subsequent to the enactment of said section: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382; *Insurance Co. v. Hull*, 51 O. S. 270, IV Longsdorf's Notes, 542; *Insurance Co. v. Hock*, 8 O. C. C. 341, 4 O. C. D. 553.

The insurance company can not show that the actual value of the property was less than the amount of the insurance: *Schild v. Insurance Co.*, 6 O. N. P. 134, 8 O. D. (N. P.) 45.

If there are two or more policies on the property, and the loss is total the full value must be paid the same as if there was but one policy. The last clause of G. C., § 9583, does not forbid this. The phrase "contribute to the payment of the whole or the partial loss" was, in the original act, "whole of the partial loss," and must have been an error in the codification. Notwithstanding a clause in the policy the basis of contribution to total loss is the whole amount of insurance in all the policies: *Insurance Co. v. Fish Co.*, 14 O. C. C. 160, 7 O. C. D. 468 [denying, *Coffin Co. v. Insurance Co.*, 8 Dec. Rep. 422, 7 Bull. 342, affirmed, without opinion, *Insurance Co. v. Fish Co.*, 61 O. S. 643].

A rebuilding clause in a valued policy is inconsistent with G. C., § 9583, in case of total loss and the full amount must be paid in money: *Russell v. Insurance Co.*, 6 O. N. P. 325, 8 O. D. (N.P.) 613.

In case of total loss of a building the right to recover the amount of the policy is not affected by the actual value of the property nor by a statement in the proofs of loss of a less value, nor by a clause in the policy that only the actual loss can be recovered: *Schild v. Insurance Co.*, 6 O. N. P. 134, 8 O. D. (N.P.) 45.

The cash amount required to restore the property and not its market value, is the basis of recovery on a house: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

The cost is no proof of value, and if objected to can only be drawn out on cross-examination. What it ought to have cost and how that compares with the intrinsic worth of the building at the prices of construction at the time of loss is proper: *Insurance Co. v. Frick*, 5 Dec. Rep. 47, 2 Am. L. Rec. 336.

A policy of \$800, where the interest of the assured is only a dower interest, worth about \$200, must be paid in full if the property is destroyed: *Hilliard v. Insurance Co.*, 7 O. N. P. 561, 5 O. D. (N.P.) 576.

After an adjustment of loss by mutual agreement, valuation and payment of the amount, it can not be opened and the company held for further articles omitted from the proof of loss by mistake: *Untersinger v. Insurance Co.*, 6 Dec. Rep. 986, 9 Am. L. Rec. 401, 8 Dec. Rep. 157, 6 Bull. 35.

If the insurance company has issued a policy to a life-tenant in excess of the value of his life estate, and if upon total loss it has paid the amount of the policy to him, the remaindermen can not recover from the life-tenant the difference between the value of his life-estate and the amount thus paid to him: *Hubbard v. Austin*, 6 O. N. P. 249, 8 O. D. (N.P.) 111.

Where the mortgagee is not a party to the procuring of the insurance contract, and had no knowledge of fraud in the procuring of the insurance, an allegation of fraudulent representations and concealments on the part of the mortgagor in the procuring of the insurance does not constitute a defense to the claim of the mortgagee under the policy: *Insurance Co. v. Boland*, 8 O. C. C. (N.S.) 325, 20 O. C. D. 811 [affirming, *Boland v. Insurance Co.*, 2 O. N. P. (N.S.) 254, 14 O. D. (N.P.) 268, and affirmed, without opinion, in *Insurance Co. v. Boland*, 72 O. S. 645, and *Insurance Co. v. Agner*, 73 O. S. 393].

Where a building or structure, is totally destroyed except the foundation walls, the

fact that the description in an insurance policy, covering the property, includes the foundation, does not prevent the application of G. C., §§ 9583 and 9584, in the settlement of the loss: *Insurance Co. v. McBee*, 85 O. S. 161 [affirming, *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469].

7. Covenant Limiting Liability.

An express covenant which attempts to modify or limit the liability of the insurance company in cases provided for in G. C., § 9583, is invalid: *Insurance Co. v. Leslie*, 47 O. S. 409, IV Longsdorf's Notes, 382.

A condition in a policy insuring a building against loss or damage by fire, which purports to give the insurer the option to rebuild in case of total loss, is repugnant to G. C., § 9583, and void. Refusal of the insured to furnish plans and specifications for rebuilding, and to permit the insurer to rebuild constitutes no defense to an action for recovery of such loss: *Insurance Co. v. Russell*, 65 O. S. 230, IV Longsdorf's Notes, 885 [for opinion below, see *Russell v. Insurance Co.*, 6 O. N. P. 325, 8 O. D. (N.P.) 613].

G. C., § 9583, enters into and becomes a part of every fire policy on a building or structure, issued since its passage and supercedes and annuls those conditions and stipulations in such policies that are at variance with its provisions: *Insurance Co. v. Russell*, 65 O. S. 230, IV Longsdorf's Notes, 885 [distinguishing *Insurance Co. v. Wells*, 42 O. S. 519, IV Longsdorf's Notes, 126].

No personal privilege is conferred upon the insured under G. C., § 9583, defining the extent of liability of insurance companies under their policies, which he may waive or qualify by agreement. The statute is a part of the policy and is read into the contract of insurance therein. Hence a company is bound to pay the loss whether total or partial and can not rebuild or replace: *Insurance Co. v. McFarland*, 12 O. C. D. 591 [affirmed, without opinion, *Insurance Co. v. McFarland*, 60 O. S. 617].

An insured, by consenting to arbitrate the amount of loss sustained by fire, in pursuance of the provisions of the policy, is not precluded, in a suit upon the policy, from claiming and recovering as for a total loss, if the evidence sustains his claim. The provisions of G. C., § 9583, being founded upon public policy, the insured can not be held to a waiver of them: *Insurance Co. v. Drackett*, 63 O. S. 41, IV Longsdorf's Notes, 848. See to the same effect, *Graham v. Insurance Co.*, 75 O. S. 374, IV Longsdorf's Notes, 1017; *Insurance Co. v. Fish Co.*, 14 O. C. C. 160, 7 O. C. D. 468 [affirmed, without opinion, *Insurance Co. v. Fish Co.*, 61 O. S.

643]; *Insurance Co. v. Gray*, 2 O. C. C. (N. S.) 265, 14 O. C. D. 268 [affirmed, without opinion, *Insurance Co. v. Gray*, 69 O. S. 542]. The same result was reached in *Insurance Co. v. Carnahan*, 19 O. C. C. 114, 10 O. C. D. 186 [not affected by a reversal of this case in *Insurance Co. v. Carnahan*, 63 O. S. 258, IV Longsdorf's Notes, 856].

Under G. C., § 9583, the amount to be recovered on a fire insurance policy in case of a total loss is a matter of public policy, and can not be waived, nor can it be arbitrated unless the loss is a partial one. It follows therefore, that where an award has been made, and an action is thereafter brought for a total loss, there can be no recovery unless a total loss is proven, and the only question for the jury is whether the loss is partial or total: *Insurance Co. v. Gray*, 2 O. C. C. (N.S.) 265, 14 O. C. D. 268.

Where the building, exclusive of the foundation, is a total loss, a disagreement as to the amount of the loss is unimportant and the necessity for an appraisal does not exist: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469 [affirmed, *Insurance Co. v. McBee*, 85 O. S. 161].

A condition contained in permission that the premises might be vacant, which provided for the reduction of one-third of the face of the policy in case the property was destroyed by fire during such vacancy was said to be invalid in being in conflict with G. C., § 9583: *Leonard v. Insurance Co.*, 56 Bull. 119.

Eight out of ten companies insuring a building served notices, after loss, of an intention to rebuild, such right being reserved in the policies. Pending their preparations to rebuild, the insured compromised with seven and now sues the eighth; its policy limited liability to the proportion of the loss that its policy bore to the total insurance. It was held that the liability for money is several and not joint. The notices converted the liability into one payable by rebuilding, but it was still several and not joint, hence, plaintiff may recover regardless of the liability of other companies. He may compromise with any of the companies liable to rebuild without releasing the others. The recovery is not to be affected by the fact of settling with other companies for less than they were liable for, or that others did not elect to rebuild, or were insolvent or not liable: *Good v. Insurance Co.*, 43 O. S. 394, IV Longsdorf's Notes, 173.

A rule of the company against more than \$1,500 insurance on goods in one building does not relieve liability to an applicant who does not know of the rule: *Krumm v. Insurance Co.*, 40 O. S. 225, IV Longsdorf's Notes, 20.

Prior to G. C., § 9583, a covenant that the amount of insurance applied for did not exceed two-thirds of the cash value of the property insured was regarded as valid; and a breach of such condition would render such policy invalid: *Insurance Co. v. McCluckin*, 40 O. S. 42, IV Longsdorf's Notes, 4.

It was held in an action upon a policy of insurance in which the insurers promise to pay the insured "all losses and damage * * * not exceeding \$2,500, that may happen by fire to their stock of goods; and providing also that the losses or damage be estimated at the actual value of the property at the time the same shall happen, and be paid at the rate of two-thirds its actual cash value," that the losses or damage being found to be the amount of \$2,500, and that such sum was less than two-thirds of the value of the stock of goods, the insured are entitled to recover the full amount of \$2,500, although that sum is the full amount of the insurance: *Insurance Co. v. Housinger*, 10 O. S. 10, II Longsdorf's Notes, 404.

When a policy on a house for \$800 provides that this does not exceed two-thirds its value, but also provides for paying all loss not exceeding such sum, after proofs of such loss, the policy is an open and not a valued one, and the insurer can prove the value of the house to be less than \$800: *Insurance Co. v. Butler*, 38 O. S. 128, III Longsdorf's Notes, 961.

That there is more than one policy on a building does not prevent the statute as to valued policies, G. C., § 9584, applying in case of total loss: *Insurance Co. v. McBee*, 85 O. S. 161 [affirming, *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 31 O. C. D. 469].

Although a fire policy on a building includes the foundation in its description, this does not prevent G. C., § 9583, from applying, and under G. C., § 9585, forbidding the foundation being considered in settling losses, the loss may be total, although part of the foundation may be but slightly damaged: *Insurance Co. v. McBee*, 85 O. S. 161 [affirming, *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 31 O. C. D. 469].

The estimated value stated in the policy concludes the parties—thus, if the insurance is \$3,000 on a boat valued at \$10,000—and the amount of injury is \$3,000, the recovery will be three-tenths thereof, or \$900, though the boat was worth but \$6,500: *Howell v. Insurance Co.*, 7 O. (pt. 1) 284, I Longsdorf's Notes, 381.

The value in a valued policy is conclusive, and the fact that in a case against another insurer the jury found a materially lower value is no reason for reducing the verdict:

Howell v. Insurance Co., 7 O. (pt. 1) 276, I Longsdorf's Notes, 381.

On a total loss under a valued policy indemnity is not the test of recovery, but the sum insured is the measure, though the articles would have sold for less at destination, the market having fallen. Expenses in managing and selling are not to be deducted: *Insurance Co. v. Brazee*, 16 O. 81, I Longsdorf's Notes, 752.

A company having issued a policy for \$20,000 and obtained reinsurance for \$5,000 and settled the loss at \$12,000, can recover the entire amount of \$5,000 from the reinsuring company, and not merely six-tenths of it, if there is no provision for prorating: *Insurance Co. v. Insurance Co.*, 38 O. S. 11, III Longsdorf's Notes, 949 [affirming, *Insurance Co. v. Insurance Co.*, 4 Dec. Rep. 158, 1 Clev. L. Rep. 81].

8. Estoppel.

The fact that the insured has presented a claim of loss for less than the amount to which he is entitled, does not of itself estop him from recovering the full amount: *Schild v. Insurance Co.*, 6 O. N. P. 134, 8 O. D. (N.P.) 45.

An insurance company will be estopped from setting up a forfeiture on the ground that consent to "other insurance" was not actually indorsed on the policy, if notice thereof was given to the company or its authorized agent and no objection was made thereto: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

Acts and conduct of the parties occurring subsequent to the delivery of a policy are applicable to the doctrine of waiver and estoppel, and may be raised by way of reply in an action at law: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

9. Compromise.

Where a person is induced by threats of a groundless prosecution to accept a less sum than is justly owing to him on a policy of fire insurance, in satisfaction of his claim, and to surrender the same, he may maintain an action on the policy for the balance due, without returning or tendering back the money so received: *Insurance Co. v. Hull*, 51 O. S. 270, IV Longsdorf's Notes, 542.

Where at the time of a compromise of a claim founded on a contract of life insurance, a dispute exists between the parties as to the liability of the company in any sum whatever, it denying that anything is owing, and an amount less than the claim is paid to the claimant in settlement of the controversy, and he executes a full acquittance and release, and surrenders the policy, an

action at law on the policy can not be maintained without a return or tender of the amount received, even though the party's assent to the settlement was obtained by the fraudulent representations of the other party, and the amount received as the settlement is in the petition credited as a payment on the policy. Where in such case the contract of settlement is pleaded as a defense, a reply which simply alleges that the settlement was induced by fraud, but does not allege a payment or tender of the amount received, is not responsive to the answer, and is insufficient in law: *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958 [*Insurance Co. v. Hull*, 51 O. S. 270, IV Longsdorf's Notes, 542, distinguished].

A policy of insurance is not a liquidated demand: *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958.

I. TIME OF TAKING EFFECT.

An insurance agent negotiated for the plaintiff, through the underwriters of an insurance company, a policy in that company. A few months later the underwriters notified the agent that the company would cancel the policy. The agent assented for the plaintiff, but said he would take the usual five days to obtain other insurance. Thereupon the underwriters offered to rewrite the insurance in the defendant company. The plaintiff, through the agent, assented, and a new policy was delivered the same day at two o'clock. The fire occurred at six o'clock. It was held that the court properly submitted to the jury the question as to the time the contract of insurance went into effect, and the finding of the jury that it went into effect at the time of delivery and was not postponed until five days later, is not contrary to law: *Ensel v. Insurance Co.*, 88 O. S. 269.

IX. MARINE INSURANCE.

A. CONSTRUCTION.

If a steamboat or other vessel be overloaded or unduly laden, she is unseaworthy. But whether or not unduly laden depends upon the capacity of the boat or vessel, not upon the depth of water upon the shoals and bars in the river upon which she is being navigated. The capacity of the craft, not the capacity of the river, is to control in deciding a question of this character: *Insurance Co. v. May*, 20 O. 211, I Longsdorf's Notes, 906.

Carrying without a license certain articles contrary to the U. S. statutes does not render the boat unseaworthy and avoid the policy: *Sherlock v. Insurance Co.*, 13 Dec. Rep.

495, 1 C. S. C. R. 193 [reversed on other grounds, *Insurance Co. v. Sherlock*, 25 O. S. 50, III Longsdorf's Notes, 210].

To recover insurance on a cargo of hay, compliance with the implied warranty of seaworthiness must be proved: *Insurance Co. v. Cobb*, 13 Dec. Rep. 785, 2 C. S. C. R. 87. If the boat becomes unseaworthy during the voyage, and there was no chance to repair before the disaster, or the unseaworthiness did not cause the disaster, this is no defense: *Insurance Co. v. Cobb*, 13 Dec. Rep. 785, 2 C. S. C. R. 87.

Seaworthiness means that the vessel is competent to resist the ordinary attacks of wind and weather, and was competently equipped and manned for the voyage, with a sufficient crew, and with means to sustain them, and with a captain of general good character and nautical skill: *Howell v. Insurance Co.*, 7 O. (pt. 1) 276, I Longsdorf's Notes, 381.

The owner's knowledge of unseaworthiness is immaterial. There can be no recovery whether he knew or not: *Insurance Co. v. Purcell*, 19 O. C. C. 135, 10 O. C. D. 528.

If a boat or vessel insured meets with disaster, the captain and crew are bound diligently to labor for the recovery of the property; but the insertion of a clause in the policy requiring such labor and effort, does not impose any additional duty upon the assured: *Insurance Co. v. May*, 20 O. 211, I Longsdorf's Notes, 906.

"Ordinary peril" does not mean frequent or probable peril, but is distinguished from accident. Things certain to happen, as loss by wear and tear, are not insured against, and those that may or may not, are. The degree of force of the waves is only important as going to show unseaworthiness: *Insurance Co. v. Reed*, 20 O. 199, II Longsdorf's Notes, 989.

Striking a rock and bilging without remaining stationary, is not stranding: *Lake v. Insurance Co.*, 13 O. 48, I Longsdorf's Notes, 623.

The conduct of a pilot causing injury to a boat is not barratry if it is free from fraud, gross negligence, and willful violation of a known positive law, as where he erred in his estimate of distances under the law, and was mistaken as to the meaning of a rule: *Insurance Co. v. Sherlock*, 25 O. S. 33, III Longsdorf's Notes, 210.

A clause forbidding abandonment unless repair is "impracticable," and the injury is 50 per cent. of the vessel's agreed value, and one-fifth new for old shall be deducted in case of partial loss. It was held: (1) "Impracticable" does not refer to possibility, but to a recovery and repair exceeding 50 per cent. of the actual value. (2) The

actual and not agreed value governs in the United States, and the above 50 per cent. clause does not alter this. (3) The one-fifth new for old is not to be deducted in determining the 50 per cent., for it does not apply to a constructive total loss, for the insurers then have the new material. (4) Notice of abandonment because the repair will cost over 50 per cent. does not conclude the parties; only the actual test binds: *Insurance Co. v. Packet Co.*, 5 Dec. Rep. 417, 5 Am. L. Rec. 499; 7 Dec. Rep. 233, 1 Bull. 379 [affirming *Packet Co. v. Insurance Co.*, 7 Dec. Rep. 30, 1 Bull. 42].

Abandonment to the underwriters, which is not necessary in case of actual total loss, is necessary to claim for a total loss when the total loss is constructive. It is constructive where the boat is injured near its home port where it is practicable to repair, and also remains in specie so that repair is possible, even though the cost of repairing may exceed the value: *Insurance Co. v. Sherlock*, 25 O. S. 50, III Longsdorf's Notes, 210 [reversing *Sherlock v. Insurance Co.*, 13 Dec. Rep. 495, 1 C. S. C. R. 193].

By reason of the insurer's promise to pay his proportion of repairs the insured did not abandon. It was held that such promise is not one to defray the whole expense, nor is it an interference such as to impose greater liability: *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352.

An abandonment vests title in the underwriters, and use of the wreck thereafter by the insured waives the abandonment: *Sherlock v. Insurance Co.*, 7 Dec. Rep. 17, 1 Bull. 26.

Abandonment is a technical term denoting an act, the legal effect of which is to transfer to the underwriter only the interest insured, though he thereby gets the legal title and right to dispose of the whole. If a boat is insured for three-fourths of her agreed value, the owners are their own insurers for one-fourth, and retain that interest after abandonment, and are entitled to one-fourth of the proceeds of the wreck: *Insurance Co. v. Duffield*, 6 O. S. 200, II Longsdorf's Notes, 230 [affirming *Insurance Co. v. Duffield*, 12 Dec. Rep. 361, 2 II. 122].

A clause requiring the insured, in case of abandonment, to assign to the company all their interest in and to the boat and every part thereof, free of all claims and charges whatever, is to be deemed to use the term abandonment in its technical legal sense; accordingly, the insured is entitled to such proportion of the proceeds of the wreck as he was his own insurer for: *Insurance Co. v. Duffield*, 6 O. S. 200, II Longsdorf's Notes, 230.

Abandonment is not always necessary in cases of salvage or total loss, as where the insured did not learn of the loss until after sale of the commodity, which, being perishable, was hastened: *Insurance Co. v. Brzee*, 16 O. 81, I Longsdorf's Notes, 752.

A clause in the policy that the boat shall be manned by four men is a warranty, but does not apply until it was necessary for men to be aboard, but the risk commences when the goods are laden; accordingly, the policy having attached for a short time, the premium can not be recovered back, though the goods were lost: *Hicks v. Insurance Co.*, 1 Dec. Rep. 374, 8 W. L. J. 416 [supreme court].

Insurance on the "steamer Sioux City" is only valid as long as the vessel continues to be a steamer. It is a warranty of such nature. On permanent removal of the machinery, with a view of selling the hull, she is no longer a steamer, and a loss is not within the policy: *Baker v. Insurance Co.*, 3 Dec. Rep. 478, 7 Am. L. Reg. (N.S.) 628.

A pilot may depart from a rule of navigation, made under the authority of congress, in an emergency to avoid immediate danger, collision, and the underwriter has the burden of showing willful violation: *Insurance Co. v. Sherlock*, 25 O. S. 33, III Longsdorf's Notes, 210.

If the policy is against fire only, and the loss was by collision and fire, the damages are to take the original value and deduct the loss by collision, including the cost of raising and bringing the boat into port, except so far as increased by the fire; the balance is the value of the wreck injured by fire, deducting one-third new for old if she is repaired, and the recovery is the proportion of this which the policy bears to the original value: *Sherlock v. Insurance Co.*, 7 Dec. Rep. 17, 1 Bull. 26.

The provisions that in case of loss all proper means shall be used to preserve the property, and that the property shall be forwarded to its destination, and if delay is not admissible it shall be sold at "public" sale, are not warranties, and only avoid the policy to the extent that their breach has increased the loss. But the assured has the burden to show no such increase of loss: *Insurance Co. v. Cobb*, 13 Dec. Rep. 785, 2 C. S. C. R. 87.

Where, by a clause in a policy, it is provided that, "the insurers shall not be liable for the expense of dockage, or hauling out for repairs, nor for any loss (except in case of general average) unless the necessary repairs, caused solely by the disaster, shall amount to ten per cent. on the agreed value in the policy;" if, by means of a peril in

sured against, repairs become necessary which are invariably made on a dry dock, it was held that a fair and reasonable charge for the use of the dock whilst such repairs are being made, forms a proper item in the cost of repairs; and by a proper construction of said clause, is not to be excluded in a computation to determine whether it is a ten per cent. loss: *Snapp v. Insurance Co.*, 8 O. S. 458, II Longsdorf's Notes, 358.

The marine insurance rule of one-third new for old applies to steamboats on western rivers: *Wallace v. Insurance Co.*, 4 O. 234, I Longsdorf's Notes, 218; *Perry v. Insurance Co.*, 5 O. 305, I Longsdorf's Notes, 284; *Insurance Co. v. Sherlock*, 25 O. S. 50, III Longsdorf's Notes, 210.

If this reduces the loss to below 10 per cent. on the value required by the policy, there can be no recovery: *Wallace v. Insurance Co.*, 4 O. 234, I Longsdorf's Notes, 218.

If the wreck when restored is substantially a different boat, so that the policies could not re-attach, it is not a repair, and the rule of one-third new for old would not apply: *Sherlock v. Insurance Co.*, 1 Bull. 26.

Where no insurance is to be paid unless the loss is over ten per cent., the insurer has no right to require items for jettison and general average separated to see if each amounts to over ten per cent., even if those items had been specially insured against in a hull policy: *Gazzam v. Insurance Co.*, 6 O. 71, I Longsdorf's Notes, 322.

A proviso that the insurer shall not be liable for partial loss on certain articles unless it amount to seven per cent. and happen by stranding, names two contingencies, that is: seven per cent. and stranding, both of which must concur. If the word "and" was insiduously substituted for "or" or "unless" in the older policies, it can not be allowed by the court: *Lake v. Insurance Co.*, 13 O. 48, I Longsdorf's Notes, 623.

A marine policy provided that the insurer should not be liable unless the loss amount to 20 per cent. of the total value. It was held that disbursements to save the property and prevent further loss, and also salvage expenses, as for the use of a flat for rescue, are to be added to the injury to determine whether the loss is over 20 per cent. The word loss includes these: *Hall v. Insurance Co.*, 3 Dec. Rep. 39, 2 Gaz. 241, 12 Dec. Rep. 639, 1 O. 308.

Commissions for raising money advanced for repairs in a home port are not chargeable to the insurer, and the part where the policy was executed is *prima facie* the home port: *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352.

The cost of repairing and the expense of towing the insured boat to the nearest port for repairs is covered by the policy: *Perry v. Insurance Co.*, 5 O. 305, I Longsdorf's Notes, 284.

Interest on the amount of loss may be added after sixty days from formal proofs of loss: *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352.

Whether the subsistence and wages of the crew during the delay are ever covered by the policy, whether they are retained or discharged and re-employed, compare *Perry v. Insurance Co.*, 5 O. 305, I Longsdorf's Notes, 284; *Gazzam v. Insurance Co.*, 6 O. 71, I Longsdorf's Notes, 322; *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352 with *Barker v. Railway*, 22 O. S. 45, III Longsdorf's Notes, 57.

Expenses in seaman's wages and subsistence are to be included in reckoning general average: *Barker v. Railway*, 22 O. S. 45, III Longsdorf's Notes, 57 [overruling *Perry v. Insurance Co.*, 5 O. 305, I Longsdorf's Notes, 284; *Gazzam v. Insurance Co.*, 6 O. 71, I Longsdorf's Notes, 322; and *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352, in so far as conflicting with above].

The master is not bound to have all the repairs made at the same port. A sound discretion exercised in good faith, which is a question for the jury, will allow him to make partial repairs at one port and then proceed to another for completion, and hold the insurer for both: *Gazzam v. Insurance Co.*, 6 O. 71, I Longsdorf's Notes, 322.

If the cause of loss was the necessary and inevitable result of the manner of repairing a boat and would occur to any boat under the same circumstances—as where the use of a side dock requires taking out the caulking whereby water enters and sinks the boat—this is not an accident but an ordinary peril and there can be no recovery: *Insurance Co. v. Purcell*, 19 O. C. C. 135, 10 O. C. D. 528.

A policy requiring two watchmen, when a boat is laid up, one of whom shall be on duty at all times, and it is a custom for watchmen to get their meals on shore, so as not to have a fire on the boat, and the boat was burned while they were at supper on shore, it was held that it is properly left to the jury to say whether this was a prudent performance of duty: *Gibson v. Insurance Co.*, 13 Dec. Rep. 629, 1 C. S. C. R. 410.

B. RISKS INCLUDED IN POLICY.

Where, by what is denominated a "contract proposition," request is made of an in-

insurance company for a policy of marine insurance in which "contract proposition" it is stated: "Insurance is wanted by the Walsh-Upstill Coal Company covering all shipments of the following description of articles, viz.: Sundry coal cargoes, belonging to them and as agents, at risk," etc., a policy of insurance issued upon such application which states that insurance is made "as per said contract," will apply to and cover only such cargoes shipped by the Walsh-Upstill Coal Co., as shall belong to it as owner and to such as shall be shipped by it as agent in which it shall have some pecuniary interest at risk: *Insurance Co. v. Coal Co.*, 68 O. S. 469, IV Longsdorf's Notes, 947 [reversing *Insurance Co. v. Coal Co.*, 13 O. C. D. 191; distinguishing *Insurance Co. v. Wilson*, 6 O. S. 553, II Longsdorf's Notes, 258].

A policy of marine insurance does not cover the sinking of a vessel as the result of attempting to repair the same: *Insurance Co. v. Purcell*, 19 O. C. C. 135, 10 O. C. D. 528 [affirmed, without opinion, *Insurance Co. v. Purcell*, 66 O. S. 678].

If a vessel is insured by an insurance company and is injured while the policy is in force, and as a result of such injury becomes a total loss after the policy expires, the insurance company is liable only for the actual injury suffered while the policy was in force: *Howell v. Insurance Co.*, 7 O. (pt. 1) 284, I Longsdorf's Notes, 381.

When goods, specified in a marine policy made with reference to a particular trade or line of steamers, are carried on deck, in accordance with an established usage of such trade or line, and are jettisoned on the voyage, the loss is covered by the policy, and the underwriter is liable thereon: *Insurance Co. v. Skillito*, 15 O. S. 559, II Longsdorf's Notes, 748.

A policy of marine insurance includes losses due to the negligence of the insured or of officers and seamen in his employment: *Insurance Co. v. Parisot*, 35 O. S. 35, III Longsdorf's Notes, 753; *Insurance Co. v. May*, 20 O. 211, I Longsdorf's Notes, 906; *Perrin v. Insurance Co.*, 11 O. 147, I Longsdorf's Notes, 548.

The opposite view was expressed in the earlier cases. See *Lodwicks v. Insurance Co.*, 5 O. 433, I Longsdorf's Notes, 297; *Howell v. Insurance Co.*, 7 O. (pt. 1) 276, I Longsdorf's Notes, 381; *Fulton v. Insurance Co.*, 7 O. 5, I Longsdorf's Notes, 383; *Gazzam v. Insurance Co.*, W. 202, I Longsdorf's Notes, 17.

In an emergency, deviation from a general usage, if there be one, is at the owner's risk; but if there be none, the navigator is not to be held responsible on opinions formed

after the event where men may differ, if he possessed and used ordinary skill; and the insurer must prove negligence or barratry: *Gazzam v. Insurance Co.*, W. 202, I Longsdorf's Notes, 17.

Injury to a flatboat by the waves raised by a steamboat, is one of the perils insured against in any ordinary policy of insurance, although the steamboat was an ordinary steamboat, and the swell raised by her an ordinary one: *Insurance Co. v. Reed*, 20 O. 199, I Longsdorf's Notes, 906.

The insurer does not insure against certain loss, such as must inevitably happen to all boats, as wear and tear, and the like; but insures against accidents such as may, or are likely to happen: *Insurance Co. v. Reed*, 20 O. 199, I Longsdorf's Notes, 906.

Insurance brokers holding an open policy of insurance for themselves and whom it may concern, may, in case of damage to property covered by their policy, maintain, in their names, an action for the use of the owners, although the latter are not named in the policy, if it sufficiently appear that the insurance was procured for their benefit: *Insurance Co. v. Wilson*, 6 O. S. 553, II Longsdorf's Notes, 258.

Where the printed terms of an open marine policy are for perils of seas, rivers, fire, and overpowering thieves, and the insurance company, by its agent, endorses thereon "\$2,000 on cargo, canalboat Ben Franklin, at and from this port, per Miami and Wabash canals, to Covington, Ind., and landed at 3-8 \$7.50," the policy, by the indorsement, covers the ordinary risks of canal navigation: *Insurance Co. v. Wilson*, 6 O. S. 553, II Longsdorf's Notes, 258.

A policy of marine insurance including the "risks of the seas, rivers, fires, enemies, pirates, rovers, assailing thieves, and all other loss and misfortune which may come to the damage of the said steamboat according to the true intent and meaning of the said policy" covers the loss of steamboat by the explosion of its boiler: *Perrin v. Insurance Co.*, 11 O. 147, I Longsdorf's Notes, 548.

A policy of insurance on a steamboat against loss by fire only, covers a loss by fire caused by collision where collision is not excepted, by the terms of the policy, from the risk named: *Insurance Co. v. Sherlock*, 25 O. S. 33, III Longsdorf's Notes, 210.

A time policy containing a permission to navigate certain waters without express avoidance for navigating elsewhere, is only suspended, and not avoided, if the boat is used on other waters, and for a loss after her return, the insurer is liable: *Wilkins v. Insurance Co.*, 30 O. S. 317, III Longsdorf's

Notes, 532 [reversed, *Wilkins v. Insurance Co.*, 13 Dec. Rep. 592, 1 C. S. C. R. 340].

As between the shipper of goods and the insurer of them, the carrier is the agent of the former and not of the latter, and a deviation by him exonerates the insurer: *Jolly v. Insurance Co.*, W. 539, I Longsdorf's Notes, 42.

A deviation by the carrier from the main channel through a chute to save time causing loss, exonerates the insurer: *Jolly v. Insurance Co.*, W. 539, I Longsdorf's Notes, 42.

The act of congress putting a penalty on carrying vitriol in the way it was carried in this case, does not render the voyage an illegal one as to a policy on the boat but not on the cargo: *Sherlock v. Insurance Co.*, 7 Dec. Rep. 17, 1 Bull. 26.

Not making known a matter within the assured's knowledge, which is material to a just estimate of the risk, avoids a policy on a steamboat; *contra*, if it could not increase the risk: *Insurance Co. v. Paver*, 16 O. 324, I Longsdorf's Notes, 766.

C. TRIAL AND EVIDENCE.

Where the record shows a special finding of facts by the court to which the case was tried, and the overruling of a motion to set aside such finding, filed by the party for whom final judgment was rendered on the facts so found, such judgment being erroneous it was proper for the reviewing court, after reversing it, to remand the case for a new trial; and such order will not be reversed on error by the supreme court: *Insurance Co. v. Shillito*, 15 O. S. 559, II Longsdorf's Notes, 748 [overruling *Perry v. Insurance Co.*, 5 O. 305, I Longsdorf's Notes, 284; *Gazzam v. Insurance Co.*, 6 O. 71, I Longsdorf's Notes, 322; and *Webb v. Insurance Co.*, 6 O. 456, I Longsdorf's Notes, 352; *Barker v. Railroad*, 22 O. S. 45, III Longsdorf's Notes, 57].

In an action by the owners of a steamboat against an insurance company, on a policy against perils in the navigation of specified privileged waters, for the loss of the vessel, occasioned by encountering an unknown cause of peril, from which she suddenly sprung a leak and sunk, while navigating a privileged water, it is not competent, in chief, to give in evidence, for any purpose, specific cases of other steamboats that have been lost, while navigating the same and other western rivers, occasioned by some unknown injury causing them to suddenly leak and sink: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

When a steamboat is shown to have been seaworthy at the time she was insured, and no intervening circumstance occurs to ren-

der her unseaworthy, her seaworthiness is presumed to continue; but when, during the life of the policy, she springs a dangerous leak, without apparent cause, a new presumption arises—that of unseaworthiness; yet, as this new presumption is not a conclusive one, the owners are not required to entitle them to recover for the loss, to show the identical cause of her loss, but may show a probable cause: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

In the case of loss from some unknown cause, a person conversant with steamboat navigation, and who is, from actual experience, familiar with the perils attending steamboat navigation on the privileged waters and other of the western rivers, may give his opinion, and say whether a steamboat, while being navigated thereon, with ordinary skill and care, might, without apparent or known cause, suddenly spring a leak and sink from some unknown peril of the river: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

A person experienced in the navigation of steamboats used to carry cotton on the western rivers, known as "cotton boats," may, when speaking from personal knowledge and experience, say whether such boats, when freighted with cotton, usually leak, and require the daily use of pumps to keep them free from water, as tending to show how the words "tight and sound," used in the policy, were understood by the parties: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

When the actual effect of a known agency is unknown, and the opinion of one familiar, by actual observation with the matter under consideration, is the best testimony the subject matter to be investigated affords, the opinion of such person may be received as testimony; hence, it was competent to receive as testimony the opinion of skilled river navigators familiar with the subject as to the effect the wave-swells made by a larger steamboat would have upon a smaller and heavily-laden one, while passing: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

The statements of a steamboat captain, made in the discharge of his duty as commander of the vessel, while she is in a sinking condition, and he is in the act of seeking aid of another to relieve her from present peril of loss, as to her perilous condition, how and where she was leaking, made under such circumstances, his statements accompanying his acts, and explanatory of them, are *res gestae*, and therefore competent testimony: *Insurance Co. v. Tobin*, 32 O. S. 77, III Longsdorf's Notes, 622.

The question whether the external force that produced the injury was great or small, may be important as an item of evidence in determining whether the vessel was seaworthy or not; but if the force causing the injury fall within the class of perils insured against, if the vessel be seaworthy, it matters not whether it be great or small, the insurer will be liable: *Insurance Co. v. Reed*, 20 O. 199, I Longsdorf's Notes, 906.

It is not proper, as a general rule, to inquire of a witness upon the stand, who has heard the testimony in a case, his opinion from the knowledge he derives from the testimony as to a particular fact, which is material in the determination of the issue in the case: *Insurance Co. v. May*, 20 O. 211, I Longsdorf's Notes, 906.

Insurance obtained by A on a cargo belonging to B & C, loss payable to A & Sons, was, on proof of loss paid to A & Sons, who accounted with B & C. The insurance company, on a claim that B & C committed frauds and never shipped the cargo at all, can not recover the payment back from A & Sons. A was plainly agent for B & C and got the insurance for their benefit, and if he applied the money to repay his own advances, it is no longer in his hands. It is the same as a payment to B & C direct by the insurers, and no action for money had and received lies: *Insurance Co. v. Rieman*, 12 Dec. Rep. 692, I D. 396.

Barratry as a defense must be by those on the insured boat, and not on the colliding boat, though owned by the same plaintiff: *Insurance Co. v. Sherlock*, 25 O. S. 33, III Longsdorf's Notes, 210.

D. INSURABLE INTEREST.

Part owners of vessels are tenants in common, and one can not insure in his own name for the benefit of all: *Walker v. Insurance Co.*, 12 Dec. Rep. 431, 2 H. 256.

If one of several part owners of a boat who have procured insurance on her, sell his interest to the others, he can not recover for his share on a loss: *Walker v. Insurance Co.*, 12 Dec. Rep. 431, 2 H. 256.

A Lloyd's policy of insurance contained the provision that "No action shall be brought to enforce the provisions of this policy except against the general manager as attorney in fact and representing all the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought, as fixing his individual responsibility thereunder." It was held, where in such policy the attorney in fact is also an underwriter, named as such in the policy, such provision is not against public policy, and is valid and binding on all the under-

writers: *Gilchrist v. Transportation Co.*, 21 O. C. C. 19, 11 O. C. D. 350.

The contract of marine insurance in its essential nature and in all its incidents is purely a contract of indemnity, accordingly. ordinarily an insurable interest of appreciable value on the part of the assured in the subject of insurance is of the very essence of the right to recover upon such contract: *Insurance Co. v. Coal Co.*, 68 O. S. 469, IV Longsdorf's Notes, 947.

Insurance is not an incident to the thing insured so as to follow it in the hands of mortgagees or purchasers, but is a mere personal indemnity to the assured. So of an insurance "for whom it may concern." This does not inure to subsequent incumbrancers, but only to those interested at the date of the policy, and not even these unless the interest was a legal ownership, and accordingly, does not protect a mortgagee of a boat where the mortgage had not become absolute by default of payment, nor one who holds a bill of sale by way of mortgage: *McDonald v. Black*, 20 O. 185, I Longsdorf's Notes, 904.

Under a Lloyd's policy, underwritten by fourteen parties, acting by their agent, each for a stipulated sum, the liability of the underwriters is several, and not joint: *Gilchrist v. Transportation Co.*, 21 O. C. C. 19, 11 O. C. D. 350.

X. LIABILITY INSURANCE.

A. MISREPRESENTATION.

Where the agent of the company, in filling out the application for a policy of insurance against loss by burglary or larceny, construes a certain question asked of the applicant to suit the circumstances of the particular case, he acts for the company, and the company can not escape liability on the policy on the ground of the incorrectness of a statement in the application, based on a contrary construction: *Kandar v. Indemnity Co.*, 10 O. C. C. (N.S.) 449, 20 O. C. D. 260.

B. NATURE OF CONTRACT.

An employer's liability policy containing the provision that "no action shall lie against the company to recover for any loss under this policy, unless it shall be brought by the assured for loss actually sustained and paid in money by him, in satisfaction of a judgment, after trial of the issue; nor unless such action is brought within ninety days after final judgment against him has been satisfied," is a contract of indemnity against loss, and not a contract to pay a liability: *Garrett v. Insurance Co.*, 9 O. N. P. (N.S.) 412, 20 O. D. (N.P.) 181.

Under an employer's liability contract the insurance company must pay the amount which the employer is actually obliged to pay to his employees who are injured, for injury together with the costs of a reasonable attorney's fees in such action; but an agreement between the insured and the administrator of the employe by which in compromise of claim the insured pays a certain amount and furthermore agrees to pay the amount which he may recover from the insurance company not exceeding a certain sum, is invalid: *Bright v. Insurance Co.*, 15 O. D. (N.P.) 124 [affirmed, *Insurance Co. v. Bright*, 1 O. C. C. (N.S.) 295, 14 O. C. D. 441; affirmed, without opinion, *Insurance Co. v. Bright*, 70 O. S. 497].

An employe who has recovered a judgment against his employer, can not maintain an action on such policy directly against the insurance company, because (1) the obligations of the policy do not extend beyond the two contracting parties; (2) because there is no jural relation between the injured employe and the insurance company; and (3) because the undertaking of the company is only to indemnify for loss actually sustained by satisfaction of judgment: *Garrett v. Insurance Co.*, 9 O. N. P. (N.S.) 412, 20 O. D. (N.P.) 181.

C. CONSTRUCTION.

A contract of employers' liability insurance should be resolved rather in favor of the insured than strictly against him: *Insurance Co. v. Bright*, 1 O. C. C. (N.S.) 295, 14 O. C. D. 441 [affirmed, without opinion, *Insurance Co. v. Bright*, 70 O. S. 497].

A man employed as a laborer by a "contracting carpenter" in constructing a building, is a laborer in the employ of such contractor within the meaning of an indemnity insurance policy held by the latter, although he is employed upon a hoisting apparatus leased and operated jointly by such "contracting carpenter" and another contractor, where it appears that he continues to receive his wages from his employer only, and that such a hoisting apparatus is a necessary and usual part of the business of a contracting carpenter: *Insurance Co. v. Bright*, 1 O. C. C. (N.S.) 295, 14 O. C. D. 441.

A boy under sixteen years of age is engaged "at employment whereby life or limb is endangered" within the meaning of G. C., § 12972, where he is required to stand within five feet of a veneer saw and receive pieces coming from the saw, and when an indemnity policy contains a condition against the violation of law as to age of employees,

the employer can not be reimbursed under such policy for a judgment paid to the boy on account of injuries received, although at the time not engaged in the line of his duties: *Unnewehr Co. v. Insurance Co.*, 8 O. L. R. 338, 16 O. F. D. 503 [affirming *Unnewehr Co. v. Insurance Co.*, 7 O. L. R. 30].

The fact that the boy did not meet with his injury while working within the place assigned to him, or the fact that he was not in line of duty when he suffered his injury, does not show that the place in which he was directed to work was not dangerous to life or limb. We consider the latter as evidence of what might reasonably have been anticipated of an immature and energetic boy: *Unnewehr Co. v. Insurance Co.*, 8 O. L. R. 338, 16 O. F. D. 502 [affirming *Unnewehr Co. v. Insurance Co.*, 7 O. L. R. 30].

G. C., § 12972, does not make the right of recovery against the employer depend upon certain conduct of the employe, but makes the child the object of protection against certain conduct of the employer: *Unnewehr Co. v. Insurance Co.*, 8 O. L. R. 338, 16 O. F. D. 503 [affirming *Unnewehr Co. v. Insurance Co.*, 7 O. L. R. 30].

A condition in an accident policy that actual payment of the monthly premiums when due, "whether insured is entitled to indemnity at the time or not is a condition precedent to a renewal of the policy for another term," must be construed to relate to further accident, and not to affect liability for injury while the policy was alive, for the parties had then become debtor and creditor and not insurer and insured. For if the clause forbids payment for the injury unless the policy is kept up after the accident, such clause is void: *Smith v. American Assurance Co.*, 12 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 763. For state liability insurance, see MASTER AND SERVANT.

D. SUBROGATION OF EMPLOYE.

Where, under a policy of employers' liability insurance, the employer has no right of action against the insurance company on account of injury to an employe until he has paid in money the amount of the judgment recovered, the employe can not be subrogated to the rights of the employer against the company: *Garrett v. Insurance Co.*, 11 O. N. P. (N.S.) 221, 22 O. D. (N.P.) 259 [for opinion in former case before the enactment of G. C., § 9510-1, see *Garrett v. Insurance Co.*, 9 O. N. P. (N.S.) 412, 20 O. D. (N.P.) 181].

G. C., § 9510-4, subrogating an injured employe to the employer's claim against an indemnity insurance gives the employe no right of action where the employer has none, as where, by reason of his bankruptcy he

has not paid: *Garrett v. Insurance Co.*, 11 O. N. P. (N.S.) 221, 22 O. D. (N.P.) 259.

The provision of the supplement to G. C., § 10284, enacted April 30, 1910, giving the right of subrogation to an employee under a judgment recovered by him against his employer for an injury, is retroactive as to recoveries had prior to the date of its enactment, and as to such recoveries is unconstitutional and void: *Garrett v. Insurance Co.*, 11 O. N. P. (N.S.) 221, 22 O. D. (N.P.) 259.

XI. ACCIDENT INSURANCE.

A. POWERS OF CORPORATION.

A statute, since repealed (Bates, § 3641-b), which authorized accident and guaranty insurance companies to insure against accidents to employees was held to be constitutional in *Casualty Co. v. Hahn*, 33 Bull. 286.

B. PREMIUM.

An engineer assigned a part of his wages for premiums; and the first installment of such assignment was paid, which paid for the insurance up to a certain date. The insured was injured on the day following. Recovery was denied: *Herbert v. Insurance Co.*, 3 O. C. C. (N.S.) 7, 13 O. C. D. 225 [affirmed, without opinion, *Herbert v. Insurance Co.*, 68 O. S. 687].

The condition written into a policy of insurance against accident or injury, that "the actual payment of the respective premiums on the date when due or within seven days thereafter, whether the insured is entitled to indemnity at the time or not," is a condition precedent to the renewal of the policy for another term and against future injury, and not a condition precedent to the payment of indemnity by the company for injuries sustained after the payment of one premium and before the next premium fell due: *Smith v. Assurance Co.*, 12 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 763.

If a covenant in a policy of accident insurance provides that the insured is not to be paid for an injury unless he continues the policy in force after the accident, such covenant is invalid: *Smith v. Assurance Co.*, 12 O. N. P. (N.S.) 97, 22 O. D. (N.P.) 763.

C. RISK.

An injury which is caused by a fall due to a temporary or unexpected physical disorder, is violent, external and accidental, within the meaning of such words in an insurance policy: *Casualty Co. v. Bird*, 18 O. C. C. 488, 10 O. C. D. 211.

The fact that the deceased complained of feeling faint immediately before the accident, does not show that the fall which resulted in death was due to vertigo: *Casualty Co. v. Bird*, 18 O. C. C. 488, 10 O. C. D. 211.

A clause avoiding a policy of accident insurance for a false or incorrect statement of the weekly earnings of the assured, is applicable only to the weekly indemnity to which the assured would be entitled in case of an injury which incapacitates him from following his vocation, and not to an injury resulting in death: *Insurance Co. v. Leibus*, 8 O. C. C. (N.S.) 201, 18 O. C. D. 700.

In an action for recovery for death under a policy of accident insurance, containing the provision that the company insures against death resulting from injuries alone, the judgment against the company will not be reversed for failure to allege in the petition that death was caused solely by the accident, where the answer affirmatively alleges another cause, thereby presenting that issue: *Insurance Co. v. Leibus*, 8 O. C. C. (N.S.) 201, 18 O. C. D. 700.

The term "voluntary exposure to unnecessary danger," in an accident policy, does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It relates to dangers of a substantial character of which the assured at the time had knowledge, and to which he purposely and consciously exposed himself, intending at the time to assume all the risks: *Accident Association v. Hubbell*, 56 O. S. 516, IV Longsdorf's Notes, 696.

Death caused by accidental drowning is death "through external, violent and accidental means," within the meaning of the stipulation of an accident policy which gives indemnity against death by such means: *Accident Association v. Hubbell*, 56 O. S. 516, IV Longsdorf's Notes, 696.

A proviso exempting the company from liability in the event of an accident due to an "unnecessary or negligent exposure to obvious dangers," does not include voluntary exposure to a necessary danger or involuntary exposure to an unnecessary danger; and if the accident was one as to the circumstances of which fair-minded persons may differ, a finding against the company should not be disturbed: *Insurance Co. v. Gulick*, 1 O. C. C. (N.S.) 477, 15 O. C. D. 395.

Drowning while swimming is an accidental death through outward force and accidental means: *Insurance Co. v. Jordan* (latter report best), 6 Dec. Rep. 1145, 10 Am. L. Rec. 625; 8 Dec. Rep. 313, 7 Bull. 71.

Under a policy which contains a provision that the insurance company is not liable

for death caused by hernia, the insurance company is liable where an accident for which the insurance company would be liable resulted in hernia from which the insured died: *Miner v. Insurance Co.*, 2 O. N. P. 103, 3 O. D. (N.P.) 289.

An accident insurance company, relying on the exemption clause in its policy, must show by a preponderance of evidence that the insured unnecessarily and voluntarily exposed himself to a known danger, resulting in the accident on account of which suit is brought: *Insurance Co. v. Gulick*, 1 O. C. C. (N.S.) 477, 15 O. C. D. 395.

Exception clause in an accident insurance policy should be construed with fair strictness, against the company; but there should be no strained or unnatural construction put upon the acts of the insured to save them from coming within the meaning of such clause: *Huston v. Insurance Co.*, 66 O. S. 246, IV Longsdorf's Notes, 905.

An accident policy contained this exception: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as motive power." The insured was walking along a railroad track, the ground being slippery and icy, when a freight train overtook him, going slowly, and it occurred to him that he would step on the caboose and ride, and as he was about to step on but before he had touched the car, he slipped and fell, and his left foot was crushed by the hind wheels. It was held that what he did after the purpose to step on the car caused him to change his conduct from that of walking along the track, to that of making preparation to step on the car, was within the exception, whether he had caught hold of the car or not: *Huston v. Insurance Co.*, 66 O. S. 246, IV Longsdorf's Notes, 905.

An accident insurance policy, after providing for indemnity for accidental injuries resulting in disability, loss of time from labor, etc., contains the further stipulation that "if death results solely from such injuries within ninety days, the said company will pay the principal sum of five thousand dollars to the beneficiary, if living; and in the event of the death of said beneficiary before the death of the insured, to the executors, administrators or assigns of the insured." The policy contains the further provision, that it is issued and accepted on certain conditions, one of which is, that "this insurance does not cover in event of accident or death, loss of limb or sight, or disability, resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, proximate or contributory, as a primary, secondary or final cause of accident, injury or death; * * *."

While said policy was in full force, and the insured was not afflicted with any known physical or mental infirmity, he unintentionally and accidentally sustained a cut or scratch on the index finger of his left hand from which blood at once issued, through which wound and coincident therewith, it became so infected that blood poisoning was at once introduced into the circulatory system of the insured from the effects of which he died within five days of the accidental injury. It was held that the death was not within said exception, and the insurance company is liable: *Rheinheimer v. Insurance Co.*, 77 O. S. 360, IV Longsdorf's Notes, 1033 [distinguishing *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940].

Under a policy which insures against accidents and provides that the insurance company shall not be liable on account of the death of the insured which results wholly or partly from infirmity or disease, the insurance company is not liable where the insured dies by reason of rupture of the stomach, the coat of the stomach having been weakened at that point by a gastric ulcer which had partially healed, and the insured having over-exerted himself by lifting a heavy stone. In such a case G. C., §§ 9391 and 9392 do not apply: *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940.

A stipulation in an accident insurance policy limiting the liability of the company to a death resulting from accident alone is not invalid: *Insurance Co. v. Dorney*, 68 O. S. 151, IV Longsdorf's Notes, 940.

Where an accident insurance policy excepts from among the risks assumed by it bodily injury or death resulting from, "gas in any form or manner," such exception applies to any death caused by gas, however it may be introduced into the human system whether by the voluntary and intelligent act of the insured, or by his involuntary and unconscious act. Accordingly, no recovery can be had upon a policy containing such exception where the death of the insured was caused by the inhalation, during sleep, of gas escaping from a broken pipe of a natural gas stove: *Trone v. Assurance Co.*, 13 O. D. (N.P.) 298.

A death which ensues from the unconscious inhalation of poisonous gas is effected through "external, violent and accidental means" within the meaning of an accident insurance policy insuring a person against bodily injuries or death effected through external, violent and accidental means: *Trone v. Insurance Co.*, 13 O. D. (N.P.) 298.

A condition in an accident insurance policy that the policy "shall not extend to re-

cover injuries, whether fatal or disabling, of which there is no visible mark upon the body," presents a question of evidence and not of law, and a provision of this character will not be enforced where the tendency would be to stifle the course of justice. Accordingly, in an action upon an accident insurance policy, where the death of the insured was the effect of the involuntary inhalation of poisonous gas, all the facts and circumstances attending the death, including the condition of the body when found, must be submitted to the jury, and it is for them to determine whether or not the death was accidental within the general intent thereof, without giving a special weight to the presence or absence of visible, external marks upon the body: *Trone v. Assurance Co.*, 13 O. D. (N.P.) 298.

Where death was caused by an accidental overdose of morphine taken for stomach trouble and the policy excluded recovery for injury or death without "external and visible sign upon the body" or "by the taking of poison," a verdict ordered for the company was sustained by the supreme court: *Batchelor v. Accident Association*, 34 Bull. 239 [without opinion in supreme court].

Disappearance from ship in mid-ocean is within the risks assumed by an accident policy, insuring against the death from bodily injury, effected through external, violent, and accidental means: *Insurance Co. v. Rosch*, 3 O. C. C. (N.S.) 156, 13 O. C. D. 491.

A policy giving a weekly indemnity for injury and \$3,000 for loss of one entire hand and one foot, or two entire hands, or two entire feet, can not be read as if and meant or; accordingly, if one hand is lost only the weekly indemnity and not the \$3,000 is due: *Gentry v. Insurance Co.*, 5 O. N. P. 331, 6 O. D. (N.P.) 114.

Under an accident insurance policy which insures against accidental means, the insurance company is liable if the insured dies from dilation of the heart caused by taking a cold plunge bath after a horseback ride: *Casualty Co. v. Johnson*, 15 O. C. C. (N.S.) 513, 24 O. C. D. 76.

D. NEGLIGENCE OF INSURED.

Accidental as used in a policy of accident insurance is used in the popular sense as meaning happening by chance or taking place unexpectedly: *Casualty Co. v. Johnson*, 15 O. C. C. (N.S.) 513, 24 O. C. D. 76.

The term "voluntary exposure to unnecessary danger," in an accident policy, does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It

relates to dangers of a substantial character of which the assured at the time had knowledge, and to which he purposely and consciously exposed himself, intending at the time to assume all the risks: *Accident Association v. Hubbell*, 56 O. S. 516, IV Longsdorf's Notes, 696.

Where a traveling salesman who holds an accident policy issued to him as such salesman, is confronted, while in pursuit of his business, with possible danger because of a slough in a public road on his regular line of travel, over which he has passed twice a year for thirteen years, and makes inquiry of other men living in the vicinity as to the existence of danger at the time, and receives opinions, some expressing fears of danger and others to the contrary, and acting on his own judgment formed from such opinions and from his previous knowledge, and from appearances at the time, in good faith concludes that there is no danger to his life in crossing and attempts to cross, and is accidentally drowned, such attempt is not a "voluntary exposure to unnecessary danger" within the meaning of the policy: *Accident Association v. Hubbell*, 56 O. S. 516, IV Longsdorf's Notes, 696.

E. NOTICE.

The proofs of death need not give every detail of the accident. It is sufficient if the manner of death is shown with sufficient certainty: *Accident Co. v. Card*, 13 O. C. C. 154, 7 O. C. D. 504 [affirmed, without opinion, *Accident Co. v. Card*, 60 O. S. 583].

Whether immediate notice has been given is a question of fact for the jury: *Accident Co. v. Card*, 13 O. C. C. 154, 7 O. C. D. 504 [affirmed, without opinion, *Accident Co. v. Card*, 60 O. S. 583].

The fact that the beneficiaries under a policy of accident insurance did not know of its existence until four months after the death of the insured excuses compliance with a provision which requires the giving of immediate notice: *Accident Co. v. Card*, 13 O. C. C. 154, 7 O. C. D. 504 [affirmed, without opinion, in *Accident Co. v. Card*, 60 O. S. 583].

An accident policy required immediate notice by the assured or his physician, and particulars in ten days from the time of accident—the assured had lost his eyes and for several weeks was delirious. It was held that immediate notice is in time, if given with due diligence under all the facts, and the particular notice within ten days is excused by the assured's delirium: *Indemnity Co. v. Fletcher*, 5 O. C. C. 633, 3 O. C. D. 308.

An accident policy required immediate notice, with full particulars and proofs within seven months and action within a year from the accident. Insured fell on an icy sidewalk, and in two days died. The assured made every effort to find some one who saw the fall, but did not find out that it was accidental until thirteen months, and then sent notice, but the company said proofs would be useless, as it was not liable, and action was begun. It was held that defendant is entitled to judgment. (1) The notice was not immediate nor in a reasonable time. (2) The want of proofs in time was not waived, for the statement showed an intent to insist on the condition. (3) The action was not begun in the stipulated time: *Coldham v. Insurance Co.*, 2 O. N. P. 358, 2 O. D. (N.P.) 314.

"Immediate written notice" in such stipulation means written notice within a reasonable time under the circumstances of the case; and where the facts are not disputed, what is a reasonable time is a question of law: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841.

In a policy which insures against loss from liability to employees of the insured who may accidentally sustain bodily injury while in the employ of the insured, "under circumstances which shall impose upon the insured a common law or statutory liability to such employees by reason thereof," a stipulation as follows: "Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor," is of the essence of the contract and can not be waived by an agent of the company without authority therefor: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841.

A stipulation that immediate notice of an accident must be given to the insurance company can not be waived by the agent, when the policy contains a provision that "no agent has authority to waive or alter anything in this policy contained": *Insurance Co. v. Meyers*, 62 O. S. 529, IV Longsdorf's Notes, 841.

"Immediate notice" was required by an employer's indemnity policy of an accident or notice of a claim. An employee was injured, but this was not known to the employer until four and a half months afterwards by an action for damages, and notice was then given to the insurer. It was held that immediate means in a reasonable time under the circumstances, and is a question for the jury, and it is error to sustain a

demurrer to the petition: *Crane v. Insurance Co.*, 3 O. N. P. 318, 4 O. N. P. 309, 6 O. D. (N.P.) 118 [affirmed, without opinion, *Insurance Co. v. Crane*, 59 O. S. 617].

The fact that the local agent of the insurance company, who had issued the insurance policy, heard of the death of the insured by accident does not of itself amount to notice to the insurance company: *Accident Co. v. Card*, 13 O. C. C. 154, 7 O. C. D. 504 [affirmed, without opinion, in *Accident Co. v. Card*, 60 O. S. 583].

If the insured is injured so that he is unconscious or delirious for a considerable time after the accident, such physical condition on his part excuses delay in giving notice: *Indemnity Co. v. Fletcher*, 5 O. C. C. 633, 3 O. C. D. 308.

The fact that the insured did not advise any one of the existence of an accident insurance policy does not amount to negligence; and ignorance of the existence of such policy is therefore an excuse for the failure of the beneficiaries to give immediate notice: *Accident Co. v. Card*, 13 O. C. C. 154, 7 O. C. D. 504 [affirmed, without opinion, in *Accident Co. v. Card*, 60 O. S. 583].

Evidence that proofs of loss were placed in a sealed envelope, directed to the insurance company at its home office, and that the envelope was thereafter placed in the hands of the local agent of the company, with no proof that it was ever deposited in the mail, is not sufficient to meet the requirement of the policy that, within twenty days from the happening of the accident, proofs of loss must be filed with the company or furnished in due form at its home office, and in such a case a motion to arrest the case from the jury should be sustained: *Insurance Co. v. Barnes*, 15 O. C. C. (N.S.) 407.

XII. HEALTH.

In a policy providing for sick benefits, a clause reading that to constitute total disability the insured must be "strictly, necessarily and continuously within the house and there regularly and personally attended by a legally qualified physician," does not bar recovery by an insured who, under the advice of his physician, went out for air and to his physician's office for treatment: *Assurance Co. v. Dickson*, 15 O. C. C. (N.S.) 228.

XIII. FIDELITY INSURANCE.

A. WHAT CONSTITUTES CONTRACT.

A contract whereby a bonding company agrees in consideration of a premium to sign the official bond of another is a contract of

insurance: *Bryant v. Bonding Co.*, 77 O. S. 90, IV Longsdorf's Notes, 1030.

B. POWER OF LEGISLATURE TO REGULATE.

The act of the general assembly entitled "An act to amend R. S., §3641c, relating to the giving of surety bonds," passed April 20, 1904 (97 v. 182), was held to be unconstitutional and void, being in violation of article 1, §§1 and 2 of the constitution in that it rendered certain official bonds invalid unless signed by a surety company: *State, ex rel., v. Robins*, 71 O. S. 273, IV Longsdorf's Notes, 982.

See to the same effect, *Haunts v. Lanman*, 2 O. N. P. (N.S.) 405, 15 O. D. (N.P.) 64.

G. C., §9571 is a reasonable and valid exercise of the police power of the state: *McKisson v. Wright*, 15 O. D. (N.P.) 105.

C. AGENTS.

When a policy contains a stipulation that "no agent has authority to waive or alter anything in this policy contained," and the same is accepted by the insured, it is both notice to and an agreement by, the insured that an agent has no authority to waive or alter anything contained in the policy: *Insurance Co. v. Myers*, 62 O. S. 529, IV Longsdorf's Notes, 841 [approving and following *Insurance Co. v. Hook*, 62 O. S. 256, IV Longsdorf's Notes, 832].

D. MISREPRESENTATION.

Written statements made by a corporation accompanying an application to a bonding company for a bond guaranteeing the honesty of employees, which statements relate to the past conduct of such employees in their service as such, and are intended to and do enter into the contract and become the inducement in part for the issuing of the bond, are in the nature of warranties, and their falsity in any material particular will defeat recovery on the bond for the delinquency of such employee: *Livingston v. Fidelity Co.*, 76 O. S. 253, IV Longsdorf's Notes, 1024 [affirming *Livingston v. Fidelity Co.*, 7 O. C. C. (N.S.) 66, 17 O. C. D. 662].

In an application to a fidelity and guaranty company for an indemnifying bond guaranteeing the faithful performance of duty by an agent of a company requiring the bond, answers to questions as to the agents having previously made application to another indemnity company and as to whether the same was refused, etc., are material and vital, being representations with respect to matters about which the defendant company had a right to be informed as affecting the hazard involved in giving the bond. False

answers to such questions by the applicant, and with knowledge thereof by the party for whose benefit the bond is required, render the same invalid: *Building & Loan Co. v. Fidelity Co.*, 3 O. C. C. (N.S.) 385, 13 O. C. D. 243.

Representations by an employer applying for a bond securing him against loss through larceny or embezzlement of a bookkeeper, that the said bookkeeper's accounts were audited on a certain day and were found correct in every particular, amount to a warranty as to the correctness of said accounts, and in a subsequent action upon the bond a plea of good faith in making such representations, with the explanation that prior embezzlements were concealed by said bookkeeper by means of fraudulent entries and were not known at the time the representations as to his fidelity were made, is demurrable where the bond provides that "if there is any statement made by the employer that is false the bond shall be void": *Legler v. Guaranty Co.*, 10 O. N. P. (N.S.) 601, 23 O. D. (N.P.) 98 [circuit court reversed without opinion in *Legler v. Guaranty Co.*, 88 O. S. —].

E. RISKS INCLUDED IN POLICY.

Where, in a suit upon a bond executed to a loan company guaranteeing the honesty of an employee, it appears that it was stipulated in the application for such bond that the duties of such employee are to receive and deposit all moneys received by the company, to indorse checks for deposit only, and not authorized to sign checks or accept drafts, or pay out on account, with no authority to withdraw money, and the obligation of the bond is to make good any loss occasioned by the fraud or dishonesty of such employee in connection with his duties as specified, and the bondsman not to be liable for other than the personal acts of such employee within the direct scope of his specified duties, the bondsman will not be held for the dishonesty of such employee in inducing the loan company to accept a loan to a fictitious person, on fictitious security, and procuring the money from the bank where moneys of the company are on deposit, on a check issued by the company in the name of such fictitious borrower, by forging his name upon the check: *Livingston v. Fidelity Co.*, 76 O. S. 253, IV Longsdorf's Notes, 1024 [affirming *Livingston v. Fidelity Co.*, 7 O. C. C. (N.S.) 66, 17 O. C. D. 662].

A bonding company will not be heard to complain that the plaintiff owners did not retain until the completion of the contract the percentage stipulated therein, where the

payments were made to the person designated by the surety company to complete the work: *Monfort v. Surety Co.*, 11 O. N. P. (N.S.) 625, 22 O. D. (N.P.) 22.

XIV. MUTUAL INSURANCE COMPANIES OTHER THAN LIFE.

A. LIABILITY OF MEMBERS.

Suit was brought by the Medina County Mutual Fire Insurance Company to recover the amount of a certain assessment made upon the premium notes of the plaintiffs in error. A former suit, between the same parties, to recover for other assessments made upon the same notes, had been compromised by the payment of those assessments, the cancellation of the policies of plaintiffs in error, and the surrender of their premium notes, by the order of the company's board of directors. By the terms of the charter of the company, each member was entitled to have his premium notes surrendered to him at the expiration of his term of insurance, upon payment of his share of losses and expenses to that time; or upon alienation of the property insured, surrender of his policy, and like payment of his share of losses and expenses; or upon payment of the whole of his premium notes and surrender of his policy. The charter directed that the board of directors should "superintend the concerns of said company, and have the management of the funds and property thereof, and all matters and things thereto relating." It was held that the directors of the company had power to compromise the former suit, by canceling the policies and surrendering the premium notes, and that the terms of settlement in that case were such as to constitute a defense against assessments subsequently made upon the same notes on account of losses sustained prior to the settlement: *Wadsworth v. Davis*, 13 O. S. 123, II Longsdorf's Notes, 601.

If a premium note has been cancelled in good faith because the insurance company objected to the risk, the maker of such note can not thereafter be assessed thereon after the insurance company has become insolvent: *Mansfield v. Furniture Co.*, 12 O. C. C. 222, 4 O. C. D. 473 [affirmed, without opinion, *Mansfield v. Furniture Co.*, 35 Bull. 180].

After the expiration of the period of insurance and after the policy has been surrendered and the premium notes therefor have been cancelled, the insured is not liable for subsequent debts, although he assumes liability for debts incurred while he was a member: *Wilhelm v. Parker*, 17 O. C. C. 234, 9 O. C. D. 724.

Although the property which is insured has been destroyed and the insurance has been paid, the person who took out such insurance still assumes liability as a member of a mutual fire insurance company for his share of the losses which occurred during the period of his insurance: *Mansfield v. Houston*, 20 O. C. C. 662, 10 O. C. D. 807, 35 Bull. 182 [affirmed, without opinion, *Houston v. Mansfield*, 58 O. S. 690].

Cancellation of the policy and return of the premium note will not absolve the member from assessment for losses incurred during membership, even had the policy not so stipulated: *Parker v. Paper Co.*, 3 O. N. P. 207, 4 O. D. (N.P.) 250.

An assessment made by a receiver on the order of court in another state binds all members resident or non-resident, though not made parties as to the necessity of assessing. The court is successor of the directors and has their power. This does not cut off such defenses to the assessment as would have been good had the action been on the contract of insurance, *e. g.*, payment of full share of losses, limitations, etc.: *Parker v. Paper Co.*, 13 O. N. P. 207, 4 O. D. (N.P.) 250.

In an action on an assessment ordered by court to be made, the plaintiff need at most only prove: (1) The incorporation of the company. (2) That a policy was issued to defendant. (3) Defendant's membership when the losses assessed for were incurred: *Parker v. Paper Co.*, 3 O. N. P. 207, 4 O. D. (N.P.) 250.

In an action by the receiver of a mutual fire insurance company against a policyholder to recover assessments to pay liabilities incurred during the time the policy was in force, mere irregularities in the proceedings to assess will not avail as a defense: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

One who authorizes the making out of a policy of insurance to be delivered to a bank to hold as security for a loan to him, and the policy remains in the possession of the bank until its purpose as security has been subserved and an assessment has been made upon it, and the policy is thereafter held by the owner of the property during the remainder of its term, he is estopped to say that he did not know its contents, but supposed it was in an old line company: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

The proper charge to a jury in such a case would be that if the defendant received and held the policy during the period it was in force by its terms, he was chargeable with knowledge of its contents and would be held

by it: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

In the absence of direct claim and proof that the defendant had not signed the constitution of the mutual company issuing the policy, as required by statute, the presumption is that he complied with this requirement; and if he had not signed, the fact that he accepted the insurance and received its benefits, would estop him from denying that he did not sign: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468.

An action to recover assessments under a mutual insurance company is barred after six years from demand: *Mills v. Whitmore*, 22 O. C. C. 467, 12 O. C. D. 338.

The maker of a premium note is liable thereon even though by the agreement of the parties, the insurance is not in force while installments upon premium notes are due and unpaid: *Insurance Co. v. Sorter*, 4 Dec. Rep. 226, 1 Clev. L. Rep. 133.

A member of a mutual insurance company who has had the benefit of the insurance can not set up fraud as a defense as against the rights of innocent creditors of such insurance company: *Mansfield v. Woods*, 11 Dec. Rep. 761, 29 Bull. 111.

A member of a mutual insurance company who wishes to avoid his contract on the ground of fraud must act promptly before the rights of creditors have intervened: *Mansfield v. Ice Co.*, 11 Dec. Rep. 617, 28 Bull. 113.

A member of a mutual insurance company can not set up irregularities of organization or failure to comply with the charter of the insurance company as a defense to an action by the insurance company to recover assessments on the premium notes: *Insurance Co. v. Horner*, 17 O. 407, 1 Longsdorf's Notes, 817; *Mansfield v. Woods*, 11 Dec. Rep. 761, 29 Bull. 111.

One who accepts a policy issued by a mutual insurance company is said to become a member thereby: *Mansfield v. Woods*, 11 Dec. Rep. 761, 29 Bull. 111.

A provision in a policy which limits the liability of the members to five times the annual cash premiums is in accordance with the provisions of G. C., § 9528: *Mansfield v. Woods*, 11 Dec. Rep. 761, 29 Bull. 111.

The provisions of G. C., § 9538 do not apply to mutual insurance associations which are organized under the provisions of G. C., §§ 9593 to 9607: *Richards v. Swaim*, 7 O. N. P. 68, 9 O. D. (N.P.) 70.

G. C., §§ 8623, *et seq.* do not apply to mutual insurance companies since they are controlled by special provisions. Mutual associations are controlled by the provisions of G. C., §§ 9593, *et seq.*: *State v. Live Stock Co.*, 38 O. S. 347, III Longsdorf's Notes, 974.

B. AMENDMENT.

A mutual fire insurance company can not reserve the right to amend its constitution at any meeting of the board of directors; accordingly an amendment adopted at the board of directors to the effect that failure to pay assessments for sixty days shall suspend the rights of the policy-holder under his policy, is invalid: *Insurance Co. v. Bachman*, 39 Bull. 324.

C. ASSESSMENTS.

In a judicial proceeding under the statute to dissolve a mutual fire insurance company and to wind up its business affairs, to which proceeding the corporation is a party defendant, the court is authorized, when necessary, to decree an assessment upon the premium notes executed by policy-holders for the purpose of paying liabilities of the company which accrued while the policies and premium notes were in force, and such decree as to the necessity for, and the amount of the assessment, is binding upon the policy-holders, although they, as individuals, were not parties to the proceedings when the decree was made. In respect to the assessment and the necessity therefore, they were represented by the corporation: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

In an action to enforce an assessment made by the court upon the dissolution of a mutual fire insurance company, it is not essential to the liability of defendants that they were policy-holders when the assessing decree was made: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

The decree of the supreme court, in the action for ouster of the Union Mutual Fire Insurance Company does not bar any stockholder or member from questioning his liability for an assessment or from setting up any other defense: *Swing v. Crane*, 11 O. C. C. (N.S.) 297, 22 O. C. D. 616 [affirmed, without opinion, *Swing v. Crane*, 79 O. S. 461].

A decree of the supreme court classifying the claims of creditors against a dissolved insurance company and ordering assessments against policy-holders classified according to the terms of such policies, does not fix the liability of each policy-holder or determine his specific defenses or claims: *Swing v. Cultivator Co.*, 9 O. C. C. (N.S.) 45, 19 O. C. D. 365 [reversed, without opinion, *Swing v. Cultivator Co.*, 77 O. S. 610].

The holding in *Swing v. Crane*, 11 O. C. C. (N.S.) 297, 22 O. C. D. 616, as to the defenses a member of a mutual insurance company may set up against an assessment does not apply where in an action to enforce

payment of an assessment the member has set up such defenses as he had: *Leverone v. Brown*, 12 O. C. C. (N.S.) 277, 22 O. C. D. 722 [affirmed, without opinion, *Leverone v. Brown*, 82 O. S. 448].

The six years' statute of limitations runs against an assessment levied on a policyholder of the Union Mutual Fire Insurance Company, and the running of the statute is not barred by the approval by the supreme court of a second assessment against the same party, when it covers the same liability as the first assessment with probable costs of collection added: *Swing v. Crane*, 11 O. C. C. (N.S.) 297, 22 O. C. D. 616 [affirmed, without opinion, *Swing v. Crane*, 79 O. S. 461].

An order by the supreme court fixing the classes of policy-holders and the assessment against each "subject to any defense which any individual member may have to show that he is not liable," is available in an action by the receiver, and the running of the statute of limitations is not interrupted by the action of the supreme court: *Mills v. Whitmore*, 22 O. C. C. 467, 12 O. C. D. 338.

G. C., § 11222, providing a six years' limitation, runs against an assessment for losses sustained by an insurance company, and begins to run at the time demand is made: *Mills v. Whitmore*, 22 O. C. C. 467, 12 O. C. D. 338.

The fact that the organization of a corporation is irregular or that its charter has not been complied with is not a defense to a member thereof as against the insurance company in an action to recover assessments on premium notes: *Insurance Co. v. Horner*, 17 O. 407, 1 Longsdorf's Notes, 817.

It was said in *Insurance Co. v. Hoeffler*, 2 O. C. C. 131, 1 O. C. D. 403, that an examination of an insured under oath waived a clause which provided that the policy should be void if the insured did not pay any assessment within thirty days after demand therefor; but this was reversed, without opinion, in *Insurance Co. v. Hoeffler*, 23 Bull. 108.

If a mutual insurance company alleges that it made an assessment which was not paid, and the insured denies that such an assessment was made, the records of the insurance company, or a duly examined and proven copy thereof, showing the action of the proper authorities in making the assessment should have been produced or the absence thereof properly accounted for: *Insurance Co. v. Bowersox*, 6 O. C. C. 1, 3 O. C. D. 321.

Unless rebutted by proof to the contrary an assessment levied at a meeting of the board of directors and officers of a mutual insurance company for payment of losses and

incidentals, will be presumed to be "necessary," within the meaning of that term as used in the policy or by-laws: *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

Where a company is authorized to take a cash premium in lieu of a deposit note, the cash to be part of the capital for payment of losses, such cash, like premium notes, can not be used to pay prior losses, and assessments on the notes are void without first exhausting the cash funds: *Insurance Co. v. Woolen Factory*, 3 O. S. 348, 11 Longsdorf's Notes, 34 [affirming *Insurance Co. v. Woolen Factory*, 1 Dec. Rep. 577, 10 W. L. J. 466].

Though insured has ceased to be a member by expiration of his policy, assessments levied to pay prior losses are *prima facie* regular, the same as upon present members: *Davis v. Sharp*, 2 Dec. Rep. 197, 2 W. L. M. 40.

Inadequacy of an assessment to pay a loss by reason of inability to collect from some of the members authorizes a deficiency assessment: *Davis v. Sharp*, 2 Dec. Rep. 197, 2 W. L. M. 40.

Inability to collect by reason of neglect of the officers is no defense to the second assessment as to present members, for it is the neglect of their own agents: *Davis v. Sharp*, 2 Dec. Rep. 197, 2 W. L. M. 40.

A dividend may be deducted by a mutual insurance company from an unpaid assessment standing on the books against a member: *Rhodes v. Insurance Co.*, 3 O. C. C. 501, 2 O. C. D. 288 [affirmed, without opinion, *Rhodes v. Insurance Co.*, 27 Bull. 160]. See also CORPORATIONS.

Mutual fire insurance being affected by a decedent, the estate is liable for assessments made prior to his death (G. C., § 9538), and jointly liable with the heirs for assessments made during the rest of the term of the policy: *In re Lones*, 57 Bull. 122. See also EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

D. REPORT.

A fire insurance company organized under a special charter before the adoption of the present constitution is subject to such reasonable regulations as the legislature may prescribe by general law, and the public good may require; such regulation serving to secure the ends for which the company was created, and not being repugnant to the franchises and privileges granted in its charter: *State, ex rel., v. Insurance Co.*, 50 O. S. 252, 14 Longsdorf's Notes, 497 [af-

firmed, in *Insurance Co. v. Ohio*, 153 U. S. 446, 8 O. F. D. 207].

A fire insurance company incorporated by special statute will not be exempt from a compliance with the requirements of G. C., §§ 9557, 9590 and 9591, to prepare and deposit annually in the office of the superintendent of insurance, a statement of its condition, unless such exemption appears to have been clearly granted by its charter: *State, ex rel., v. Insurance Co.*, 50 O. S. 252, IV Longsdorf's Notes, 497 [affirmed, in *Insurance Co. v. Ohio*, 153 U. S. 446, 8 O. F. D. 207].

A special statute passed before the present constitution took effect which did not specifically exempt the insurance company which it incorporated from making returns to the proper state officer, does not exempt it from making the reports to the superintendent of insurance or other state officers which are required by law: *Insurance Co. v. Ohio*, 153 U. S. 446, 8 O. F. D. 207 [affirming *State, ex rel., v. Insurance Co.*, 50 O. S. 252, IV Longsdorf's Notes, 497].

E. POLICY.

Under G. C., § 9574 a mutual insurance company must use the word "mutual" in such a way that the policy-holder will know that he is becoming a member of mutual company; but where the policy shows upon its face that it is in a mutual company, the policy-holder can not set up the defense of fraud as against creditors of the company who have extended credit to the company without knowledge of such fraud: *Mansfield v. Ice Co.*, 11 Dec. Rep. 617, 28 Bull. 113.

As to the power of an agent of a mutual fire insurance company to waive a forfeiture of a policy which required the consent of the directors to the sale of the premises by the insured, see *Insurance Co. v. Maloney*, 33 Bull. 147. Decided by an evenly divided supreme court.

A mutual fire insurance company issuing a policy without the word "mutual" conspicuously printed therein, as provided by G. C. § 9574 and inducing its acceptance by falsely and fraudulently representing that there would be no contingent liability thereon, acts unlawfully and commits a fraud upon persons induced thereby to enter into an agreement with the company: *Williams v. Fire Association*, 10 O. C. C. (N.S.) 422, 20 O. C. D. 197.

If the insured informed the agent of a company that he could not accept a policy in a mutual company, or in a company wherein there was contingent liability for future assessments and there was sent him through said agent a paper writing, in form

and appearance like unto a standard cash policy of insurance, which was received by him after paying the sums specified therein as the cash premium, and placed with other like papers without critical inspection, where it remained until he received notice to pay an assessment thereunder, several months later, he did not enter into an undertaking to accept such policy, nor is he estopped from denying liability thereunder: *Williams v. Fire Association*, 10 O. C. C. (N.S.) 422, 20 O. C. D. 197.

A mutual insurance company issuing a policy under the stock plan under G. C., § 9574, is liable on it as a stock company, hence the insured is not a member bound by a charter provision against alienations and transfers, and if he sells the property and transfers the policy to the vendee, the company's agent consenting, the policy covers the vendee's interest, and forfeiture by alienation is waived: *Insurance Co. v. Maloney*, 33 Bull. 147 [without opinion, in supreme court].

F. LIEN.

An answer of an insurance company which set up a provision in the policy to the effect that the policy should be invalid if the title to the land was not in the insured in fee simple and which alleged that the insurance was issued to a partnership while the title to the land was in the individual partners was held invalid on demurrer: *Weber v. Swing*, 36 Bull. 179.

The lien given in an insurance charter on the buildings for assessments on the premium notes can not be enforced against a subsequent mortgagee without notice by an assignee of the claim. If good against the mortgage it is not assignable: *Shaw v. Shaw*, 2 Dec. Rep. 609, 4 W. L. M. 158.

XV. BURIAL ASSOCIATION.

G. C., § 666, which provides that no association engaged in the business of providing for the payment of funeral expenses of deceased members or engaged in any other insurance business shall contract to pay the proceeds of the insurance to any specified undertaker so as to prevent the family of the deceased from employing any undertaker that they may please is a valid and constitutional provision; and such statute becomes a part of subsequent contracts of insurance and is binding upon all the parties to such contract: *Robbins v. Hennessy*, 86 O. S. 181.

An assignment of a contract of insurance issued by a company, corporation or association engaged in the business of providing for the payment of funeral, burial or other

expenses of deceased members, or certificate holders therein, or engaged in the business of providing any other kind of insurance, to any designated undertaker, or undertaking concern, or to any particular tradesman, or business man, is in violation of the provisions of G. C., § 666, and void: *Robbins v. Hennessey*, 86 O. S. 181.

An insurance company to which the franchise of making contracts of insurance is granted is subject to the control of the state not only as to the nature of the business which it may do but also as to the form of the contract which it may make: *Robbins v. Hennessey*, 86 O. S. 181.

The right to carry on the business of insurance is a franchise and not a matter of natural right in this state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536; *Robbins v. Hennessey*, 86 O. S. 181.

XVI. CREDIT GUARANTY INSURANCE.

Indemnity against uncollectible debts is a contract of insurance, and accordingly ambiguities are to be construed in favor of the assured: *Credit Co. v. Littleford*, 18 O. C. C. 889, 9 O. C. D. 846.

XVII. MUTUAL PROTECTIVE ASSOCIATION.

A. NATURE.

Associations formed under this chapter are not authorized to do an insurance business on what is known as the "joint stock" plan nor on the "contingent liability" plan, as defined in G. C., §§ 9524 to 9529; but they are confined to an insurance business in which its members insure each other against loss by fire and other casualties, and agree to be assessed specifically, for payment of losses, and for incidental purposes: *State, ex rel., v. Mutual Fire Association*, 50 O. S. 145, IV Longsdorf's Notes, 491.

G. C., §§ 9593, *et seq.*, do not authorize the organization of corporations with a view to profit to its officers or members, therefore any plan or scheme by which profits are made or divided is unauthorized: *State, ex rel., v. Monitor Fire Association*, 42 O. S. 555, IV Longsdorf's Notes, 130.

B. POWERS.

Associations under G. C., §§ 9593 to 9598, are not authorized to do business under the joint stock or contingent liability plans: *State, ex rel., v. Fire Association*, 50 O. S. 145, IV Longsdorf's Notes, 491.

Associations, under G. C., §§ 9593 to 9598, are not authorized to admit nonresidents of

the state to membership: *State, ex rel., v. Fire Association*, 50 O. S. 145, IV Longsdorf's Notes, 491.

C. CONSTITUTION AND BY-LAWS.

Where a policy has been issued by a mutual protective association which is organized and doing business under G. C., §§ 9593, *et seq.*, and said policy has been held in good faith as an indemnity, and premiums have been paid and received under it, such association is estopped from asserting by way of defense to an action to recover for a loss under said policy, that the plaintiff is not a member of the association because he has not signed the constitution of the association: *Richards v. Louis Lipp Co.*, 69 O. S. 359, IV Longsdorf's Notes, 959.

Where a policy has been issued in good faith by an association and has been received and held by the assured as an indemnity, upon the condition, set out in said policy, that such policy is made and accepted subject to the express agreement by the assured that he will pay such further assessments within thirty days notice thereof, as might be made under the by-laws adopted for the government of said association, and in accordance with the laws of Ohio, the assured, in an action to recover assessments on such policy is estopped to deny that he is a member of said association because he had not signed the constitution thereof: *Richards v. Louis Lipp Co.*, 69 O. S. 359, IV Longsdorf's Notes, 959.

One who has accepted a policy from an insurance company formed under G. C., §§ 9593, *et seq.*, will be presumed to have signed the constitution of such company, in the absence of an averment supported by clear evidence that he did not so sign. If he has accepted a policy he is estopped in equity from denying that he is a member of such association: *Richards v. Hale*, 1 O. C. C. (N.S.) 181, 14 O. C. D. 468; *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

An association formed under G. C., §§ 9593, *et seq.*, can insure only its members: *Richards v. Swaim*, 7 O. N. P. 68, 9 O. D. (N.P.) 70.

A member who fails to pay the assessment within the time limited by its by-laws, can not recover for losses sustained by him while thus in default: *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

An assessment which is levied by the officers and directors of an association at a

regular meeting will be presumed to be a necessary assessment: *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

Only the members of the association can change its constitution and by-laws; even though the constitution provides that such change may be made by the directors: *Insurance Co. v. Bachman*, 39 Bull. 324.

D. MEMBERSHIP.

Associations organized under G. C., §§ 9593, *et seq.*, are not authorized to receive into their membership, persons who are nonresidents of this state: *State, ex rel., v. Mutual Fire Association*, 50 O. S. 145, IV Longsdorf's Notes, 491.

Whether a corporation can be a member of a mutual fire association was discussed, in *Fire Association v. Drug Mills*, 8 O. C. C. 112, 4 O. C. D. 350.

The system of mutual companies under G. C., §§ 9593 to 9598, is radically different from the mutual system of G. C., §§ 9524 to 9553 and 9538, making every insured a member, does not apply to the former. But to become a member thereof he must sign the constitution: *Richards v. Swaim*, 7 O. N. P. 68, 9 O. D. (N.P.) 70.

A person to whom a policy issues under G. C., §§ 9593, *et seq.*, becomes a member of the association, although he does not sign the constitution; or at least he is estopped in equity from denying his liability for debts and losses during the time that his policy was in force, although he may not be regarded as a member at law: *Richards v. Swaim*, 7 O. N. P. 68, 9 O. D. (N.P.) 70.

No recovery for a loss can be had on a fire insurance policy issued to a member of a mutual insurance company organized under G. C., §§ 9593 to 9598, where he has "refused or neglected" to pay the "necessary assessments" thereon within the time limited by its laws, unless the condition as to the time of payment thereof has been waived or the time extended by the officers of the association: *Crandall v. Insurance Co.*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Co. v. Crandall*, 52 O. S. 674].

Where a member of an association received notice from the secretary of the company directing him to pay the assessment levied to the collector, naming him, when he should call at his (assured's) house, the expiration of that time while waiting for the collector to call would not avoid the policy: *Crandall v. Insurance Co.*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Co. v. Crandall*, 52 O. S. 674].

When the collector called, and informed insured that he would not be required to pay the assessment at once, if assured had reason, knowing the rules of the company, to believe that the collector had authority to extend the time, his failure to pay as first described would not avoid the policy: *Crandall v. Insurance Co.*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Co. v. Crandall*, 52 O. S. 674].

In the absence of estoppel persons become members of associations formed under G. C., §§ 9593, *et seq.*, by signing the constitution and by-laws: *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

A policy of fire insurance is not rendered void by reason of the fact that the application for the insurance, which was signed by an agent of the owners, indicated a joint ownership instead of ownership in severalty, when it appears that the nature of the ownership was fully understood by the agent of the company at the time the application was signed, and that it was procured by him: *Insurance Co. v. Ward*, 5 O. C. C. (N.S.) 509, 14 O. C. D. 156.

E. DIRECTORS AND TRUSTEES.

Since only residents of this state (or at present an adjoining state, see G. C., § 9593), can be members of an association, formed under G. C., § 9593, a person who has not such qualifications can not lawfully fill the office of director thereof: *State, ex rel., v. Fire Association*, 50 O. S. 145, IV Longsdorf's Notes, 491.

The directors are not personally liable for losses under policies issued by the association: *Fire Association v. Drug Mills*, 8 O. C. C. 112, 4 O. C. D. 350.

F. LIABILITY OF MEMBERS AND OF ASSOCIATION.

G. C., § 9593, and the following sections, authorize the formation of corporations to insure its members against loss by fire or other casualties, and empower them to make and enforce among their members contracts of indemnity, by which those entering therein shall agree to be assessed specifically from time to time, as may be necessary to pay losses which occur to its members, and also to pay incidental expenses in the management of the business. Such members are liable to be specifically assessed, from time to time, to pay losses which occur while they are such, but no member is liable to such assessment to pay losses occurring before he became a member, or which may occur after

he ceases to be a member: *State, ex rel., v. Fire Association*, 42 O. S. 555, IV Longsdorf's Notes, 130.

G. C., §§ 9593, *et seq.*, do not authorize a contract with members, by which they, upon advance payment of an agreed annual deposit during the life of their policy, shall be exempted from liability to assessment to pay losses occurring during the year for which such prepayment was made; or by which a member's liability to assessment is limited, without regard to the amount that may be necessary to pay losses to fellow members, that may occur during such year: *State, ex rel., v. Fire Association*, 42 O. S. 555, IV Longsdorf's Notes, 130.

If the beginning of a policy is worded like an ordinary fire insurance policy but conditions proper to a mutual policy are inserted in the latter part thereof, such conditions prevail; and the liability of the insurance company is restricted to that which is created by statute and by the articles of association and by-laws of the mutual insurance company: *Fire Association v. Drug Mills*, 8 O. C. C. 112, 4 O. C. D. 350.

G. C., § 9593, authorizes the adoption, by the corporation, of a constitution and by-laws, regulating the assessment and collection of such sums of money as may be necessary to pay losses as they occur, and for incidental purposes; but it does not authorize a regulation by which a policy may be declared forfeited, for the non-payment in advance of an annual deposit or premium, whether an assessment during such year, to pay losses, may be necessary or not. Such an annual deposit paid in advance, based upon the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year, is in fact a premium paid for carrying the risk, and not a specific assessment authorized by the statute: *State, ex rel., v. Fire Association*, 42 O. S. 555, IV Longsdorf's Notes, 130.

One insured in a mutual fire insurance company meeting with a total loss which is paid by the company remains liable to assessments for debts of the company up to the end of the term for which insured, notwithstanding they have receipted for, canceled and returned the policy and received their premium note: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

In a judicial proceeding under the statute to dissolve a mutual fire insurance company and to wind up its business affairs, to which proceeding the corporation is a party defendant, the court is authorized, when necessary, to decree an assessment upon the premium notes executed by policy-holders for the purpose of paying liabilities of the company which accrued while the policies and

premium notes were in force, and such decree as to the necessity for, and the amount of the assessment, is binding upon the policy-holders, although they, as individuals, were not parties to the proceeding when the decree was made. In respect to the assessment and the necessity therefor, they were represented by the corporation: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

An association formed under G. C., §§ 9593, *et seq.*, may collect assessments in advance of losses: *State, ex rel., v. Fire Insurance Association*, 17 O. C. D. 838, 3 O. L. R. 248.

An assessment which is levied at a regular meeting of the directors and officers of a mutual insurance company for the payment of losses and incidental expenses will be presumed to be a necessary assessment: *Crandall v. Insurance Association*, 8 O. N. P. 632, 10 O. D. (N.P.) 711 [affirmed, without opinion, *Insurance Association v. Crandall*, 52 O. S. 674].

If a certificate contains a promise to pay a fund which may be raised by an assessment upon the members, not exceeding a certain amount, such provision is a covenant to levy such assessment; and in case of the failure of the company so to levy it, the insured may maintain an action at law for damages; and he is not bound to resort to equity for specific performance: *Hall v. Live Stock Association*, 11 Dec. Rep. 145, 25 Bull. 79.

The funds derived from assessments upon members to pay losses to fellow members, are, in their nature trust funds, to be applied to the payment of such losses; hence, the application of such funds, or of the annual deposits received in lieu of assessments, to the purchase of the assets of another like corporation, including real estate not necessary to its business, or to the payment of losses to members of such other corporation whose risks it has assumed, is a misapplication of such funds: *State, ex rel., v. Fire Association*, 42 O. S. 555, IV Longsdorf's Notes, 130.

When a special act of incorporation provided that the insured might bring an action against the company for loss or damage at the next court held in the county, unless it was held within sixty days after the disallowance of the loss, but if held within that time, then at the next court held in said county thereafter, such statute applied to cases where the directors after examining a claim for losses wholly disallowed it: *Insurance Co. v. West*, 6 O. S. 600, II Longsdorf's Notes, 261.

G. REPORTS.

The fact that there are immaterial variations between a report required by G. C., § 9602, and the actual condition of the asso-

ciation is not ground for ousting such association by proceedings in *quo warranto*: *State, ex rel., v. Fire Insurance Association*, 17 O. C. D. 838, 3 O. L. R. 248.

H. DISSOLUTION.

An association formed under G. C., §§ 9593, *et seq.*, may be dissolved and a receiver appointed as provided for in G. C., § 11943: *Russell v. Insurance Association*, 21 O. C. C. 472, 12 O. C. D. 82.

XVIII. LIVE STOCK INSURANCE.

A contract issued by a company formed under G. C., §§ 9608, *et seq.*, by which it agrees to pay to the members a fund to be raised by assessment not exceeding two hundred dollars, is in effect a covenant to levy the necessary assessment; and if the corporation fails to levy such assessment, the assured may maintain an action at law for breach thereof, but he is not bound to sue in equity for specific performance: *Hall v. Live Stock Association*, 11 Dec. Rep. 145, 25 Bull. 79.

XIX. FOREIGN INSURANCE COMPANIES, OTHER THAN LIFE.

A. WHAT CONSTITUTES CORPORATION.

When an insurance company, which has not complied with the Ohio law requiring that a license be issued to do business within the state, evades this requirement by issuing policies outside of the state on property located within the state, an action can not be prosecuted in the courts of the state for the recovery of premiums on such policies; but payment on a policy so issued may be enforced within the jurisdiction of the state in which it was issued, and an action for recovery of premiums may be maintained within such state provided jurisdiction can be obtained over the person of the policyholder: *Casualty Co. v. Banking Co.*, 12 O. C. C. (N.S.) 200, 21 O. C. D. 428.

A fire insurance company, organized under the laws of another state, that maintains an office in this state and there enters into contracts of insurance respecting property in other states, or transacts the business of insurance respecting property in other states, is engaged in this state in the transaction of the business of insurance, notwithstanding it does not enter into contracts of insurance with citizens of this state, nor insure property in the state: *State v. Insurance Co.*, 1 O. C. C. (N.S.) 4, 14 O. C. D. 387.

B. WHAT CONSTITUTES INSURANCE.

A policy of marine insurance, which contained a stipulation that in case of loss or misfortune the insurer would contribute ratably to expenses incurred by the assured or their agents in and about the recovery of the insured cargo, was issued by a corporation of the state of Connecticut, also doing business in the state of Ohio. The cargo was sunk in waters of the state of Michigan, and labor was expended in efforts to recover it. It was held that the breach of such stipulation on the part of the insurer constituted a cause of action against the company, cognizable by the courts of this state: *Handy v. Insurance Co.*, 37 O. S. 366, III Longsdorf's Notes, 920.

After the filing of a petition on cause of action and the issuing of a summons, which was returned served on the defendant by delivering a true and attested copy on an agent of the defendant, the defendant filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this state." It was held that the filing of such motion was a voluntary appearance in the action and a waiver of any defect in the service of the summons: *Handy v. Insurance Co.*, 37 O. S. 366, III Longsdorf's Notes, 920.

The fact that a foreign insurance company lends money secured by mortgage upon property in this state does not show that such insurance company is transacting the business of insurance in this state: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

A foreign insurance company which lends money secured by mortgage, does not thereby engage in the banking business: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

C. ADMISSION TO DO BUSINESS.

Where a foreign insurance company, tendering compliance with our laws, applies for authority to transact its business within this state, the superintendent of insurance has no power, in the exercise of a mere arbitrary discretion, to refuse such admission: *State, ex rel., v. Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

It is within the province of such superintendent, in considering the application of such insurance company for admission to transact business within this state, to inquire into its financial soundness, and if upon such inquiry, made in good faith, he is not satisfied of its financial soundness, he

is invested with discretion to refuse such admission, and his exercise of such discretion will not be controlled by mandamus: *State, ex rel., v. Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

Foreign insurance companies and associations, whether incorporated, or not, before commencing business in this state, are required to obtain a certificate of authority to do so, from the superintendent of insurance. That certificate, so long as it remains in force, confers on the company or association receiving it, the right and privilege of carrying on its business in the state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

A mutual fire insurance company organized under the laws of another state, but similar to domestic mutual fire insurance companies, which has at least \$50,000 in premium notes, on which at least \$10,000 in cash has been paid before commencing the business of insuring, may, so far as its capital is concerned be admitted to transact business within this state: *State, ex rel., v. Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

The provisions of the Valentine anti-trust law include the business of fire insurance, and an indictment which charges the defendants with unlawfully conspiring, combining and agreeing together to restrict the "trade, business and commerce of insuring property," and to fix and increase the premiums therefor and prevent competition, charges a crime under the laws of Ohio: *State, ex rel., v. Ross*, 4 O. N. P. (N.S.) 377, 16 O. D. (N. P.) 704.

Bonds deposited in compliance with G. C., § 9565, are to be listed for taxation in the county in which they are held: *Scottish Union v. Bowland*, 196 U. S. 611, 14 O. F. D. 543, 2 O. L. R. 515.

Bonds which are deposited in compliance with G. C., § 9565, are personal property within the meaning of G. C., §§ 5404, *et seq.*: *Scottish Union v. Bowland*, 196 U. S. 611, 14 O. F. D. 543, 2 O. L. R. 515; *Assurance Co. v. Halliday*, 128 Fed. 257, 61 C. C. A. 271, 14 O. F. D. 73, 1 O. L. R. 643; *Assurance Co. v. Halliday*, 110 Fed. 259, 13 O. F. D. 682.

If the insurance company fails or omits to list such bonds for taxation, the auditor of the county in which they are held may list them: *Western Assurance Co. v. Halliday*, 127 Fed. 830, 14 O. F. D. 305; *Assurance Co. v. Halliday*, 110 Fed. 259, 13 O. F. D. 682.

D. OUSTER BY QUO WARRANTO.

The authority to do business in this state, emanates from the state, and the privilege

it confers is a franchise; and any company or association carrying on its business here, without having obtained such authority, is unlawfully exercising a franchise: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

To come within the purview of that provision of G. C., § 12303, paragraph 3, which authorizes an action in *quo warranto* to be brought "against an association of persons who act as a corporation within the state without being legally incorporated," it is not necessary that the association, or persons composing it, avow a purpose to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

The defendants, without being legally incorporated, associated themselves together for the purpose of transacting the business of insurance, by articles of agreement, under which they issue policies in an artificial name, the "Guarantee and Accident Lloyds, New York," insuring persons for certain amounts on payment of specified rates, "against loss of life, eye or eyes, limb or limbs, at or above the wrist or ankle," by accidents, other than those excepted in the policy, or in the conditions indorsed on it; each member contributed an equal amount to a common fund for the payment of losses and expenses, and each stipulates with the others that no policy shall be issued unless it is executed in behalf of all, but, that his liability shall be several only, and limited to the amount contributed or authorized by him; the interest of each member in the concern is made transferable by him if he wishes to withdraw, or by his personal representative after his decease, and the assignee takes the place of a member, thus making the association capable of perpetuity like a corporation; and the defendants are carrying on the business of insurance in that mode, in this state, without having obtained a certificate of authority from the superintendent of insurance. It was held that in so conducting their business, the defendants unlawfully exercise a franchise, within the meaning of G. C., § 12303, paragraph 1, and act as a corporation, within the meaning of paragraph 3, of that section, and under either, may be ousted from transacting the business of insurance within the state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

Quo warranto will lie against a group of persons who are exercising powers which can only be exercised by a corporation even if they do not claim to be incorporated: *State,*

ex rel., v. *Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

E. SERVICE OF SUMMONS.

After a petition was filed upon a policy of marine insurance, a summons was issued which was returned served on the defendant by delivering a true and attested copy on an agent of the defendant, the defendant filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this state." It was held that the filing of such motion was a voluntary appearance in the action and a waiver of any defect in the service of the summons: *Handy v. Insurance Co.*, 37 O. S. 366, III Longsdorf's Notes, 920.

In *Leonard v. Insurance Co.*, Fed Cases (8258), 4 O. F. D. 521, it was held that the statute on the subject of the service of a foreign insurance company (G. C., § 9561), does not apply to actions brought in the United States court. The opposite result was reached, however, in *Runkle v. Insurance Co.*, 2 Fed. 9, 4 O. F. D. 620, 5 Bull. 217.

That a foreign insurance company may be served in this manner if sued in the United States courts: *Runkle v. Insurance Co.*, 2 Fed. 9, 4 O. F. D. 620, 5 Bull. 217.

For the opposite view, see *Leonard v. Insurance Co.*, Fed. Cases (8258), 4 O. F. D. 521.

When insurance companies were incorporated by a special statute, the place where they might be sued depended entirely upon the terms of their charter: *Insurance Co. v. Stukey*, 18 O. 455, I Longsdorf's Notes, 856.

That service by mail is sufficient: *Distilling Co. v. Insurance Co.*, 6 Dec. Rep. 1180, 12 Am. L. Rec. 168, 10 Bull. 82.

XX. REMEDIES.

In an action to recover premiums paid to an insurer which has not incurred any risk, the rights of the parties at the beginning of the action should determine the judgment and the insurer can not by the averments of its answer effectively waive the defense that, by the terms of the policy, the risk had not attached inasmuch as the person whose life was insured had not filed the application: *Insurance Co. v. Felix*, 73 O. S. 46, IV Longsdorf's Notes, 998.

Where at the time of a compromise of a claim founded on a contract of life insurance, a dispute exists between the parties as to the liability of the company in any sum whatever, it denying that anything is owing; and an amount less than the claim

is paid to the claimant in settlement of the controversy, and he executes a full acquittance and release, and surrenders the policy, an action at law on the policy can not be maintained without a return or a tender of the amount received, even though the party's assent to the settlement was obtained by the fraudulent representations of the other party, and the amount received as the settlement is in the petition credited as a payment on the policy: *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958.

When an insurance association properly refuses to perform, before due, its contract of insurance on the ground that it is *ultra vires*, a cause of action quasi *ex contractu* immediately arises in favor of assured to recover all premiums paid. But if the contract is not *ultra vires* and the disaffirmance is wrongful, the assured may treat the contract as discharged, and sue at once for damages for its breach; and the fact that recovery is asked of the premiums paid, instead of damages, is immaterial: *Insurance Co. v. Hare*, 5 O. C. C. (N.S.) 348, 16 O. C. D. 197 [reversed, without opinion, *Insurance Co. v. Hare*, 74 O. S. 466].

The concurrence of the beneficiaries is a condition precedent to the valid action on the part of the insured in the nature of treating a contract of life insurance as rescinded and basing thereon a suit for recovery of premiums paid; nor can a suit, without the concurrence of the beneficiaries, be based upon the wrongful refusal of the company to receive further premiums or continue the policy in force: *Insurance Co. v. Penn.*, 4 O. N. P. (N.S.) 97, 16 O. D. (N.P.) 375, 1 Hosea, 209.

Both the insured and the beneficiaries are necessary parties to an action for recovery of premiums paid on a policy of life insurance which has been repudiated by the company: *Insurance Co. v. Penn.*, 5 O. N. P. (N.S.) 547, 16 O. D. (N.P.) 544, 1 Hosea, 217.

Where a life insurance company is sued in Ohio by the beneficiary of a policy issued in Michigan and assigned in Michigan by both the insured and the beneficiary to parties still resident in Michigan, an answer by the company denying the right of the beneficiary to recovery by reason of the assignment is not inconsistent with a supplemental answer alleging the subsequent filing in the federal court in Michigan by the assignees of an action on the same policy, and further alleging the necessity of making the assignees parties to the Ohio action; nor is such a supplemental answer, without a tender of the proceeds of the policy into court, in the nature of an interpleader, but the two answers must be read together, and the com-

pany can not be required to elect upon which it will rely: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, which was affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

A mutual assessment society's policy, agreeing to pay on loss a fund collected by assessment on the members, implies a promise to levy such assessment, and on refusal the assured need not seek specific performance, but may sue at law for breach of the contract: *Hall v. Live Stock Association*, 11 Dec. Rep. 145, 25 Bull. 79.

Where a person applies for insurance on his interest as mortgagee, but by mistake the policy is written on the owner's interest, with a clause making the loss, if any, payable to the mortgagee, and he does not discover this until after loss, by reason of having gone abroad, he may have the policy reformed and enforced as reformed: *Mitchell v. Insurance Co.*, 4 O. N. P. 386, 6 O. D. (N.P.) 420.

A domestic life insurance company may be sued in the county where the death occurred. The words in an earlier form of G. C., § 11272, where the loss or "some part" thereof occurred, do not exclude life companies. *Insurance Co. v. Pyers*, 36 O. S. 544, III Longsdorf's Notes, 874.

XXI. TIME OF BRINGING ACTION.

A. SPECIAL COVENANT IN CONTRACT.

A provision that action must be brought upon the policy within twelve months is valid: *Insurance Co. v. Schican*, 1 O. C. C. 192, 1 O. C. D. 105.

A provision that no action can be maintained on a policy unless it is brought in six months is said to be valid in *Insurance Co. v. Howle*, 19 O. C. C. 621, 10 O. C. D. 290.

The courts do not look with favor upon a provision restricting the time for bringing an action upon a policy for life insurance: *Insurance Co. v. Gierl*, 16 O. C. C. 294, 9 O. C. D. 162 [affirmed, without opinion, *Insurance Co. v. Gierl*, 57 O. S. 671].

Under a clause which requires action to be brought against an insurance company within one year from the time of the accident, the fact that the beneficiary did not know that the death of the insured was caused by accident, does not excuse delay in bringing such suit: *Coldham v. Insurance Co.*, 2 O. N. P. 358, 2 O. D. (N.P.) 314 [affirmed, in *Coldham v. Insurance Co.*, 8 O. C. C. 620, 4 O. C. D. 548 and affirmed without opinion, in *Coldham v. Insurance Co.*, 57 O. S. 657, 38 Bull. 270].

If a petition shows on its face that suit is brought after the time limited in the policy for bringing such suit, a sufficient excuse for such delay must also be alleged or the petition will be subject to demurrer: *Minerick v. Insurance Co.*, 4 Dec. Rep. 288, 1 Clev. L. Rep. 217.

Under a policy which requires proof of loss to be made "forthwith", such proof may be made within a reasonable time: *Kirk v. Insurance Co.*, 8 Dec. Rep. 182, 6 Bull. 200.

A limitation clause requiring action within six months from the date of death can not be construed as from date of a right of action being after proofs of loss: *Meyer v. Insurance Co.*, 6 O. N. P. 34, 7 O. D. (N.P.) 573 [affirmed, *Meyer v. Insurance Co.*, 9 O. D. (N.P.) 596].

B. REJECTION OF CLAIM.

Acceptance of proof of disability on the part of a policy holder and treatment of such proof as final, with an offer to pay a certain amount thereon but less than the amount claimed, constitutes a rejection of the claim by the company, and suit instituted thereon after such rejection is not prematurely brought: *Assurance Co. v. Dickson*, 15 O. C. C. (N.S.) 228.

C. LIMITATION.

An action to recover upon a policy of fire insurance, though transitory, when brought in this state upon a cause arising in another state is, by virtue of G. C., § 11234, limited to the time fixed by the statute of that state: *Hunter v. Insurance Co.*, 73 O. S. 110, IV Longsdorf's Notes, 999.

For the application of the statute of limitations, see LIMITATIONS, STATUTE OF.

XXII. PARTIES.

The insured and the beneficiary are both proper and necessary parties plaintiff to an action against a life insurance company for the rescission of a policy and the recovery of premiums already paid: *Insurance Co. v. Penn*, 5 O. N. P. (N.S.) 547, 16 O. D. (N.P.) 544, 1 Hosea, 217.

Where the foreign and domestic administrators both join in an action on a casualty policy, it is not prejudicial error to dismiss the former as an unnecessary party: *Insurance Co. v. Jordan*, 6 Dec. Rep. 1145, 10 Am. L. Rec. 625, 8 Dec. Rep. 313, 7 Bull. 71.

Under a policy insuring property belonging to assured and as agents, a suit by the agents in their own name is authorized by G. C., § 11244: *Insurance Co. v. Coal Co.*, 13 O. C. D. 191.

Where a policy of fire insurance contains a clause making loss, if any, payable to the mortgagee and the assured afterwards, not observing such clause, transfers such policy to the mortgagee, by assignment absolute in form, but intended simply to indemnify the mortgagee in case of loss, the assured and the mortgagee may join in an action upon such policy: *Insurance Co. v. Wolf*, 21 O. C. C. 202, 11 O. C. D. 815.

Where a life insurance company issued in Ohio by the beneficiary of a policy issued and assigned in Michigan to parties still resident there, and where the assignees of such policy have subsequently filed a suit in a federal court in Michigan on such policy, a motion by the insurance company to make the assignees parties to the action will be overruled, for the reason that there can be no injustice in requiring the beneficiary to return to Michigan and litigate in a court of that state her claims against residents of that state with whom she dealt while herself domiciled there, and a motion of the company to dismiss the action in default of an order making the assignees parties will be granted: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, and affirmed without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

Insurance brokers holding an open policy for themselves and whom it may concern, may sue on it in their own names for the use of the owners if it was got for their benefit: *Insurance Co. v. Wilson*, 6 O. S. 553, II Longsdorf's Notes, 258.

A part owner of a vessel procuring insurance in his own name on the whole for account of the owners, becomes their trustee and may sue on it: *Knight v. Insurance Co.*, 26 O. S. 664, III Longsdorf's Notes, 338.

An applicant for insurance who has the policy made to a third person, as to his wife, he not being a party to the policy, can not maintain a suit to avoid it for fraud and recover the premiums: *Insurance Co. v. Wright*, 33 O. S. 533, III Longsdorf's Notes, 687.

On a policy issued to an employer who paid the premium for the protection of injured employees, claims to be paid to the assured (the employer) in trust to be paid to the injured employee, an injured employee can not, as the real party in interest, maintain an action where he does not aver that the employer has failed to comply with the conditions of the policy: *Garrett v. Insurance Co.*, 37 Bull. 394 [without opinion in supreme court].

Notwithstanding the provision that suit must be brought against the general man-

ager as attorney in fact, an action may be maintained against the individual members of the association where the association has ceased to do business, and has no assets, and the attorney in fact who issued the policy has resigned, and his place has not been filled, and no service could therefore be had upon such officer: *Transportation Co. v. Gilchrist*, 2 O. C. C. (N.S.) 505, 14 O. C. D. 165.

After expiration of a charter (of an Odd Fellows' lodge) by limitation an action by a member for benefits is properly brought against some of the members for all, they being too numerous to bring before the court although they are still acting as a corporation, but it would also have been proper to treat the body as still a corporation under G. C., § 8736, by reason of continuing to act as such: *Myers v. Lucas*, 16 O. C. C. 545, 8 O. C. D. 431. See also CORPORATIONS.

An insured person who conveys his property to his wife, but, in fact, in trust for himself, can sue in his own name on the policy, but he should have stated this in his reply to an answer that he had parted with the title: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266.

The individual members of an unincorporated lodge are the proper defendants. But if the trustees are sued, and they are members, the defect is one of parties merely, and it will be presumed after judgment that they were members, though it is not averred: *Mattoon v. Wentworth*, 7 Dec. Rep. 639, 4 Bull. 513.

For the general discussion of the subject of parties, see PARTIES.

XXIII. PLEADING.

An insurance policy is a written instrument within the meaning of G. C., § 11333, and when sued upon, a copy thereof should be attached to the petition; and if a copy of the application for insurance constitutes a part of the policy, it should be also attached; otherwise it is not required: *Lauer v. Assurance Society*, 8 O. N. P. 117, 10 O. D. (N.P.) 397.

In an action for recovery for death under a policy of accident insurance, containing the provision that the company insures against death resulting from injuries alone, the judgment against the company will not be reversed for failure to allege in the petition that death was caused solely by the accident, where the answer affirmatively alleges another cause, thereby presenting that issue: *Insurance Co. v. Leibus*, 8 O. C. C. (N.S.) 201, 18 O. C. D. 700.

A petition in an action by the assignee of a life insurance policy, setting up the

contract of insurance, the assignment for a valuable consideration, the assent of the company issuing the policy to the assignment, demand upon and payment by the assignee of the annual premium, and the death of the insured, is sufficient as against a demurrer, no other facts intervening to defeat recovery: *Insurance Co. v. Burke*, 13 O. C. D. 39 [reversed, *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958].

The petition must specifically and clearly aver the insured's ownership of the property at the time of loss: *Margolis v. Insurance Co.*, 1 Dayton Term Rep. (Iddings) 19.

If a petition avers execution of a policy on specified property occupied by the insured, an insurable interest is sufficiently shown under the code: *Insurance Co. v. Hart*, 24 O. S. 331, III Longsdorf's Notes, 176 [affirming *Insurance Co. v. Hart*, 5 Dec. Rep. 237, 3 Am. L. Rec. 657].

A petition on a policy averring that plaintiff, "being the owner of a stock of goods," was insured by defendant, etc., though not a model form of pleading, sufficiently avers ownership: *Insurance Co. v. Leonard*, 9 O. C. C. 46, 6 O. C. D. 49.

Fraud and mistake in securing a settlement must be pleaded if advantage is to be taken thereof: *Casualty Co. v. Jordan*, 17 O. C. D. 696, 3 O. L. R. 133.

A petition to recover upon a policy of accident insurance must set forth the facts which resulted in the death of the insured: *Koch v. Insurance Co.*, 7 O. L. R. 643.

Averments in a petition in a suit on a life insurance policy, that the condition as to proof of death was definitely performed on a certain date and that every condition required by the policy was performed, are wholly inconsistent with a subsequent averment that the condition of the policy with reference to proof of death had been waived; and in the absence of any averment of an excuse for non-performance, or any inference to be drawn from the petition that there was such an excuse, evidence could not be offered on the question of waiver: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

Where there is nothing in the terms of a policy of insurance which requires the truth of the representations in the application therefor to be averred as precedent to a right of action on the policy, a good cause of action may be made in a petition founded on the policy, without setting forth the application and averring the truth of the representations therein; but the falsity of such representations, where they are such as to invalidate the policy, may be set up by way of defense: *Insurance Co. v. McGookey*, 33 O. S. 555, III Longsdorf's Notes, 688.

Where a policy requires notice of a loss to be given to the insurer immediately after the fire, such notice is a condition precedent to a right of action on the policy; but in such action, under the provisions of G. C., § 11339, it is a sufficient averment of the performance of the condition for the plaintiff to state in his petition that he has performed all the conditions on his part to be performed: *Insurance Co. v. McGookey*, 33 O. S. 555, III Longsdorf's Notes, 688.

In an action by an insurance company against the railroad company for recovery of the amount paid on a policy of insurance covering a building destroyed by fire through the alleged negligence of the railroad company, an averment that the owner of the property had complied with all the conditions of the insurance contract is a proper averment: *Insurance Co. v. Railway*, 4 O. N. P. (N.S.) 373, 17 O. D. (N.P.) 113.

Where conditions subsequent (for example, failure to comply with clause as to other insurance) are matters of defense, they need not be proven in chief or alleged in the petition, inasmuch as plaintiff may not be advised which conditions subsequent the insurance company claims were violated. When they are raised in defense the plaintiff may reply, claiming either a waiver or estoppel at law, or he may combine in one proceeding both legal and equitable causes of actions, one for reformation and the other for judgment after the contract is reformed: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

A plaintiff who has alleged that he "has duly kept, observed and performed all the requirements and conditions contained in said policy," is not in a position to avail himself of a waiver of the provision as to an examination under oath, even if the conduct of the company had been such as to constitute a waiver: *Mahoney v. Insurance Co.*, 3 O. N. P. (N.S.) 246, 16 O. D. (N.P.) 131 [affirmed, without opinion, *Mahoney v. Insurance Co.*, 74 O. S. 503].

A condition which provides that the policy shall be void or inoperative on the happening of some event can be taken advantage of by the insurance company only by appealing same and alleging a breach thereof: *Moody v. Insurance Co.*, 52 O. S. 12, IV Longsdorf's Notes, 560.

A petition setting forth the contract to insure and a policy issued accordingly, and performance of conditions is sufficient. The contract was complete before the policy, which is only evidence of it, issued: *Hughes v. Insurance Co.*, 4 Dec. Rep. 412, 2 Clev. L. Rep. 125.

The petition must aver neglect or refusal to levy the assessment, else it avers no

breach: *Hall v. Live Stock Association*, 11 Dec. Rep. 145, 25 Bull. 79.

Where it is provided in a fire policy that the insurer, in lieu of paying for a loss in money, may rebuild or replace the property destroyed, such provision is in the nature of a condition subsequent, available only at the option of the insurer. It is therefore unnecessary to aver in the petition, in an action on the policy for the amount of the loss, that the insurer refuses to rebuild or replace the property destroyed: *Insurance Co. v. McGookey*, 33 O. S. 555, III Longsdorf's Notes, 688.

Facts constituting excuses for nonperformance of condition, waiver of performance, estoppel to claim non-performance, and interpretation by the parties themselves of ambiguous conditions are not immaterial nor irrelevant: *Boswell v. Insurance Co.*, 13 O. N. P. (N.S.) 364.

An allegation of an agreement is often an allegation of mixed law and fact, and it is sufficient to allege the agreement as it was at the time of the breach without giving all the agreements and modifications thereof resulting in the ultimate agreement: *Boswell v. Insurance Co.*, 13 O. N. P. (N.S.) 364.

Except as specifically provided by the code, an insertion of agreements bodily in a petition is not good pleading, but the remedy is not a motion to strike out but for a reformation of the petition. However informal a pleading may be a court can not strike out allegations essential to plaintiff's cause of action: *Boswell v. Insurance Co.*, 13 O. N. P. (N.S.) 364.

Where the line between evidential and ultimate facts is not clear and the plaintiff relies upon certain well-defined facts in support of what otherwise would be an essential allegation of mixed law and fact, he should be allowed to plead them so that the issues as to such facts of their sufficiency may be clearly presented. Brevity in pleading is to be desired and is accomplished by the allegation of ultimate facts, but should be subordinate to the purposes of the code, which is to present clear and separate issues of law and fact: *Boswell v. Insurance Co.*, 13 O. N. P. (N.S.) 365.

The law of another state being relied on to avoid forfeiture for non-payment of premiums, the facts bringing the case within such law must be averred: *Sheifers v. Insurance Co.*, 46 O. S. 418, IV Longsdorf's Notes, 335.

An averment that an appraisal under the terms of a fire insurance policy is illegal, void and of no effect, is merely a legal conclusion if not based upon a statement of

facts: *Insurance Co. v. Ries*, 80 O. S. 272, IV Longsdorf's Notes, 1051.

In a suit to recover on a fire loss it is not a misjoinder of defendants or of separate causes against different parties, to join in one action several companies whose policies cover the same property, or a part of the same property, notwithstanding each policy contains the provision that the company issuing it shall not be liable for a greater proportion of any loss on the property described than the amount thereby insured bears to the whole amount of insurance covering the property: *Brewing Co. v. Insurance Co.*, 2 O. N. P. (N.S.) 125.

Where in a policy of insurance it is made a condition precedent that in case of disagreement as to the amount of loss, it shall be determined by appraisal the insured may bring suit upon the policy, averring in his petition the performance of all conditions on his part, and when the insurer pleads in its answer the disagreement and the determination of the amount by appraisal, and the provisions of the policy as to concurrent insurance, the amount the plaintiff may recover is limited to a proportionate amount of the loss so determined, and he can not recover a larger amount unless the appraisal is void or is set aside. If it is void, he may plead its invalidity in his reply, but if it is only voidable, he should in his petition unite a cause of action to set it aside: *Insurance Co. v. Ries*, 80 O. S. 272, IV Longsdorf's Notes, 1051.

Where the plaintiff, in an action on an insurance policy, has been released from performance of any of the conditions of the contract, he should aver such facts in his petition; but matters of a merely defensive nature need not be met earlier than at the filing of the reply: *Kandar v. Indemnity Co.*, 10 O. C. C. (N.S.) 449, 20 O. C. D. 260.

In an action on a policy of fire insurance an amended petition which fails to allege any consideration for the contract is demurrable, notwithstanding the original petition supplied the omission: *Kehm v. Insurance Co.*, 8 O. C. C. (N.S.) 486, 18 O. C. D. 839.

In an action on a policy of insurance, where the case has been tried in part on the theory that there had been a waiver of the condition of the policy as to prepayment of premiums, it is not error after verdict to permit an amendment of the petition setting up such waiver: *Accident Association v. Harrington*, 10 O. C. C. (N.S.) 134, 20 O. C. D. 612 [vacated, without opinion, *Accident Association v. Harrington*, 80 O. S. 739].

Two causes of action on two policies of fire insurance by different companies on the same property, with provisions for apportioning loss, are not joinal: *Seibert v. In-*

insurance Co., 12 O. N. P. (N.S.) 210 [withdrawing former opinion in *Seifert v. Insurance Co.*, 22 O. D. (N.P.) 221].

A petition in interpleader should set forth generally the nature of the claims that have been asserted to the fund, so that the court can determine from the petition whether an interpleader is proper. Thus a petition by a life insurance company, averring that two independent persons claim to own the policy and the fund due thereon, should set out the name of the beneficiary and the nature and foundation of the antagonistic claims: *Insurance Co. v. Lea*, 7 O. N. P. 399, 10 O. D. (N.P.) 39. See also INTERPLEADER.

It is not a departure, in an action on a policy of insurance, to set up in the reply the provisions of a by-law of the defendant company, which is a part of the contract of insurance and negatives the effect of an affirmative defense and therefore tends to fortify and strengthen the cause of action set up in the petition: *Beckel v. Insurance Co.*, 14 O. N. P. (N.S.) 207.

A general denial does not put in issue performance of conditions precedent to recovery of loss, where such performance was alleged in the petition: *Insurance Co. v. Titus*, 82 O. S. 161.

G. C., § 9583, controls the construction of subsequent policies, so that breaches of condition subsequent must be such as increase the risk, and this must be averred. Thus, as becoming unoccupied is not necessarily an increase of risk, a defense under a clause against liability for loss on vacant buildings must aver that the risk was increased. Whether it was increased is a question for the jury: *Moody v. Insurance Co.*, 52 O. S. 12, IV Longsdorf's Notes, 560.

An unexpired and uncanceled policy is *prima facie* valid, and the burden of proof is on the defendant to prove the contrary. The conditions precedent on the plaintiff are those necessary to perfect his right of action, such as notice and proofs of loss. Conditions defeating the liability are subsequent, and the insurer must plead and prove them—as here that the building became vacant: *Moody v. Insurance Co.*, 52 O. S. 12, IV Longsdorf's Notes, 560.

False representation and breaches of warranty, if relief on, must be averred and proved by the defense: *Insurance Co. v. Leonard*, 9 O. C. C. 46, 6 O. C. D. 49, 2 O. D. (N.P.) 122.

Warranties and representations in a life insurance application are collateral to the contract, and the burden is on the defendant to show their falsity, and not on plaintiff: *Insurance Co. v. Reif*, 7 Dec. Rep. 200, 1 Bull. 290 [reversed, on other grounds, *Insur-*

ance Co. v. Reif, 36 O. S. 596, III Longsdorf's Notes, 877].

Where a life insurance company is sued in Ohio by the beneficiary of a policy issued in Michigan and assigned in Michigan to parties still resident in Michigan, an answer by the company denying the right of the beneficiary to recovery by reason of the assignment is not inconsistent with a supplemental answer alleging the subsequent filing in the federal court in Michigan by the assignees of an action on the same policy and alleging the necessity of making such assignees parties: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 649 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

In an action by the beneficiary on a life insurance policy, a supplemental answer alleging the necessity of making assignees of such beneficiary parties, without a tender of the proceeds of the policy into court, is not in the nature of an interpleader, but such supplemental answer and an answer denying the right of the beneficiary to recovery must be read together, and the company can not be required to elect upon which it will rely. *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 649, [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, and affirmed without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

Under the U. S. statutes requiring boats carrying passengers to have a licensed pilot, a defense of want of such pilot is bad, without stating and showing that she was carrying passengers: *Insurance Co. v. Frank*, 7 Dec. Rep. 302, 2 Bull. 93.

In an action in mandamus to compel the superintendent of insurance to renew the license of a fraternal beneficial association chartered under the laws of Pennsylvania to do business in this state, want of an averment in the answer that notice was duly given to the officers of the association that its license would not be renewed on expiration, makes the answer bad on demurrer: *State, ex rel., v. Lemert*, 11 O. N. P. (N.S.) 535, 21 O. D. (N.P.) 118.

An answer in an action on notes given for life insurance, which alleges that (1) the notes were executed on an express agreement that they should be discounted with a certain brokerage firm of which the insured was a member and brokerage allowed such firm, otherwise the insurance should be void and the policy canceled; (2) that upon notice of failure to carry out said brokerage agreement, the policy was returned to the agent, cancellation demanded and return of the notes requested; and (3) that the insured became the beneficiary of a rebate, which was

illegal and contrary to G. C., § 9404, is defective in that it fails to bring the insured within the terms of the statute so as to invalidate the notes or make them fail for want of consideration: *Dailey v. Chappell*, 12 O. C. C. (N.S.) 561, 21 O. C. D. 509.

An allegation that an insurance company did not tender the premium note and cash premium given for a policy until long after the bringing of suit for a loss thereon, nothing appearing in such allegation, standing alone, that the company had knowledge of the time when other insurance, upon which forfeiture is claimed, was taken by the plaintiff, can not be considered as a defense to the claim of forfeiture: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

To an answer of untrue representations a reply, denying they were untrue, and that the insurer knew the facts and induced the assured to believe he had properly stated them, is not inconsistent: *Cheever v. Insurance Co.*, 5 Dec. Rep. 268, 4 Am. L. Rec. 155.

For the general discussion of the subject of pleading, see PLEADINGS.

XXIV. EVIDENCE.

A. PRESUMPTIONS AND BURDEN OF PROOF.

The burden is on the company to show a breach of a condition that the insured was free from certain diseases at the date of application: *Melvin v. Insurance Co.*, 9 O. L. R. 361, 56 Bull. 377.

If an insurance company claims that the policy is rendered invalid by a breach of an express condition the burden of proof is upon such insurance company: *Casualty Co. v. Bird*, 18 O. C. C. 488, 10 O. C. D. 211.

The burden is upon one complaining to show that the effect of the rule limiting the time within which a suit can be brought to six months after a fire, is such as to demand in a given case that its operation be suspended: *Appel v. Insurance Co.*, 4 O. N. P. (N.S.) 229, 16 O. D. (N.P.) 499, 1 *Hosea*, 270 [affirmed, *Appel v. Insurance Co.*, 76 O. S. 52, IV Longsdorf's Notes, 1022].

The burden of proving requisite notice of assessments in a mutual benefit association is upon the company: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

The burden of proving that a member who has disappeared was dead at the time the payment of assessment was tendered by the beneficiary to keep the certificate alive, is on the company: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

Where the answer denies compliance, the burden of proof is upon the plaintiff to show that the condition of the policy as to submission to an examination under oath was

complied with: *Mahoney v. Insurance Co.*, 3 O. N. P. (N.S.) 246, 16 O. D. (N.P.) 131 [affirmed, without opinion, *Mahoney v. Insurance Co.*, 74 O. S. 503].

The burden of proof rests on company to prove the answers in the application false: *Hanner v. Insurance Co.*, 49 Bull. 140, [affirmed without opinion, *Insurance Co. v. Hanner*, 69 O. S. 568].

A defense that a life insurance policy was taken out by the plaintiff in the name of the assignor upon an agreement that the latter should apply therefor and the former pay the premium thereon and that an assignment thereof should be made, etc., and that it was a mere wagering policy, is an affirmative defense, the burden of proving which rests upon the defendant. Therefore, no evidence having been offered in favor of such defense, it will be considered as withdrawn notwithstanding no formal withdrawal appears in the record, especially where such fact is conceded in argument on review and the trial court in its charge substantially so stated: *Insurance Co. v. Burke*, 23 O. C. C. 39, 13 O. C. D. 39, [reversed, *Insurance Co. v. Burke*, 69 O. S. 294, IV Longsdorf's Notes, 958].

A provision in a fire insurance policy that the same shall be void in case of loss "if sworn statements in accordance with all the requirements of this policy * * * shall not be rendered within sixty days after the fire," is valid and binding upon the parties thereto; and, where assured admits that the provision was not complied with, the burden of proof is upon him to show a waiver thereof by the insurer: *Billings v. Insurance Co.*, 2 O. N. P. (N.S.) 21, 14 O. D. (N.P.) 387.

The burden of proof under G. C., § 9583, rests upon the insurance company: *Insurance Co. v. Werner*, 6 O. N. P. (N.S.) 514, 16 O. D. (N.P.) 524, [reversed, without affecting this proposition, in *Insurance Co. v. Werner*, 76 O. S. 543, IV Longsdorf's Notes, 1027].

A member of a mutual benefit association had paid all the assessments made on him by the association up to the time when he disappeared. The association thereon declined to accept payment of the assessment coming due subsequently to his disappearance, tendered by the beneficiary named in the certificate, on account of such disappearance, and did not longer make any assessments on him. It was held that in an action brought on such certificate after seven years from the disappearance of such member had elapsed, that the presumption being that he was dead, the beneficiary was entitled to recover on the certificate: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

The burden of proving that a member who has disappeared was dead at the time the payment of the assessment was tendered by the beneficiary to keep the certificate alive, is on the company: *Supreme Commandery v. Everding*, 20 O. C. C. 689, 11 O. C. D. 419.

If a petition on a mutual insurance policy alleges performance of all conditions, and the answer denies payment of a certain assessment, the plaintiff need not prove that the assessment was made and paid. The defendant must prove the assessment: *Insurance Co. v. Bowersox*, 6 O. C. C. 1, 3 O. C. D. 321.

A death certificate, agreeing to pay a certain sum when the class is full, with proof that it was full when the certificate was issued makes a *prima facie* case, and if the association sets up in defense that the class had become depleted, and alleging failure of the assured to pay certain assessments, the burden is on it to prove these facts, they being peculiarly within its knowledge, and the plaintiff need offer no evidence under his general allegation of performance of conditions: *Hall v. Scottish Rite*, 6 O. C. C. 137, 3 O. C. D. 384. See also CONTRACTS.

Where notice of a change of address of the insured is relied upon to invalidate the notice of an assessment mailed by a mutual benefit association, such issue must be supported by a preponderance of the evidence: *Judge v. Benefit Association*, 10 O. C. C. (N.S.) 473, 20 O. C. D. 133.

Suicide of the assured within one year from the date of a policy of insurance must, when put in issue by a reply, be established by the insurer by a preponderance of the evidence to constitute a defense to an action commenced under a policy which provides that if assured shall commit suicide, whether sane or insane, the policy shall be void unless death occurs one year or more after its date: *Hanner v. Insurance Co.*, 49 Bull. 140, [affirmed, without opinion, *Insurance Co. v. Hanner*, 69 O. S. 568].

No presumption arises that assured intentionally committed suicide from the fact that he was found with a bullet hole in his head and with a revolver in his hand: *Hanner v. Insurance Co.*, 49 Bull. 140, [affirmed, without opinion, *Insurance Co. v. Hanner*, 69 O. S. 568].

B. JUDICIAL NOTICE.

A judge being a member of a fraternal order, and knowing its objects and purposes, will take judicial notice thereof in an action involving that question: *Hildreth v. Knights of Pythias*, 8 O. N. P. 540, 11 O. D. (N.P.) 622. See also JUDICIAL NOTICE.

C. PAROL EVIDENCE.

The rules as to parol evidence of the situation of the parties are applied liberally to insurance policies made in the name of an agent, trustee, etc.: *Insurance Co. v. Boyle*, 21 O. S. 119, III Longsdorf's Notes, 13.

An insurance policy is an exception to the rule excluding parol evidence, where a literal construction would defeat the real intention of the parties and the parol evidence makes it plain: *Walrath v. Insurance Co.*, 16 O. C. C. 413, 9 O. C. D. 233. See also EVIDENCE.

In actions upon contracts of life insurance, the general rule as to declarations made by the deceased are applicable where the policy was held in a mutual benefit society, and oral statements made by the insured with reference to his physical condition prior and subsequent to the time of the filing of his application for insurance, are not competent for the purpose of showing the falsity of the written answers contained in his application: *Daley v. Trainmen*, 7 O. N. P. (N.S.) 238, 19 O. D. (N.P.) 60.

In an action on a policy requiring waiver of conditions to be in writing, parol evidence is not admissible to show that the facts as to title of the property were known to the agent of the insurer when he accepted the application for the insurance, delivered the policy and received the premium: *Agricultural Society v. Insurance Co.*, 9 O. N. P. (N.S.) 49, 19 O. D. (N.P.) 664.

Where in accordance with the terms of the policy, proofs of loss were furnished the underwriters, and at the trial it is shown that notice had been served on them to produce the original proofs of loss so furnished them, but the same are not produced, secondary evidence of their contents, may be admitted: *Gilchrist v. Transportation Co.*, 21 O. C. C. 19, 11 O. C. D. 350.

Where the grand master of a beneficiary society testifies that he knew at the time a certificate was issued that the holder was a saloon keeper (a class of risks forbidden by its constitution), and had been for several years prior thereto, but that he did not know until several months later that the policy was issued to such holder, although signed by him, the part relating to his knowledge when the insured became a member, was properly excluded, as tending to vary and contradict the terms of the policy signed by the witness and upon which the action is based: *A. O. U. W. v. Bunkers*, 3 O. C. C. (N.S.) 256, 13 O. C. D. 487.

D. ADMISSIONS AND DECLARATIONS.

Admissions or declarations made by insured and affecting the policy may be offered in evidence against the beneficiary in an

action on the policy where the insured had the right to change the beneficiary: *Foxhever v. Order of Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56.

An insured's declarations as to the cause of his approaching death, viz., that it was suicide, are not competent against the beneficiary. See report of circuit court recited in *National Union v. Rothert*, 39 Bull. 143.

A coroner's verdict of suicide, if voluntarily furnished as part of the proof of loss, is competent evidence as an admission: *Insurance Co. v. Maguire*, 19 O. C. C. 502, 10 O. C. D. 562.

Where insurance on a man's life is for his wife's benefit, his declarations or letters as to a past state of health are not admissible as against her to show that his application contained false statements. They are hearsay, and not *res gestae*: *Insurance Co. v. Cheever*, 36 O. S. 201, III Longsdorf's Notes, 840, [reversing *Insurance Co. v. Cheever*, 7 Dec. Rep. 254, 2 Bull. 19]; *Insurance Co. v. Reif*, 7 Dec. Rep. 200, 1 Bull. 290, [reversed, on other grounds, *Insurance Co. v. Reif*, 36 O. S. 596, III Longsdorf's Notes, 877].

If a husband having got insurance on his own life for the sole use of his wife afterwards make declarations to the company as to his health, showing that the representations in his application were false, this hearsay evidence is not made competent by the fact of his death, and are not admissible against the wife: *Insurance Co. v. Applegate*, 7 O. S. 292, II Longsdorf's Notes, 298.

An allegation in a petition at law, claiming that acts and conduct before or at the time of the delivery of the policy waived a forfeiture, should be stricken out. Testimony as to such prior acts and conduct may possibly be admissible as tending to prove the probability of subsequent acts. This, however, is a question of the relevancy of evidence for the trial court: *Kehm v. Insurance Co.*, 8 O. N. P. 542, 11 O. D. (N.P.) 739.

E. OPINIONS.

A witness who knows the property well may testify as to its value although he is not an expert: *Insurance Co. v. Bowersox*, 6 O. C. C. 1, 3 O. C. D. 321.

In the trial of an action brought by a trustee appointed by the court against the defendants as members of a co-partnership to collect an assessment made by the court, in which action an issue is joined between the parties as to whether the policy of insurance was held by the defendants as members of the co-partnership, it is error for the court to permit the defendants to state their mere opinions: *Swing v. Rose*, 75 O. S. 355, IV Longsdorf's Notes, 1017.

A non-expert acquaintance can be asked as to the physical condition, as to being well or ill of a person suing a lodge for sick benefits: *Myers v. Lucas*, 16 O. C. C. 545, 8 O. C. D. 431. See also EVIDENCE.

F. CORONER'S INQUEST AND PHYSICIAN'S STATEMENTS.

The finding of a coroner that the assured came to his death from a wound caused by a revolver fired by him with suicidal intent filed by plaintiff with the proofs of death, although not decisive of the manner of the death, is admissible in evidence as admissions on the part of plaintiff as to the death and manner of death of the insured, and as such may be considered by the jury with other facts in evidence to determine how assured came to his death: *Hanner v. Insurance Co.*, 49 Bull. 140, [affirmed, without opinion, *Insurance Co. v. Hanner*, 69 O. S. 568].

The coroner's inquest and testimony thereat offered by the company to show suicide is properly rejected: *Insurance Co. v. Schmidt*, 40 O. S. 112, IV Longsdorf's Notes, 8, [affirming *Insurance Co. v. Schmidt*, 6 Dec. Rep. 901, 8 Am. L. Rec. 629].

Proofs of death containing a physician's statements based entirely on hearsay, which are readily separable from his other statements, being offered by the company to support a defense of suicide, it was held that an instruction to the jury to disregard such hearsay statements is right: *Insurance Co. v. Schmidt*, 40 O. S. 112, IV Longsdorf's Notes, 8, [affirming *Insurance Co. v. Schmidt*, 6 Dec. Rep. 901, 8 Am. L. Rec. 629].

Though the attending physician's declarations to others as to the medicines he gave are hearsay, yet a consulting physician having testified that he recommended continuing the treatment of the other physician, may be asked what that was to test him as an expert: *Insurance Co. v. La Boiteaux*, 5 Dec. Rep. 242, 4 Am. L. Rec. 1.

G. RULES AND RECORDS OF COMPANY.

Rules of the order (as to right to sick benefits, etc.) may be offered in evidence, but not decisions of the order construing the rule, the right being a matter in controversy: *Myers v. Lucas*, 16 O. C. C. 545, 8 O. C. D. 431.

The company's premium rates are not relevant to show complicity of the assured with the agent's fraud in substituting a spurious application, nor to show the company's want of knowledge of the assured's state of health, nor that the contract was inequitable: *Insurance Co. v. Eshelman*, 30 O. S. 647, III Longsdorf's Notes, 554.

A defense to a policy being the non-payment of an assessment the defendant can not prove the assessment orally, but by its records: *Insurance Co. v. Bowersox*, 6 O. C. C. 1, 3 O. C. D. 321.

H. OTHER MATTERS.

G. C., § 11495, providing that a party shall not be permitted to testify where the adverse party claims as heir, grantee, etc., renders incompetent the testimony of a widow who has sued a beneficial order upon a policy of insurance upon the life of her husband; but members of the order are not debarred by this statute from testifying as to matters occurring in the lodge room when the decedent was present: *Foahever v. Red Cross*, 2 O. C. C. (N.S.) 394, 14 O. C. D. 56. See also WITNESSES.

Disagreement as to amount of loss and salvage calls for an appraisal and subsequent action on the policy; it is not competent for the insured to give his reasons why he did not demand an appraisal: *Everett Co. v. Insurance Co.*, 9 O. N. P. (N.S.) 241, 20 O. D. (N.P.) 171, [affirmed by circuit court, without opinion].

Averments in a petition in a suit on a life insurance policy, that the condition as to proof of death was definitely performed on a certain date and that every condition required by the policy was performed, are wholly inconsistent with a subsequent averment that the condition of the policy with reference to proof of death had been waived; and in the absence of any averment of an excuse for non-performance, or any inference to be drawn from the petition that there was such an excuse, evidence could not be offered on the question of waiver: *Menear v. Insurance Co.*, 12 O. C. C. (N.S.) 411, 21 O. C. D. 483.

Although the relations between the insurer and insured are contractual, the courts will not permit accident insurance companies to establish rules of evidence which are wholly at war with the fundamental principles of evidence: *Trone v. Assurance Co.*, 13 O. D. (N.P.) 298.

An employe of the company may testify as to notices sent by him to the assured of the maturity of the premium notes, and also as to the forms of notice in general use by his company at that time after refreshing his memory from the books: *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419.

A defense of suicide by the assured may be established by circumstantial evidence in the absence of direct evidence, and the jury may, in determining such issue, take into account and consider the kind of a man the assured was; his conduct at the hotel where he was

stopping at the time; the situation of the room in which the act occurred; the situation in which he was found, and other facts and circumstances in evidence bearing upon the subject: *Hanner v. Insurance Co.*, 49 Bull. 140 [affirmed, without opinion, *Insurance Co. v. Hanner*, 69 O. S. 568].

In ascertaining the value of a vessel destroyed by fire, to determine the amount of insurance to be paid for its loss, the price at which the vessel was sold prior to its loss is admissible in evidence, but the price asked at the commencement of the negotiations for its sale is not competent: *Gilchrist v. Transportation Co.*, 21 O. C. C. 19, 11 O. C. D. 350.

The receipt of an insurance company for the premium having been offered without explanation in an action on a policy of insurance, stands as *prima facie* evidence of compliance with the conditions of the policy, and a verdict should stand regardless of the question of waiver: *Accident Association v. Harrington*, 10 O. C. C. (N.S.) 134, 20 O. C. D. 612, [vacated, without opinion, *Accident Association v. Harrington*, 80 O. S. 739].

Cross examination of a witness for plaintiff in an insurance case can not go to show incendiarism when no such issue is made: *Phillips v. Insurance Co.*, 13 O. C. C. 679, 6 O. C. D. 266. See also WITNESSES.

Waiver of conditions can not be proved under a plea of performance. Thus in an action on an insurance policy averring performance of all conditions, the plaintiff can not show waiver of immediate notice and proofs of loss: *Insurance Co. v. Baldwin*, 62 O. S. 368, IV Longsdorf's Notes, 836 [reversing *Insurance Co. v. Baldwin*, 17 O. C. C. 143, 9 O. C. D. 118]. See also CONTRACTS.

Where the petition, in an action on a policy of fire insurance, alleges performance of the conditions of the policy, evidence of waiver of conditions by the company is inadmissible, and a reply alleging such waiver is not only a departure, but contains irrelevant facts which should be stricken out on motion: *Kehm v. Insurance Co.*, 12 O. D. (N.P.) 227. See also PLEADINGS.

Where discrepancies appear between the original application for life insurance and the copy of the application which was returned with the policy, and these discrepancies are matters of substance, it is not error to exclude them as evidence, if the court finds that they were of such a character as to afford a reasonable ground for a defense: *Insurance Co. v. Hoffman*, 13 O. C. C. (N.S.) 127, 22 O. C. D. 653, [affirmed without opinion, *Insurance Co. v. Hoffman*, 83 O. S. 477].

An answer in an action on notes given for life insurance, which alleges that (1) the notes were executed on an express agreement that they should be discounted with a cer-

tain brokerage firm of which the insured was a member and brokerage allowed such firm, otherwise the insurance should be void and the policy canceled; (2) that upon notice of failure to carry out said brokerage agreement, the policy was returned to the agent, cancellation demanded and return of the notes requested; and (3) that the insured became the beneficiary of a rebate, which was illegal and contrary to G. C., § 9404, is defective in that it fails to bring the insured within the terms of the statute so as to invalidate the notes or make them fail for want of consideration: *Dailey v. Chappell*, 12 O. C. C. (N.S.) 561, 21 O. C. D. 509.

A wide departure between the calculations made as to profits at the time the policy was taken out and the realization eight years later, constitutes evidence which may be considered by the jury upon the question of the falsity of the representations; and in an action for the recovery back of premiums paid no bar is raised by the provisions of G. C., § 9404, nor by the four-years' statute of limitations where the petition alleges that the plaintiff continued to rely upon the representations in making his quarterly premiums, nor is the claim available to the company that the plaintiff should have read his policy where the falsity of the representations as to profits would not have been revealed by such reading: *Life Assurance Co. v. Statler*, 1 O. C. C. A. 1 [affirmed, without opinion, *Life Assurance Co. v. Statler*, 88 O. S. —].

In an action on a policy of life insurance, failure of the company to plead any of the conditions of the policy as a special defense, renders it doubtful whether the plaintiff would be required to offer any proof in support of an averment or waiver, but would rather be entitled to a judgment on the pleadings: *Insurance Co. v. Shively*, 1 O. C. C. A. 63, 24 O. C. D. 357.

For the general discussion of the subject of evidence, see EVIDENCE.

XXV. CHARGE.

Where it is undisputed that the loss was total, a failure on the part of the court to qualify the definition of "total loss" in the charge to the jury does not constitute error: *Insurance Co. v. McBee*, 12 O. C. C. (N.S.) 228, 21 O. C. D. 469, [affirmed, with opinion, *Insurance Co. v. McBee*, 85 O. S. 161].

A charge of court, which assumes that because a husband acted for his wife in applying for membership for both himself and his wife in a mutual benefit society, any false representations which he may have made with reference to his own age, etc.,

affected equally the membership of his wife, is erroneous: *Schwartz v. Catholic Union*, 9 O. C. C. (N.S.) 337, 19 O. C. D. 471.

Under an averment of performance of all the conditions of a policy it is error to limit a charge requiring such performance by the words "unless you are satisfied that the parties did not know the terms of the policy," the action being to enforce the policy and not to evade it: *Insurance Co. v. Howle*, 62 O. S. 204, IV Longsdorf's Notes, 831.

Where a policy of life insurance has a condition to the effect that the company assumes no obligation unless the insured is at the date of the policy alive and in sound health, and there is an issue as to whether at that time the insured was in sound health, the insurance company is entitled upon the trial to have the jury instructed unconditionally to find for the company in case they find that the insured was not in sound health at the date of the policy: *Insurance Co. v. Howle*, 68 O. S. 614, IV Longsdorf's Notes, 949.

As G. C., § 9391, provides that falseness of answers to interrogatories must be "clearly proved," it is not error to charge that the proof must be "clear and convincing," though it is generally safer to use the words of the statute: *Insurance Co. v. Howle*, 62 O. S. 204, IV Longsdorf's Notes, 831.

Interrogatories as to illness, for submission to a jury, in an action against a life insurance company on a policy which is lapsed and upon reinstatement relative to the illness of the insured preceding such reinstatement without including a definition of sound health or a definition of what constitutes an ailment may be properly refused by the court: *Life Association v. Draddy*, 8 O. N. P. 140, 10 O. D. (N.P.) 591.

Where in an action for recovery for death under a policy of accident insurance containing the provision that the company insures against death resulting from injuries alone, the court charged the jury generally that the plaintiff must show that death resulted from the accident alone, and also charged that the burden was on the defendant to show the specific cause of death to have been other than the accident, the apparent inconsistency is not of such a character as to require a reversal of the judgment: *Insurance Co. v. Leibus*, 8 O. C. C. (N.S.) 201, 18 O. C. D. 700.

A charge to the jury to the effect that if a settlement was procured by fraud or mistake it is not binding upon the plaintiff is erroneous in the absence of an averment to that effect in the pleading: *Casualty Co. v. Jordan*, 17 O. C. D. 696, 3 O. L. R. 133. See also CHARGE OF COURT.

A court is within the law in charging the jury that the act of an insurance company in mailing a policy to its agent, to be by him

delivered to the insured, constitutes delivery to the insured where the first premium has been paid. The contract is consummated by acceptance of the application for insurance, executing the policy and the depositing of it in the mail directed to the agent for delivery to the applicant, and delivery in law becomes complete without actual manual delivery being made: *Insurance Co. v. Shively*, 1 O. C. C. A. 63, 24 O. C. D. 357.

XXVI. JUDGMENT.

The decree of the supreme court, in an action for ouster of the Union Mutual Fire Insurance Company does not bar any stockholder or member from questioning his liability for an assessment or from setting up any other defense: *Swing v. Crane*, 11 O. C. C. (N.S.) 297, 22 O. C. D. 616 [affirmed, without opinion, *Swing v. Crane*, 79 O. S. 461].

The plaintiff below brought an action to recover \$800 on a fire insurance policy on a house which it was claimed was totally destroyed. The defense was that the destruction of the house was partial, not total, and that as the defendant company had demanded of the plaintiff an appraisal of the loss, which demand had been refused by the plaintiff, there could be no recovery. The jury returned a verdict for \$595. There were no special findings of fact. The defendant claiming that the verdict showed a partial loss and therefore the verdict should have been for the defendant, filed three motions—one for judgment *non obstante veredicto*, one in arrest of judgment, and one for judgment. It was held that the remedy of the defendant provided in the code was to file a motion for a new trial, and if the motion was well taken to have a new trial granted; and that the three motions filed by the defendant were unavailing to raise the question it sought to present: *Insurance Co. v. Brown*, 2 O. N. P. (N.S.) 185, 15 O. D. (N.P.) 227.

Where a life insurance company issued in Ohio by the beneficiary of a policy issued and assigned in Michigan to parties still resident there, and where the assignees of such policy have subsequently filed a suit in the federal court in Michigan on such policy, a motion by the insurance company to make the assignees parties to the action will be overruled, for the reason that there can be no injustice in requiring the beneficiary to return to Michigan and litigate in a court of that state her claims against residents of that state with whom she dealt while herself domiciled there, and a motion of the company to dismiss the action in default of an order making the assignees

parties will be granted: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, which was affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

For the general discussion of the subject of judgments, decrees and orders, see JUDGMENT.

XXVII. SUPERINTENDENT OF INSURANCE.

A. POWERS IN GENERAL.

The superintendent of insurance is given wide discretion under G. C., §§ 617, *et seq.*, and no appeal lies from his decision. He may withhold the certificate of authority to carry on business if he thinks that the insurance company, which applies for such certificate is unsound financially: *State, ex rel., v. Moore*, 42 O. S. 103, IV Longsdorf's Notes, 94.

The provisions of G. C., § 625, providing for examination by the superintendent of insurance, of the affairs of any insurance company are for the protection of the public at large, and no insurance company whether created before or since the adoption of the present constitution should be exempt from its salutary provisions: *State, ex rel., v. Insurance Co.*, 50 O. S. 252, IV Longsdorf's Notes, 497 [affirmed, *Insurance Co. v. State*, 153 U. S. 446].

The provisions of G. C., § 665, are reasonable and just, and are adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

The provisions of G. C., § 628, conferring power upon the superintendent of insurance to require unsound companies to restore their capital to the standard required by law, are primarily for the benefit of the public. They confer no powers upon the courts of equity to extend their jurisdiction to wind up the affairs of an insurance company upon the application of policy holders: *Benson v. Life Insurance Co.*, 7 O. N. P. (N.S.) 113, 19 O. D. (N.P.) 17.

Under G. C., § 628, the stock of an insurance company is liable to assessment and stockholders are charged with knowledge of such liability: *Rhodes v. Insurance Co.*, 3 O. C. C. 501, 2 O. C. D. 288 [affirmed, without opinion, *Rhodes v. Insurance Co.*, 27 Bull. 160].

Referred to, as illustrating the proposition that reinsurance under G. C., § 628, is not a *bona fide* debt for taxation purposes, and should not be deducted from credits;

but if the insurance company returns its credits and its liabilities, including reinsurance, and the auditor deducts such reinsurance from such credits, the insurance company has not made a false return: *Insurance Co. v. Cappellar*, 38 O. S. 560, III Longsdorf's Notes, 993.

Mandamus will lie to compel the superintendent of insurance to issue a certificate to a fraternal beneficiary association which has complied with the statutes of Ohio with reference to incorporation: *State, ex rel., v. Lemert*, 10 O. N. P. (N.S.) 133, 21 O. D. (N.P.) 113.

B. POWERS OVER FOREIGN INSURANCE COMPANIES.

If a foreign insurance company furnishes a certificate of valuation made by the commissioner, or the proper state officer of the state under the laws of which such company is organized, the superintendent of insurance in Ohio can not exact compensation for another valuation, although such insurance company has paid such exaction in prior years: *State, ex rel., v. Reinmund*, 45 O. S. 214, IV Longsdorf's Notes, 269.

G. C., § 665, applies to a foreign insurance company, whether it is incorporated or not: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

G. C., § 673, does not exclude a proceeding in *quo warranto* to oust an unauthorized company or association from the privilege of doing business in this state: *State, ex rel., v. Ackerman*, 51 O. S. 163, IV Longsdorf's Notes, 536.

G. C., § 644, does not apply to a contract to recommend a certain insurance agency to prospective applicants for insurance, for a commission on the first annual premium paid: *Connelly v. Pickard*, 4 O. N. P. (N.S.) 294, 17 O. D. (N.P.) 116.

A foreign insurance company, which has an office in this state, is engaged in business here, although it does not contract with citizens of Ohio, or insure their property in this state: *State v. Insurance Co.*, 1 O. C. (N.S.) 4, 14 O. C. D. 387.

XXVIII. APPLICATION OF PROCEEDS OF INSURANCE.

A "mortgage clause" attached to a fire insurance policy at the time the same is executed which clause makes the loss, if any, under the policy payable to the mortgagee, as his interest may appear, is not an assignment of the policy to such mortgagee, and, in the absence of fraud or collusion, he is bound by the award of appraisers, provided for and required by the terms of the policy in the event of a disagreement between the

insured and the insurance company as to the amount of the loss, although the mortgagee was not a party to and had no notice of the appraisal and award: *Brewing Co. v. Insurance Co.*, 81 O. S. 1, IV Longsdorf's Notes, 1055.

A power of attorney to one to control, sell, or otherwise dispose of his interest in a steamboat, not being coupled with an interest, is revoked by the death of the principal. Accordingly, the agent can not consent to an application of insurance money to pay a mortgage on the boat: *McDonald v. Black*, 20 O. 185, I Longsdorf's Notes, 904. See also AGENCY.

A mortgagor's contract to keep the premises insured for the benefit of the mortgagee, gives the latter in case of loss an equitable lien on insurance taken in the mortgagor's name before or afterwards: *Lange v. Grabe*, 11 O. C. C. 171, 5 O. C. D. 148.

Before the debt was due the mortgagee sought foreclosure for breach of a stipulation to keep insurance "in favor of" the mortgagee, failing in which the mortgagee could effect insurance, the expenses thereof to be a lien, and on failure to pay the premiums for thirty days the whole debt to become due. The mortgagor refused to assign his policies and the mortgagee could not procure additional insurance. It was held that there was no breach of this condition until the mortgagee has himself actually procured and paid for insurance: *Lange v. Grabe*, 11 O. C. C. 171, 5 O. C. D. 148. See also MORTGAGES.

The fact that an owner of property damaged by negligence has received indemnity therefor by way of insurance, can not be pleaded as a defense in an action by the owner against the party causing the damage: *Shields v. Traction Co.*, 13 O. N. P. (N.S.) 133.

A mortgagee can not claim the benefit of a policy of insurance effected upon the mortgaged property by the mortgagor. Each has insurable interests, but neither can, as a general rule, take advantage of an insurance effected by the other. The rule is the same, although the policy effected by the mortgagor may contain the words "for whom it may concern," if, at the time, the mortgage upon personal property has not become absolute at law by failure to pay the money: *McDonald v. Black*, 20 O. 185, I Longsdorf's Notes, 904.

Insurance money on property burned after the owner's death is to be distributed as real estate, and, accordingly, is subject to dower: *Fleming v. Jordan*, 11 Dec. Rep. 688, 28 Bull. 332. See also DESCENT AND DISTRIBUTION.

XXIX. CRIMINAL LIABILITY.

A. FIRE INSURANCE.

In an indictment for blackmailing (G. C., § 13384) an averment that A, the defendant, accused B of burning his own building with intent to defraud, is not sufficient to charge the crime described in this section, but it must be averred that the building was insured and that they burned it with intent to prejudice the insurer: *Smith v. State*, 1 O. C. C. (N.S.) 493, 15 O. C. D. 22.

It is not essential to the crime defined in this section that the building be the sole property of the person who burns it, or that the value of his property in it be fifty dollars; it is sufficient if he has an estate in it and that the building be of the value of fifty dollars: *Jones v. State*, 70 O. S. 36, IV Longsdorf's Notes, 968.

A breach of condition which avoids a policy of insurance is a defense to an indictment under G. C., § 12434, there being no insurance on the property at the time of the fire: *State v. Tuttingerding*, 8 Dec. Rep. 74, 5 Bull. 464.

A person, not the owner of the property burned, who aids or abets the owner to commit the crime described in G. C., § 12434, may be indicted and convicted as an aider and abettor: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

An aider and abettor may be prosecuted and convicted, although his principal has not been prosecuted, or having been prosecuted, has been acquitted; but in such case where the crime is one which the aider could not commit as principal, as for example burning the house of another with intent to prejudice an insurer, the evidence must show that the principal was guilty of the crime: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

In such cases the form of the indictment should be such as to charge the defendant as an aider and abettor, and not as a principal. G. C., § 12380, authorizing the prosecution and punishment of an aider and abettor as a principal, does not apply since one other than the owner of the property could not possibly be the principal: *Searles v. State*, 6 O. C. C. 331, 3 O. C. D. 478.

An indictment under G. C., § 12434, averring that the building was insured in a company named, is demurrable, unless it avers that the insurance was against fire: *State v. Calland*, 8 Dec. Rep. 75, 5 Bull. 472; *State v. Yablon*, 11 Dec. Rep. 569, 27 Bull. 324.

Admissions by the principal after the fire that he hired the accused to burn the property, not made in connection with any efforts of the principal to obtain the insurance, are not admissible against the aider and abettor:

Searles v. State, 6 O. C. C. 331, 3 O. C. D. 478.

Where the indictment describes the insurer as a corporation, and on trial the state fails to prove the incorporation, such variance is not fatal: *Evans v. State*, 24 O. S. 458, III Longsdorf's Notes, 185.

A refusal to instruct on behalf of the accused that one employed by an owner of a building to burn it was guilty of no crime, since the burning was with the owner's consent, and that he was therefore interested in procuring the conviction of the owner, is not error: *Evans v. State*, 24 O. S. 458, III Longsdorf's Notes, 185.

The business of writing fire insurance is not included under the provisions of the Valentine anti-trust law, and no recovery can be had thereunder on account of any agreement among fire insurance agents which precludes unrestricted competition: *Foster v. Ankenbauer*, 14 O. N. P. (N.S.) 637, 24 O. D. (N.P.) 70 [*Runck v. Cloud*, 8 O. N. P. 436, 11 O. D. (N.P.) 444, and *State v. Bovee*, 6 O. N. P. (N.S.) 337, 17 O. D. (N.P.) 663, approved and followed; *State v. Ross*, 4 O. N. P. (N.S.) 377, 16 O. D. (N.P.) 704, not followed].

B. LIFE.

An indictment under G. C., § 13144, against one who writes part of a claim for life insurance loss with intent to defraud, lies, although the defendant did not intend to obtain the money for himself, and although the policy was void: *State v. Hoffman*, 1 O. N. P. 290, 2 O. D. (N.P.) 206. See also FALSE CLAIM.

INSURANCE AGENTS.

See INSURANCE.

INSURANCE FUND,
STATE.

See STATE LIABILITY BOARD OF AWARDS.

INSURANCE, SUPERIN-
TENDENT OF.

See SUPERINTENDENT OF INSURANCE.

INTEMPERANCE.

For intemperance, see INTOXICATION; INTOXICATING LIQUOR.

INTENT.

Scope Note.—Includes definition, nature and general illustrations of intent as applicable to particular topics. Excludes detailed consideration of intent as applicable to each specific topic.

Cross References.

- For detailed consideration of intent, see specific topics by name.
- For questions of pleading, see PLEADINGS.
- For averments of intent in an indictment, see INDICTMENT.
- For questions of evidence, see EVIDENCE.
- For presumptions, see PRESUMPTIONS.
- For burden of proof, see EVIDENCE.
- For failure of proof, see EVIDENCE; TRIAL.

ANALYTICAL OUTLINE.

- I. Definition and Nature, 9391.
- II. When Intent Must Exist, 9392.
- III. Legislative Intent, 9392.
- IV. Domicile, 9394.
- V. Civil, 9395.
 - A. Descent, 9395.
 - B. Advancement, 9395.
 - C. Deeds, 9396.
 - D. Dedication, 9396.
 - E. Abandonment, 9396.
 - F. Wills, 9397.
 - G. Charge on married woman's estate, 9398.
 - H. Franchises, 9398.
 - I. Contracts, 9398.
 - J. Waiver, 9399.
 - K. Partnership, 9399.
 - L. Trade-marks and trade names, 9399.
 - M. Fraud, 9400.
 - N. Machinery, safety-devices, etc., 9402.
 - O. Injunction, 9402.
 - P. Subrogation, 9402.
 - Q. Pleading, 9402.
 - R. Evidence, 9402.
- VI. Contempt, 9405.
- VII. Criminal, 9405.
 - A. Homicide, 9405.
 - B. Assault, etc., with intent, 9406.
 - C. Abortion, 9407.
 - D. Burglary, 9407.
 - E. Possession of burglar's tools, 9408.
 - F. Arson, 9408.
 - G. Larceny, 9408.
 - H. Malicious injury, 9408.
 - I. Forgery, 9409.
 - J. Blackmail, 9409.
 - K. Bigamy, 9409.
 - L. Sunday laws and ordinances, 9409.
 - M. Embezzlement, 9409.

N. Evidence, 9410.

1. Degree of proof, 9410.
2. Presumptions and circumstantial evidence, 9410.
3. Similar transactions, 9412.
4. Rebutting evidence, 9413.
5. Sufficiency, 9414.

I. DEFINITION AND NATURE.

"Intent" is a creature of the human mind, conceived in and born of the mind, and is not easy of demonstration or proof except from the acts of the party in whose mind it exists: *State v. Kerlin*, 51 Bull. 317.

Intent or purpose is a question of fact to be determined from all the facts and circumstances in the case: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

The intent essential to constitute a crime, is not necessarily an evil or wrongful intent, beyond that which is involved in the prohibited act. Whatever one voluntarily does, he of course intends; and, whenever the statute has made that act criminal, the party voluntarily doing the prohibited act is chargeable with the criminal intent: *Mitchell v. State*, 21 O. C. C. 24, 11 O. C. D. 446 [affirmed, without opinion, *Mitchell v. State*, 65 O. S. 565].

An honest belief in the legality of an act founded upon a misapprehension of the law does not prevent such act from being a crime: *Gates v. Cleveland*, 11 O. N. P. (N. S.) 545, 21 O. D. (N.P.) 141.

When an act is done purposely, it is done intentionally, and not accidentally or by mischance; it imports an act of the will, and presupposes the free agency of the actor: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975]; *State v. Kerlin*, 51 Bull. 317.

An attempt, when a crime, is not a mere intent to commit without a movement: *Bevington v. State*, 2 O. S. 160, I Longsdorf's Notes, 1036.

The intent is the gist of all crimes; and if circumstances and surroundings show there was no malice, and no intention to do what was actually done, or that the assault was the result of accident or misadventure, or occurred while the defendant was in a state of unconsciousness, there can be no guilt: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common

pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Acts are not criminal unless the intention accompanies the act, either expressly or by necessary implication from the act itself: *Muhlhauser v. State*, 1 O. C. C. (N.S.) 273, 15 O. C. D. 81.

There can be no crime where there is no criminal intent on the part of the accused: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Intention as it relates to trade fixtures does not mean tenant's secret intention but is to be deduced from mode of attachment to the realty, the character of the article and the purpose for which it was put in place: *Distillery Co. v. Miholovitch-Fletcher Co.*, 9 O. N. P. (N.S.) 218, 7 O. L. R. 77.

The purpose and intention of the parties to a transaction should govern and determine its legal effect in the absence of a statute or positive rule of law requiring the contrary: *Goodrich v. Case*, 68 O. S. 187, IV Longsdorf's Notes, 941.

II. WHEN INTENT MUST EXIST.

Fraudulent intent, to be malice, must have existed at the very time of the transaction involved in the indictment. It is not sufficient to show that such intent was subsequently formed and affected later transactions, or the subsequent carrying out of the transaction charged: *State v. Bair*, 50 Bull. 11 [affirmed, *State v. Bair*, 71 O. S. 410, IV Longsdorf's Notes, 984].

To constitute child-stealing under G. C., § 12425, it is essential that intent unlawfully to detain or conceal shall accompany the taking: *Mayo v. State*, 43 O. S. 567, IV Longsdorf's Notes, 183.

III. LEGISLATIVE INTENT.

It is the duty of the courts to enforce plain statutes as they find them: *State v. Borham*, 72 O. S. 358, IV Longsdorf's Notes, 991.

Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning: *Railway v. Naylor*, 73 O. S. 115, IV Longsdorf's Notes, 990.

Where a statute is ambiguous in its terms, common pleas courts have the power to supply the defects by rules duly promulgated and brought to the attention of the members of the bar: *State v. Fronizer*, 2 O. N. P. (N.S.) 476, 15 O. D. (N.P.) 146 [reversed, *Hunt v. State*, 5 O. C. C. (N.S.) 621, 17 O. C. D. 16].

Ground for the construction of a statute by a court exists only when the language to be considered is vague and ambiguous: *Cooper v. Commissioners*, 4 O. N. P. (N.S.) 185, 16 O. D. (N.P.) 638.

The statutes of Ohio are a patchwork, drawn by different persons at different times, and should not be examined for refinements of meaning in seeking to determine what the legislature really meant: *State v. Cooley*, 2 O. N. P. (N.S.) 589, 15 O. D. (N.P.) 393.

Various similar terms used in a statute are presumed to have different meanings and not to include each other: *Cooper v. Commissioners*, 4 O. N. P. (N.S.) 185, 16 O. D. (N.P.) 638.

Where different words are used in a statute, each word should be given a separate meaning if consistent with a fair interpretation: *Gease v. Carlisle*, 15 O. D. (N.P.) 435.

It is the duty of courts to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to every enactment of the general assembly not obnoxious to constitutional prohibition: *Beverstock v. Board of Education*, 75 O. S. 144, IV Longsdorf's Notes, 1014 [affirming *Board of Education v. Beverstock*, 7 O. C. C. (N.S.) 373, 18 O. C. D. 187].

An exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience: *Coal Co. v. Donley*, 73 O. S. 298, IV Longsdorf's Notes, 1003.

Consistency of interpretation of a statute is of first importance and requires the assumption that the legislature knew and took into consideration existing legislation: *Charles v. Fawley*, 71 O. S. 50, IV Longsdorf's Notes, 979.

Terms implied from the express terms of a statute are as much a part of the statute as the express terms themselves: *Railway v. Railway*, 5 O. C. C. (N.S.) 583, 16 O. C. D. 180 [affirmed, without opinion, *Railway v. Railway*, 73 O. S. 364].

If particular words and phrases have acquired a fixed legal significance particularly by statutory usage, it is presumed that the legislature intended such limited meaning and acceptance: *Cooper v. Commissioners*, 4 O. N. P. (N.S.) 185, 16 O. D. (N.P.) 638.

In construing statutes a word is not to be given a limited or specialized meaning until such meaning is made by legislative

enactment: *Venable v. Schafer*, 7 O. C. C. (N.S.) 337, 18 O. C. D. 202.

Where it is apparent that the legislature has enacted laws with reference to a particular city and a particular institution within that city denominated a "university," these laws will be construed as applying to the institution manifestly referred to, notwithstanding it is not, technically speaking, a university, but is a school of a lower grade: *Waddick v. Merrill*, 5 O. C. C. (N.S.) 103, 16 O. C. D. 437.

In the interpretation of G. C., § 10581, to prevent the lapsing of a device or legacy when made "to any child or other relative of the testator if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator," the phrase "other relative" should, in accordance with the maxim *nositur a sociis*, be restricted to relationships of the character indicated by the associated word "child," and regarded as including those which are consanguineous, but excluding those which are affinitive merely: *Schaefer v. Bernhardt*, 76 O. S. 443 [affirming *Bernhardt v. Bernhardt*, 7 O. C. C. (N.S.) 517, 18 O. C. D. 686]; *Porterfield v. Porterfield*, 4 O. N. P. (N.S.) 654, 17 O. D. (N.P.) 448.

Where the mode of performing an authorized act is not prescribed, it is presumed that the legislature intended it to be performed in a reasonable manner not in conflict with any law of the state: *State v. Morris*, 63 O. S. 496, IV Longsdorf's Notes, 861 [approving *Jewett v. Railway Co.*, 34 O. S. 601, III Longsdorf's Notes, 741].

The general assembly will not be presumed to have intended in a statute to abrogate a settled rule of the common law, unless the language used clearly imports such intention: *State, ex rel., v. Fronizer*, 77 O. S. 7, IV Longsdorf's Notes, 1029 [affirming *State, ex rel., v. Fronizer*, 8 O. C. C. (N.S.) 216, 18 O. C. D. 709].

IV. DOMICILE.

Every person must have a domicile somewhere. No person can have more than one domicile at the same time. Every person who is *sui juris* and capable of controlling his personal movements may change his domicile at pleasure. A change of domicile is a question of fact and intention: *State v. Kuhn*, 8 O. N. P. 197, 11 O. D. (N.P.) 321.

To create a change of legal domicile there must be actual residence elsewhere combined with intent to remain: *Greene v. Burkhardt*, 8 O. N. P. 237, 11 O. D. (N.P.) 399.

Intention to acquire a new residence without removal does not work a loss of resi-

dence; nor does removal without intention to change residence: *Hull v. Ernst*, 4 O. L. R. 13, 51 Bull. 30.

A married man's residence is where his family resides, except where husband and wife are separated and live apart. Then the place where they resided at the time of separation is his residence: *Hull v. Ernst*, 4 O. L. R. 13, 51 Bull. 30.

Residence can not be gained by an elector coming into a place for temporary purposes without the intention of making such place his home: *Hull v. Ernst*, 4 O. L. R. 13, 51 Bull. 30.

Removal from a village with the intention of abandoning his residence there disqualifies an elector from voting there; but leaving home for temporary purposes only does not work a loss of residence: *Hull v. Ernst*, 4 O. L. R. 13, 51 Bull. 30.

An elector's residence is that place where his habitation is fixed and to which when absent he intends to return: *Hull v. Ernst*, 4 O. L. R. 13, 51 Bull. 30.

V. CIVIL.

A. DESCENT.

The rule which prevails as to real property, that descent follows the legal title, does not apply to personal property; and where the owner of personal property, intending and desiring that it should descend, according to the provisions of G. C., § 8577, mingles the same in a common fund with property which is specifically within the terms of said section and makes a partial distribution in accordance with such intention and desire, such fund is impressed with a trust that it shall so descend, and upon the death of the owner of such fund will descend according to the provision of G. C., § 8577: *Bruer v. Johnson*, 64 O. S. 7, IV Longsdorf's Notes, 863.

A mistake as to the devolution of property by descent, may be sufficient evidence of an intention to vary the course of descent of personal property: *Bruer v. Johnson*, 64 O. S. 7, IV Longsdorf's Notes, 863.

A mistake as to the course of descent of property even under the advice of counsel is not sufficient indication of intention to vary the course of descent of real property: *Russell v. Bruer*, 64 O. S. 1, IV Longsdorf's Notes, 863.

B. ADVANCEMENT.

The father's intent to defraud his creditors by purchasing property in the name of his child with the father's funds does not rebut the presumption of an advancement to such child, for no trust results to him but

only to the creditors: *Vanzant v. Davies*, 6 O. S. 52, II Longsdorf's Notes, 216.

C. DEEDS.

Whether the language used in a deed creates a reservation or exception from the grant, depends upon the intention of the parties as evinced by a construction of the whole instrument in the light of the circumstances of each case: *Gill v. Fletcher*, 74 O. S. 295, IV Longsdorf's Notes, 1010.

If the true line is certain, an erroneous making of a line or corner by adjoining owners, and acts and declarations induced by such mistake, and fencing in accordance therewith for less than twenty-one years, do not estop in the absence of acquiescence or gross neglect after its discovery: *McAfferty v. Conover*, 7 O. S. 99, II Longsdorf's Notes, 274.

Monuments will not control course and distance if that would pervert the intention manifest in the deed and proceedings; as where the monument is an ideal corner, the deed a sheriff's deed of 40 acres only, the land appraised and sold and described by the courses and distances, but, if the ideal monument controlled, sixty acres would be included: *Spiller v. Nye*, 16 O. 16, I Longsdorf's Notes, 746.

D. DEDICATION.

To show the establishment of a street by a common law dedication, it is essential to prove clearly that the owner of the land intended to donate it for that use, and to prove also an acceptance: *Railroad v. Roseville*, 76 O. S. 108, IV Longsdorf's Notes, 1022.

An intention by a railroad company to dedicate a street is not clearly shown by proof that a way over its tracks and unenclosed lands had been used for about forty years by the public, when during the entire time the way was maintained by the company, and was used by its patrons, and the use by the public was merely permissive: *Railroad v. Roseville*, 76 O. S. 108, IV Longsdorf's Notes, 1022.

E. ABANDONMENT.

The acts and declarations of the parties, taken in connection with the surrounding circumstances, may constitute an intention to abandon the easement for a right of way, which it is sought to protect by injunction: *Manufacturing Co. v. Greenwald Co.*, 5 O. C. C. (N.S.) 37, 16 O. C. D. 556.

A company shutting itself off from access to an easement by structures permanent in their nature indicates an intention to aban-

don: *Manufacturing Co. v. Greenwald Co.*, 5 O. C. C. (N.S.) 37, 16 O. C. D. 556.

The question of the abandonment of property appropriated for public use, is a question of intention: *Railway Co. v. Garlick*, 20 O. C. C. 561, 11 O. C. D. 337.

A railroad company organized under the laws of Ohio, may acquire title to lands within the state for railroad purposes either by grant or proceedings in appropriation, and when the right of way is thus acquired, and the company has constructed its railroad thereon, the same becomes such title to and interest in the lands acquired, that without intending to abandon the same, said company may sell and convey to another corporation for like railroad purposes all, or a part of the premises so acquired. The question of abandonment is one of intention and to be determined from the nature of the conveyance itself and the attending facts and circumstances: *Garlick v. Railway Co.*, 67 O. S. 223, IV Longsdorf's Notes, 929 [distinguishing, *Platt v. Pennsylvania Co.*, 43 O. S. 228, IV Longsdorf's Notes, 163; *Pennsylvania Co. v. Platt*, 47 O. S. 366, IV Longsdorf's Notes, 378].

F. WILLS.

Where a will after its execution remains in the possession of the testator until his death, at which time it is found among his papers with his name erased, the presumption is that the testator erased his name and that he did so with the intention of revoking the will: *Crosby v. Crosby*, 10 O. C. C. (N.S.) 57, 20 O. C. D. 14.

In construing a will, whatever doubt there may be as to the real intention of the testator should be resolved in favor of that disposition of his property which more nearly approaches the disposition which the law would make in the absence of a will: *Hicatt v. Simpson*, 18 O. C. D. 590, 4 O. L. R. 136 [reversed, without opinion, *Hicatt v. Simpson*, 77 O. S. 597; on rehearing, *Hicatt v. Simpson*, 78 O. S. 446].

Where the evidence shows that a testator removed from his will and tore one of its pages, for the purpose of showing the intent with which the page had been removed, it is competent to show that after it had been restored the testator regarded the instrument as his will: *Coghlin v. Coghlin*, 79 O. S. 71, IV Longsdorf's Notes, 1043 [affirming, *Coghlin v. Coghlin*, 9 O. C. C. (N.S.) 385, 19 O. C. D. 251, and approving and following, *Behrens v. Behrens*, 47 O. S. 323, IV Longsdorf's Notes, 375].

It may also be presumed, in construing the will in question, that testatrix intended to bequeath to her husband something of substantial value and the fact that a life estate

in the property first bequeathed, would have been unprofitable and valueless to him, should be considered: *Silk v. Merry*, 3 O. C. C. (N.S.) 91, 13 O. C. D. 218. See also WILLS, LEGACIES AND DEVISES.

G. CHARGE ON MARRIED WOMAN'S ESTATE.

As the law stood in 1876, the ownership by a married woman of separate property when the contract was entered into, was essential to the establishment of an intent to create a charge thereon. Property thereafter acquired did not become bound for the previous engagement, nor did such acquisition give validity to a promise made when the defendant was not the owner of separate property: *Sticken v. Schmidt*, 64 O. S. 354, IV Longsdorf's Notes, 872.

H. FRANCHISES.

If a company is misusing its corporate privileges in such a way as to be a public abuse the writ must issue regardless of the intention: *State v. Investment Co.*, 64 O. S. 283, IV Longsdorf's Notes, 871.

The fact that two railroad companies, operating connecting lines except for a short parallel track constructed and operated by one upon the right of way of the other under an *ultra vires* contract, stipulated in a subsequent contract between them under which the parallel track was taken up, that in event the contract was terminated, the use of the parallel track could be returned to, being a mere intention of possible future action, is neither a ground for forfeiture of its franchise, nor does it change the legal status of the company or affect the validity of the remaining portion of the contract: *Railway Co. v. Railway Co.*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705 [affirmed, without opinion, *Railway Co. v. Railway Co.*, 67 O. S. 523].

A mere intention on the part of a railroad company to violate its public duties, does not change the legal status of the company, or afford ground for the forfeiture of its charter: *Railway v. Railway*, 6 O. C. C. (N.S.) 537, 15 O. C. D. 705 [affirming, *Railway v. Railway*, 1 O. N. P. (N.S.) 577, 15 O. D. (N.P.) 795; affirmed, without opinion, *Railway v. Railway*, 67 O. S. 523].

I. CONTRACTS.

While much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be ex-

cluded: *Gas Co. v. Akron*, 81 O. S. 33, IV Longsdorf's Notes, 1055.

Where it is shown, or admitted, that a party performing services that should have been performed by another, had no intention at the time to claim compensation, and did not expect to receive any from the other, no recovery therefor can be had upon a *quantum meruit* against the party for whom the work was done: *Railway Co. v. Gaffney*, 65 O. S. 104, IV Longsdorf's Notes, 882.

Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered, absolute on its face, was conditional and was not intended to take effect until another event should take place: *Metzger v. Roberts*, 5 O. C. C. (N.S.) 344, 16 O. C. D. 675 [affirmed, without opinion, *Metzger v. Roberts*, 74 O. S. 484].

In the absence of evidence of knowledge on the part of the board of public service that specifications are so drawn as to render competition impossible the court will not impute to such board a willful intention to violate the law and sacrifice public interests: *State, ex rel., v. Miller*, 18 O. D. (N.P.) 218, 5 O. L. R. 260 [affirmed, *State, ex rel., v. Miller*, 10 O. C. C. (N.S.) 406, 20 O. C. D. 460].

J. WAIVER.

The fact that a widow as executrix of her deceased husband's estate, fails to file an account of a claim against his estate or institute proceedings for its allowance and collection, the same being paid by her, raises a presumption that she did not intend to charge it, but intended that it should inure to the benefit of her children, and, in the absence of proof to the contrary, an exception will not be sustained to the inventory of her estate for failure to include such claim among the assets of her estate: *In re Glenn*, 3 O. C. C. (N.S.) 608, 13 O. C. D. 397.

K. PARTNERSHIP.

A partnership may be dissolved by the agreement of the parties, which may be either express, or may be inferred from the acts and conduct of the partners, but a mere intention to dissolve without acts to carry such intention into effect would not end the partnership: *Dun v. Insurance Co.*, 8 O. N. P. 612, 10 O. D. (N.P.) 667 [affirmed, without opinion, *Insurance Co. v. Dun*, 52 O. S. 639, IV Longsdorf's Notes, 584].

L. TRADE-MARKS AND TRADE NAMES.

Where a label or style of package is imitated, it is necessary to show by evidence an

intent to deceive the public and to steal the plaintiff's market. This intent may be shown by proof of actual deception, but it may be inferred from examination of the respective labels. Positive proof of fraudulent intent is not required if the simulation is clearly shown. If the infringing device be such that persons exercising ordinary caution are liable to be misled into purchasing the article bearing the objectionable device when they intend to purchase the other one, an injunction will be allowed: *Medicine Co. v. Glessner*, 68 O. S. 337, IV Longsdorf's Notes, 945.

To obtain an injunction for unfair competition in trade in the selling of an improper and rejected article as the genuine, it is not necessary to prove an intention to mislead: *Light Co. v. Tappehorn*, 2 O. N. P. (N.S.) 553, 15 O. D. (N.P.) 598.

M. FRAUD.

Intention to defraud in case of the disposition of property must be shown. The remedy being an extreme one, the plaintiff must bring his case fairly within the statute: *Hoyman v. Beverstock*, 8 O. C. C. 473, 4 O. C. D. 491; *Bank v. Bethel*, 32 Bull. 135.

Constructive fraud, or that the fact that the transfer has this effect, is not sufficient: *Chamberlain v. Strong*, 3 Dec. Rep. 118, 3 Gaz. 281; *Bank v. Bethel*, 32 Bull. 135; *Bank v. Purcell*, 6 Dec. Rep. 936, 8 Am. L. Rec. 744; *Rolling Mill v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46, 13 Bull. 591 [affirmed, without opinion, by supreme court commission, *Bank v. Purcell*, 11 Bull. 323].

The fraudulent intent to injure or delay the creditor must actually exist to justify an attachment before the debt is due. Merely that such is the necessary consequence of a sale is not sufficient: *Heidenheimer v. Ogborn*, 12 Dec. Rep. 665, 1 D. 351.

An affidavit that defendant is about to sell his goods for the purpose of defrauding plaintiff is bad. Mere selling or intent to sell without implicating circumstances can not be fraudulent: *Mulligan v. Ruggles*, 3 Dec. Rep. 311, 1 Gaz. 157.

Evidence of an insolvent's voluntary conveyance is not alone proof of an intent to defraud creditors, so as to justify attachment, even though it would be set aside on a bill in chancery: *McFarlan v. Mills*, 7 Dec. Rep. 706, 4 Bull. 1064; *Bank v. Purcell*, 6 Dec. Rep. 936, 8 Am. L. Rec. 744 [affirmed, without opinion, by supreme court commission, *Bank v. Purcell*, 11 Bull. 323].

Converting a business into a corporation with the reasonable belief and intent of being better able thereby to provide for creditors is not a fraudulent disposition, although creditors first getting judgment might have

collected in full. And to corroborate such intent, settlement with many creditors on the basis that assets were not diminished by the change of form may be shown: *Beitman v. McKenzie*, 9 Dec. Rep. 241, 11 Bull. 272 [affirmed in district court, *Beitman v. McKenzie*, 9 Dec. Rep. 403, 12 Bull. 321, and in supreme court, without opinion, *Beitman v. McKenzie*, 17 Bull. 405].

Where a failing debtor forms a corporation, composed of himself and certain members of his family, he taking substantially all the stock, and at once conveys all his property to the corporation in exchange for the stock by him taken and for no other consideration; and immediately places all his stock except one share, with certain of his creditors who have knowledge of the facts, as collateral security to their claims; and, as president and general manager, retains control of the property and manages it for his own use and benefit, such a conveyance is a fraud on his other creditors, and may be set aside by a court at their suit, and the property administered for the benefit of all his creditors under the insolvent laws of the state: *Bank v. Trebein Co.*, 59 O. S. 316, IV Longsdorf's Notes, 765.

Becoming incorporated and transferring the assets of the business to the corporation will not sustain an attachment without evidence of fraudulent intent: *Rolling Mill Co. v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46, 13 Bull. 591.

Removal of property will not sustain an attachment unless the intent to defraud creditors is present, and this must be proved by a preponderance of evidence: *McAllister v. Davey*, 5 O. N. P. 274, 7 O. D. (N.P.) 354.

The intention of the purchaser not to pay for goods may be presumed when he has knowledge of his own insolvency and inability to pay for them; and such intention may be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency, but such inference may be rebutted: *Lithographing Co. v. Belford*, 8 O. N. P. 640, 10 O. D. (N.P.) 640 [affirmed, without opinion, *Belford v. Lithographing Co.*, 52 O. S. 668].

Where the vendee of the property of a traction company is a natural person who purchases for himself and others associated with him, and he and his associates afterwards form an incorporated company and after the purchase price is actually paid to the vendor company's treasurer, the latter company at the request of the vendee makes the deed of conveyance directly to the new incorporated company; and some of the stockholders of the vendor company take stock in the new company as well as some money, for the transfer to the purchaser of their cer-

tificates of stock in the vendor company, which are destroyed; and the treasurer of the vendor company distributes to its stockholders the balance of the money so paid to him, after having paid to its acknowledged and listed creditors \$70,000 to discharge their claims leaving unpaid only the plaintiff's unlisted and unliquidated claim finally adjudicated to be \$1,250. It was held that these circumstances are not sufficient to establish a constructive fraudulent purpose of the new company to defeat the vendor's creditors, and thereby avoid the conveyance: *Pfisterer v. Traction Co.*, 89 O. S. ...

N. MACHINERY, SAFETY-DEVICES, ETC.

The provisions of G. C., §§ 8949, *et seq.*, (98 v. 75), relative to automatic car couplers, etc., are civil in their nature, and guilty knowledge and intention are not essential elements of the offense: *State v. Railway*, 7 O. N. P. (N.S.) 571, 19 O. D. (N.P.) 867.

O. INJUNCTION.

The rule that an injunction will not be granted, unless the evidence shows a probability of the defendant doing the act which it is sought to restrain, will be applied on a hearing on demurrer to an answer denying any intention of doing the thing complained of: *Fritter v. Bohl*, 2 O. N. P. (N.S.) 365, 14 O. D. (N.P.) 710.

P. SUBROGATION.

The right of subrogation is not founded on contract but it may be qualified and controlled by express agreement of the parties. Contracts of that nature, like all others, are to be construed and enforced according to the intention of the parties, as derived from the language they have employed: *Lithographic Co. v. Shillito Co.*, 64 O. S. 236, IV Longsdorf's Notes, 870.

Q. PLEADING.

The ground of attachment may be stated in the language of the statute. Intention is a fact and not a conclusion: *Hockspringer v. Ballenburg*, 16 O. 304, I Longsdorf's Notes, 765; *Coston v. Paige*, 9 O. S. 397, II Longsdorf's Notes, 385; *Gans v. Thompson*, 11 O. S. 579, II Longsdorf's Notes, 534; *Emmitt v. Yeigh*, 12 O. S. 335, II Longsdorf's Notes, 567.

R. EVIDENCE.

Where intent is material, it is proper to ask a witness what his intention was with reference to the matter in hand: *Tucker v.*

Hendricks, 2 O. C. C. (N.S.) 122, 15 O. C. D. 426.

The motive or intent of an act may be testified to directly by the person who did the act, as here that a conveyance was in good faith and without intent to defraud creditors: *Coal Co. v. Davenport*, 37 O. S. 194, III Longsdorf's Notes, 905.

The servant may testify that he relied on the foreman's promise to have a defect fixed, and that the effect of the promise was to keep him at work, for a party may testify to his own belief or motives or intentions when in issue: *Stove Co. v. Reep*, 18 O. C. C. 58, 9 O. C. D. 467.

In contesting an attachment issued on the ground of transferring property, the debtor may testify to his intent to put it out of the reach of creditors, for this is a fact, and not a conclusion: *Pierce v. White*, 10 Dec. Rep. 552, 22 Bull. 98.

Parties are presumed to intend the natural consequences of their own acts; and to the extent that an act works a fraud, to that extent a fraud is presumed intended, and need not be proved: *Jamison v. McNally*, 21 O. S. 295, III Longsdorf's Notes, 29.

A person may testify to his own intent, as that delivery of his deed for record was for the grantee's use: *Mitchell v. Ryan*, 3 O. S. 377, II Longsdorf's Notes, 37.

If intent is to be proved, declarations made to the person are admissible. Thus, if a person is run over while on the track waiting for a train, a statement to him when starting from home for the station that the train was fifteen minutes late, made by a messenger whom he had sent to inquire, is competent, not as showing that it was late, but as showing whether false or true that he was on the track on the supposition that it was late: *Railway v. Herrick*, 49 O. S. 25, IV Longsdorf's Notes, 438.

The abandonment or change of domicile is a proceeding of a very serious nature, and an intention to make such a change must be proved by very satisfactory evidence: *State v. Kuhn*, 8 O. N. P. 197, 11 O. D. (N.P.) 321.

A member of a board can not testify as to what is intended to be done by the board, for he can not bind the board. Thus, in fixing damages for a proposed improvement, if following the plans and specifications would obstruct a culvert and thus flood the land, it is error to admit evidence of the officials that they did not intend to do so, but would extend the culvert: *Martin v. Bond Hill*, 7 O. C. C. 271, 4 O. C. D. 591 [affirmed, without opinion, *Martin v. Bond Hill*, 53 O. S. 646].

A member of a board can not testify that the board expect to adopt a grade without

delay: *Feuerstein v. Jackson*, 8 O. C. C. 396, 4 O. C. D. 516.

In an action for false representations by a debtor as to his solvency, inducing plaintiff to compromise a collectible claim, similar false representations to other creditors, known by the debtor to be false, are not competent to prove the representations made to plaintiff, but if the latter are proved *aliunde*, are competent to show the intent: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728.

It would seem that similar representations by a clerk in the debtor's store will be deemed made under instructions and in concert, and are also admissible to show fraud as to the solvency of the debtor: *Edwards v. Owen*, 15 O. 500, I Longsdorf's Notes, 728.

In a suit based on fraudulent representations, made to procure plaintiff to contract, similar representations to others are competent to show only scienter and intent, accordingly, if no knowledge of their falsity in the other instances is shown, they should be excluded: *Insurance Co. v. Wright*, 33 O. S. 533, III Longsdorf's Notes, 687.

To sustain an attachment on the ground of fraud, actual intent to defraud must be clearly shown: *Engineering Specialty Co. v. O'Brien*, 7 O. C. C. (N.S.) 103, 18 O. C. D. 64 [affirming, *Engineering Specialty Co. v. O'Brien*, 2 O. N. P. (N.S.) 550, 15 O. D. (N.P.) 749].

The debtor may show that he had reported the incorporation to a mercantile agency, and noted it on the letter heads to show that he was not concealing the fact: *Rolling Mill Co. v. Packard*, 1 O. C. C. 76, 1 O. C. D. 46, 13 Bull. 591.

Upon the principle that every man is presumed to intend the natural consequences of his own act, strikers who loiter, patrol and picket in the neighborhood of a factory while a strike is in progress will be presumed to do so with intent to intimidate and interfere with other or non-union employees: *Brunsmen v. Atherton*, 12 O. D. (N. P.) 547.

If a libel is ambiguous as to who is intended, a witness, who knows the parties and circumstances, may give their opinion as to who is meant. This is not construing the libel. The defendant can not escape because his ingenuity has prevented any but acquaintances recognizing who is intended: *McLaughlin v. Russell*, 17 O. 475, I Longsdorf's Notes, 823.

It has been questioned whether a witness who heard certain words can be asked what he understood the defendant to mean by them. If the meaning is plain, such evi-

dence is not prejudicial: *Haywood v. Foster*, 16 O. 88, I Longsdorf's Notes, 752.

VI. CONTEMPT.

A court of equity, when called upon to inflict punishment for disobedience to an order of chancery, must consider whether or not the accused had knowledge of the order, or whether, when informed of the order, he could easily have obtained knowledge of its contents, and finally, whether, in furtherance of justice to all concerned an equitable duty was not resting upon those seeking punishment to have given the accused an opportunity to be informed either by notice before the order was obtained or by service of the restraining order itself. This rule does not apply to acts so clearly illegal that a simple notice of the allowance of the restraining order would be notice that the commission of such acts would be summarily punished: *Hunter v. Condron*, 12 O. D. (N. P.) 577.

VII. CRIMINAL.

A. HOMICIDE.

The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural consequences of his act. The purpose or intent to kill in general is proved by the circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life, intent may be presumed: *Carr v. State*, 21 O. C. C. 43, 11 O. C. D. 354.

The term "malice" and "maliciously," as used to define the crime of murder in connection with the term "purposely," signifies that the killing is done unlawfully and intentionally, and without any reasonable provocation, and under such circumstances of cruelty, brutality or wantonness as to show such killing to have been done from the prompting of a wicked and depraved heart, regardless of social duty and fatally bent on mischief: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The term "purposely," as used in the definition of murder in the first or second degrees, means that at the time of doing the act from which death results, there must be a definite purpose and intention actually formed and existing in the mind to do the act, and by means thereof to kill or cause the death of another: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The word "purposely," in G. C., § 12400, used in defining murder in the first degree, means an intent to kill, intentionally and not

accidentally; an operation of the mind, an act of the will, an intention or design to kill: *State v. Oppenheimer*, 49 Bull. 257.

A purpose to kill, or malice, are not essential to constitute the crime of manslaughter: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

Neither purpose to kill, nor malice, is necessary to convict the accused of manslaughter under an indictment charging murder in the first degree by means of poison; and inasmuch as the knowingly giving of poison presumes deliberation, premeditation and malice, the jury need not consider these elements: *State v. Oppenheimer*, 49 Bull. 257.

The supreme court were equally divided as whether intoxication excuses homicide: *Walton v. State*, 1 Dec. Rep. 32, 1 W. L. J. 256.

Intoxication can not be considered in a capital case either as to malice or intent to kill: *State v. Powell*, 1 Dec. Rep. 38, 1 W. L. J. 273.

Drunkenness not amounting to insanity is of little weight in second degree homicide, unless it is so great as to show incapacity to form a purpose, or no intention so to act, or unless it caused or was connected with a sudden quarrel: *Davis v. State*, 25 O. S. 369, III Longsdorf's Notes, 241.

In order to justify a conviction for murder in the second degree, it must be proved affirmatively that the accused "purposely" killed the deceased; to show that he purposely inflicted the wound that caused the death, or that he purposely struck the deceased, from which stroke the deceased died, is not sufficient: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

An intent to kill must be shown beyond a reasonable doubt in a murder case of first or second degree, and the rule applies where the killing is claimed to be accidental, the latter evidence being, in effect, simply to controvert the state's proof of intent: *Jones v. State*, 51 O. S. 331, IV Longsdorf's Notes, 545.

B. ASSAULT, ETC., WITH INTENT.

An indictment for assault with intent to murder, sufficiently describes the intent thus: "With intent in and upon him, the said A B, then and there feloniously, willfully, and of their malice aforethought to commit a murder." The fact that, nothing being charged as to premeditation neither the first nor second degree, as defined by our statute, is

indicated, does not limit the jury to convict. The assault with intent, unlike murder, is a single offense: *Sharp v. State*, 19 O. 379, I Longsdorf's Notes, 883.

Malice is an essential ingredient of assaulting with intent to kill, though not mentioned in G. C., § 12415. Whether had death ensued, and it would have been manslaughter only, and not murder, it would affect the grade of the crime was questioned but not decided: *State v. Stout*, 49 O. S. 270, IV Longsdorf's Notes, 453.

Intent and malice are necessary in malicious shooting with intent to kill or wound, unlike manslaughter; accordingly, a charge to convict if defendant would have been guilty of manslaughter, had death ensued, is error: *Cline v. State*, 43 O. S. 332, IV Longsdorf's Notes, 169.

On a trial for malicious stabbing it is proper to refuse to charge that intoxication may be considered in determining malicious intent. It is only allowed to rebut deliberation and premeditation or an intent requiring nice discrimination, and should go no further: *Nichols v. State*, 8 O. S. 435, II Longsdorf's Notes, 356.

Intoxication is no defense to a crime. It may be proved in some cases to show that no crime was committed, or to reduce the grade of a crime. In shooting with intent to wound, the defendant may show that he was too intoxicated to have such intent: *Cline v. State*, 43 O. S. 332, IV Longsdorf's Notes, 169.

C. ABORTION.

An instruction to the effect that accused is not guilty of causing the death of a woman through an attempted miscarriage if he honestly believed that there was a dead foetus in her uterus, and he administered chloroform as an anaesthetic in order to operate to remove such foetus even if she died as a result of such anaesthetic, would not be erroneous because of failure to provide that the honest belief of the accused must have been based on reasonable grounds, since if there should be a finding that the intent of the accused was not to destroy foetal life but to relieve the patient of a foetus already dead, there would be a failure on the part of the state to prove intent, and the accused would be entitled to an acquittal: *Tippie v. State*, 15 O. C. C. (N.S.) 522.

D. BURGLARY.

Under the burglary law against breaking into a mansion and committing or attempting to commit violence, the intent of the entry is immaterial and need not be averred; if the violence was done or attempted, it

is enough: *Forsythe v. State*, 6 O. 19, I Longsdorf's Notes, 318.

Under an indictment for breaking with intent to steal goods, proof that the intent was not to steal, but to destroy, gambling tools in revenge, does not sustain the charge: *State v. Wilmore*, 9 Dec. Rep. 61, 10 Bull. 321.

E. POSSESSION OF BURGLAR'S TOOLS.

The state is not required to make proof of any specific intention on the part of the accused to use burglar's tools at any particular time, or in any particular manner, or in any particular place, but proof of the general intent to so use them is sufficient: *State v. Hahn*, 8 O. N. P. 101, 11 O. D. (N. P.) 311.

R. S., § 1924 (repealed, 96 v. 96, § 231), for punishing the possession of burglar's tools within a city, must be accompanied with an unlawful intent to use the same to constitute the offense, but such intent will be deemed proved on *habeas corpus*: *In re Wiggins*, 7 Dec. Rep. 708, 4 Bull. 1066.

F. ARSON.

A prisoner is not guilty of arson if the intent is not to burn the jail, but merely to burn a hole for escape. However, he is presumed to intend the result that his act would naturally accomplish: *State v. Nevel*, 2 Dec. Rep. 358, 2 W. L. M. 494.

G. LARCENY.

A custom among contractors to help themselves to each other's material is unreasonable, but in a malicious prosecution is competent as tending to show lack of criminal intent: *Stone Co. v. Mack*, 17 O. C. C. 663, 12 O. C. D. 177.

If defendant took up a check inadvertently, without intent to steal it, and finding he had it, intended to return it or the money, and maintained that intent throughout, and paid out the check in buying goods, intending to return the money, his offense is not larceny, for there is no felonious intent: *Case v. State*, 12 O. C. C. 158, 5 O. C. D. 194.

Felonious intent must accompany the taking. A debtor and creditor disputing as to the amount, and the debtor putting the money on the table on condition a receipt in full is given, and the creditor taking it without signing does not show felonious intent, and the court will order a *nolle prosequi*: *State v. Carmans*, T. 65.

H. MALICIOUS INJURY.

A malicious injury to an animal is penal under G. C., § 13361, though the motive was

not malice or ill will, but a desire for gain by being employed to cure it; although, at common law the only penal motive would have been intent to injure the owner: *Brown v. State*, 26 O. S. 176, III Longsdorf's Notes, 295.

I. FORGERY.

If in a prosecution for forgery an intent to defraud is shown, it is immaterial who was defrauded or intended to be defrauded thereby: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N. S.) 537, 18 O. C. D. 800, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

J. BLACKMAIL.

If the owner of poisoned cattle, honestly demanding compensation, threatens to prosecute criminally if it is not paid, he is not guilty, under G. C., § 13384, of intent to extort; accordingly, the truth of the charge he made may be material in determining his intent, and it is error to charge the contrary: *Mann v. State*, 47 O. S. 556, IV Longsdorf's Notes, 394.

K. BIGAMY.

Absence of criminal intent is a defense. The defendant may show that he believed, and had reasonable ground to believe, that he was divorced, as where he is ignorant and was told by his lawyer that a writing shown him was a divorce: *State v. Stank*, 9 Dec. Rep. 8, 10 Bull. 16.

L. SUNDAY LAWS AND ORDINANCES.

An affidavit charging the accused with violation of a Sunday closing ordinance is insufficient unless it charges knowledge and criminal intent: *Daugherty v. Dennison*, 11 O. C. C. (N.S.) 13, 12 O. C. D. 776 [affirmed, without opinion, *Dennison v. Daugherty*, 59 O. S. 593, IV Longsdorf's Notes, 773].

M. EMBEZZLEMENT.

Where one acting as president and treasurer of a corporation engaged in the brokerage business and shown by the evidence to have been the controlling factor of said corporation, sells the stock of a customer and converts the proceeds to his individual use or the use of the corporation, he will be held to have acted as the agent of said customer, and the intent involved in the wrongful conversion will be regarded as his intent, and an indictment for embezzlement lies against him rather than against the corporation: *State v. Brown*, 15 O. N. P. (N.S.) 65.

N. EVIDENCE.

1. Degree of Proof.

In a trial upon indictment containing two counts, one for assault with intent to rape and the other for assault with intent to rob, the intent is a substantive part of the offense and must be proven beyond a reasonable doubt: *Coles v. State*, 3 O. C. C. (N.S.) 420, 13 O. C. D. 313.

To establish the offense of assault with intent to commit rape, the evidence must show beyond a reasonable doubt that the assault was made with intent to commit rape, against the will of the party assaulted, and to use whatever degree of force might be necessary to overcome any resistance she might make: *Patterson v. State*, 11 O. C. D. 602.

2. Presumptions and Circumstantial Evidence.

Intent though an operation of the mind is to be inferred and deduced from the circumstances under which the act was done: *State v. Holden*, 12 O. D. (N.P.) 91; *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, which was affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975].

The design and purpose of guilt may be determined from all the attending and sustaining circumstances; the manner of inflicting the wounds and the kind of weapon employed: *State v. Strong*, 12 O. D. (N.P.) 701.

Every one is presumed to intend the reasonable, natural and probable consequences of his acts: *State v. Holden*, 12 O. D. (N. P.) 91.

The presumption of an intent to kill from the use of a deadly weapon is not a legal presumption, but a mere argumentative deduction from the facts and does not obtain when other circumstances of the killing are shown, in which such a charge to that effect is error, for then the use of a deadly weapon is merely one of the circumstances and often of little weight, and the jury must be left free to find that the intent was to wound or disable, or that death resulted from accidentally running against the knife while the combat was between others, or that the cutting was done while in great fear and excitement: *Bailus v. State*, 16 O. C. C. 226, 8 O. C. D. 526.

Intent may be shown by proof of the association of the accused with burglars, of his declarations and admissions as to the use of the implements in question, and from other circumstances surrounding the case at the time of his possession of the burglarious tools in question: *State v. Hahn*, 8 O. N. P. 101, 11 O. D. (N.P.) 311.

The intent to use whatever force might be necessary to overcome resistance, may be shown by the conduct and acts of the accused in his efforts to attain his purpose; whatever these may have been at the time of the occurrence, or immediately thereafter, are proper to be considered to determine whether such intent existed in his mind at the time the perpetration of the offense charged was attempted: *Patterson v. State*, 11 O. C. D. 602.

It is a fair inference and presumption that one who intentionally strikes, wounds, etc., with an instrument, and in such a manner as naturally calculated to produce death, intended to kill: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

Evidence tending to show possession by the accused of other burglar's tools not named in the indictment, at another time and place is admissible as tending to show the character of his possession and his knowledge of the tools and implements described in the indictment and of his intent in their possession, and such evidence can only be considered for such purposes: *State v. Hahn*, 8 O. N. P. 101, 11 O. D. (N.P.) 311.

The presumption that one intended the natural and probable consequences of his own act can not be extended in its application to justify a charge to the jury, under an indictment for murder in the second degree, that defendant is presumed to have intended to kill the deceased because he purposely inflicted the act which caused the death: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

The rule that where the killing is unexplained, and there is no evidence except the fact that one has killed another, the presumption is that it was done intentionally, and is murder in the second degree, does not prevail where the facts and circumstances are laid before the jury by one or more witnesses who claimed to have been present at the time of the killing: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

In every case of intentional killing not otherwise explained by circumstances so as to give rise to a reasonable doubt thereof, it is to be presumed that the slayer was actuated by the malice necessary to constitute murder in the second degree. But this presumption does not include the deliberation and premeditation necessary to constitute the crime of murder in the first degree: *State v. Mueller*, 6 O. L. R. 542, 54 Bull. 94.

The law presumes that a rational man, being free to choose and capable of choosing between right and wrong, intends the natural

consequences of his act. The purpose or intent to kill in general is proved by the circumstances, by what the party does and says, the manner of inflicting the wound, the instrument used and its tendency to destroy life; if palpably calculated to take life, intent may be presumed: *Carr v. State*, 21 O. C. C. 43, 11 O. C. D. 354.

A purpose or intent to kill will be presumed if a dose of poison sufficient to kill, was given intentionally, knowing it to be such, to an infant child: *State v. Oppenheimer*, 49 Bull. 257.

A prisoner is not guilty of arson if the intent is not to burn the jail, but merely to burn a hole for escape. But he is presumed to intend the result that his acts would naturally accomplish: *State v. Nevel*, 2 Dec. Rep. 358, 2 W. L. M. 494.

The state is not required to make proof of any specific intent on the part of the accused to use burglar's tools at any particular time, or in any particular manner, or in any particular place, but proof of the general intent to so use them is sufficient: *State v. Hahn*, 8 O. N. P. 101, 11 O. D. (N.P.) 311.

3. Similar Transactions.

Evidence of other offenses is admissible where it clearly appears that a connection between them and the crime charged must have existed in the defendant's mind. The evidence is not to show a probability that he who commits one crime will commit another, but to show motive or purpose: *Brown v. State*, 26 O. S. 176, III Longsdorf's Notes, 295.

To prove conspiracy between persons jointly indicted, evidence that shortly before the crime they were in a conspiracy to commit crimes of like character, is competent: *Tarbox v. State*, 38 O. S. 581, III Longsdorf's Notes, 995.

On trial for obtaining property under false pretenses the state may show similar representations by the accused to others than the prosecuting witness in order to show fraudulent intent: *State v. Finney*, 7 Dec. Rep. 22, 1 Bull. 30.

On trial for uttering forged deeds, other forged deeds, including trust deeds to secure notes found in defendant's possession or shown to have been uttered by him, are competent to show guilty knowledge: *Lindsey v. State*, 38 O. S. 507, III Longsdorf's Notes, 989.

Possession by the defendant of other forged notes running through several months is competent on the question of intent if probably parts of a connected scheme of forgery, by personating another person, and so, though the proof that the other notes were forged, is not

direct; and as such notes would have been competent, parol evidence as to them is also: *Devere v. State*, 5 O. C. C. 509, 3 O. C. D. 249 [affirmed, without opinion, *Devere v. State*, 25 Bull. 435].

Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered or forged, and its issue in connection with other instruments forged by the defendant: *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800 [exceptions overruled, without opinion, *State v. Lingafelter*, 73 O. S. 336, IV Longsdorf's Notes, 1035].

Where a person is accused, and on trial for forgery evidence of other like acts are admissible and may be considered in determining the question of knowledge or intent in the commission of the offense: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800, and exceptions overruled, without opinion, *State v. Lingafelter*, 73 O. S. 336].

Proof of scienter by evidence that the accused or his accomplice in his presence passed another counterfeit is admissible without production of such note if it be out of the jurisdiction and not accessible: *Reed v. State*, 15 O. 217, I Longsdorf's Notes, 705.

In establishing a conspiracy between persons who are jointly indicted evidence may be given of acts committed shortly after the crime for which they are on trial: *Jackson v. State*, 38 O. S. 585, III Longsdorf's Notes, 995.

At the time proof of other similar offenses tending to show the corrupt course of dealing of a public official, is offered in the trial for the solicitation of a bribe, the trial judge should limit its competency to the specific intent, charged in the indictment, and if reference be made thereto in the charge the same limitation should be made by the trial judge: *State v. Davis*, 89 O. S. ...

In proving corrupt intent in the solicitation of a bribe, other similar offenses tending to show the corrupt course of dealing of a public official may be shown as tending to prove the specific corrupt intent charged in the indictment: *State v. Davis*, 89 O. S. —.

4. Rebutting Evidence.

The accused may show good faith and ignorance of facts, which made his acts criminal, to rebut guilty intention in an act in apparent violation of statute, when good

faith is a material element: *Farrell v. State*, 32 O. S. 456, III Longsdorf's Notes, 643.

It is error to charge the jury to the effect that, if the proof shows that defendant "purposely" committed the act, the natural and probable consequences of which was to and did cause the death of the deceased, evidence on behalf of the defendant tending to show that he did not in fact intend to kill the deceased is immaterial: *Munday v. State*, 5 O. C. C. (N.S.) 656, 16 O. C. D. 712 [affirmed, without opinion, *State v. Munday*, 72 O. S. 614].

5. Sufficiency.

Where an act forbidden by law is proved to have been knowingly done, no further proof is needed to warrant a conviction, in the absence of justifying or excusing facts, since the law, in such case, *prima facie* presumes the criminal intent: *State v. Knapp*, 50 Bull. 28 [reversed, *Knapp v. State*, 4 O. C. C. (N.S.) 184, 15 O. C. D. 571, and the judgment of the common pleas affirmed, *State v. Knapp*, 70 O. S. 380, IV Longsdorf's Notes, 975]; *State v. Kerlin*, 51 Bull. 317.

Proof of the single act of forgery charged in an indictment will not of itself warrant the inference of guilty knowledge and intent: *State v. Lingafelter*, 52 Bull. 88 [affirmed, *Lingafelter v. State*, 8 O. C. C. (N.S.) 537, 18 O. C. D. 800, and exceptions overruled without opinion, *State v. Lingafelter*, 73 O. S. 336].

The state is not required to show any specific intent on the part of the accused to use burglar's tools at any particular time, or in any particular manner, or in any particular place, but proof of the general intent to so use them is sufficient: *State v. Hahn*, 8 O. N. P. 101, 11 O. D. (N.P.) 311.

INTENTION.

See CONTRACTS; DEEDS; REFORMATION.

INTENTION OF LEGISLATURE.

See STATUTES.

INTENTION OF TESTATOR.

See WILLS, LEGACIES AND DEVISES.

INTENTION TO RETURN.

See DOMICILE.

**INTER COUNTY HIGH-
WAYS.**See **ROADS.****INTERCOURSE.**For sexual intercourse, see **INCEST; RAPE; SEDUCTION; SEXUAL INTERCOURSE.****INTERESSE TERMINI.**See **LANDLORD AND TENANT.****INTEREST.**For insurable interest, see **INSURABLE INTEREST; INSURANCE.****INTEREST AND USURY.**

Scope Note.—Includes compensation for the use or detention of money at legal rates and at rates higher than those allowed by law; the effect of paying, taking or contracting for such unlawful rate; the validity of such contracts; the rights and liabilities of parties to contracts or judgments bearing interest whether usurious or not; method of computing interest; pleading and proof of usury as a defense; remedies for usury. Excludes rights and liabilities of persons acting in specific fiduciary capacity.

Cross References.For liability for interest on public funds, see also **PUBLIC FUNDS.**For liability of executors, guardians, etc. for interest, see specific topics by name such as **EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES; GUARDIAN AND WARD; ETC.**For interest upon legacies, see also **WILLS, LEGACIES AND DEVISES.**For the allowance of interest as damages, see also **DAMAGES.**For questions arising upon negotiable instruments, see also **NEGOTIABLE INSTRUMENTS.**For questions of estoppel to set up usury, see also **CONTRACTS; ESTOPPEL; VENDOR AND PURCHASER.**For the effect of usury upon a surety upon negotiable bonds, see **BONDS, NEGOTIABLE.**For the effect of usury upon a surety upon negotiable instruments, see **NEGOTIABLE INSTRUMENTS.**For interest upon assessments, see **ASSESSMENTS.**For questions arising on the alteration of instruments, see **ALTERATION OF INSTRUMENTS.****ANALYTICAL OUTLINE.**

- I. Definition and Nature of Interest, 9417.
- II. Definition of Usury, 9419.
- III. Constitutionality of Statutory Provisions, 9419.
- IV. Former Legislation, 9420.
- V. Specific Items Bearing Interest, 9421.
 - A. Debts due on demand, 9421.
 - B. Money due on public contracts, 9422.
 - C. Overdue interest, 9422.
 - D. Executors, guardians and receivers, 9423.
 - E. Interest on public funds, 9425.
 - F. Taxes, 9428.
 - G. Penalties, 9428.
 - H. Advancements, 9428.
 - I. Damages, 9429.
 - J. Other items, 9430.
- VI. Suspension of Interest, 9432.
- VII. Interest on Judgments, 9432.
- VIII. Interest in Advance, 9436.

- IX. Specific Illustrations, 9436.**
 - A. *Exchange*, 9436.
 - B. *Interest in advance*, 9437.
 - C. *Interest on interest*, 9437.
 - D. *Interest payable semi-annually*, 9439.
 - E. *Discount*, 9439.
 - F. *Other disguised forms of usury*, 9441.
 - G. *Contracts held not usurious*, 9443.
- X. Rate After Maturity, 9445.**
- XI. Change of Statute, 9447.**
- XII. Exceptions to Usury Laws, 9448.**
 - A. *Trust company*, 9448.
 - B. *Railway*, 9448.
 - C. *State banks*, 9449.
 - D. *National banks*, 9449.
 - E. *Building and loan associations*, 9452.
- XIII. Estoppel, 9453.**
 - A. *Assumption of debt*, 9453.
 - B. *Judgment as estoppel*, 9454.
- XIV. Conflict of Laws, 9455.**
- XV. Rights Arising on Usurious Transaction, 9457.**
 - A. *Validity*, 9457.
 - 1. *In general*, 9457.
 - 2. *Under contract ultra vires*, 9458.
 - B. *Legal rate only allowed*, 9461.
 - C. *Recovery of usurious payment*, 9464.
 - D. *Usury as penalty*, 9465.
 - E. *Relief in equity*, 9466.
 - F. *Special cases in which usury not available as defense*, 9467.
 - G. *Renewal as payment*, 9468.
 - H. *Computation of interest*, 9470.
 - I. *Application of payments*, 9472.
 - J. *Bona fide indorsee*, 9474.
 - K. *Rights under former statute*, 9475.
- XVI. Parties, 9476.**
- XVII. Pleading, 9478.**
- XVIII. Evidence, 9481.**
- XIX. Review, 9482.**

I. DEFINITION AND NATURE OF INTEREST.

Interest is the compensation which the law allows for the delay in the payment of an obligation after the maturity thereof: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirming, 7 O. N. P. 40, 9 O. D. (N.P.) 607; affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

If interest is contractual in character, and is provided for by the agreement under which the loan is made, payment of the principal and the acceptance thereof by the creditor does not waive the right to recover interest; and if interest is allowed by way of dam-

ages, as incidental to the debt, the acceptance of the principal debt by the party entitled thereto is a waiver of the right to recover interest: *Graveson v. Odd Fellows' Temple Co.*, 4 O. N. P. 112, 6 O. D. (N.P.) 287. See to the same effect, *Electric Co. v. Toledo*, 13 O. D. (N.P.) 137, 47 Bull. 820.

One in whose custody public funds have been placed lawfully has no right or title thereto and can confer none upon others; and the interest which accrues thereon follows the principal as an incident thereto: *Eshelby v. Board of Education*, 66 O. S. 71, IV Longsdorf's Notes, 897; *Glennville v. Engelhart*, 19 O. C. C. 285, 10 O. C. D. 408;

State v. McKinnon, 15 O. C. C. (N.S.) 1, 23 O. C. D. 163 [affirmed, without opinion, *McKinnon v. State*, 87 O. S. 474]. For opinion below, see *State v. McKinnon*, 9 O. N. P. (N.S.) 513, 20 O. D. (N.P.) 300; and *State v. McKinnon*, 11 O. N. P. (N.S.) 165, 21 O. D. (N.P.) 346; *Nicholson v. Maile*, 3 O. N. P. (N.S.) 201, 15 O. D. (N.P.) 682; *State, ex rel., v. Banks*, 7 O. N. P. (N.S.) 43, 19 O. D. (N.P.) 82; *State v. McKinnon*, 9 O. N. P. (N.S.) 513, 20 O. D. (N.P.) 300; *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320; *State v. McKinnon*, 11 O. N. P. (N.S.) 165, 21 O. D. (N.P.) 346.

Interest follows the principal as an incident to it, while it is an incident; but after it is set apart by being carried to the credit of the owner of the principal it is no longer an incident, and is not transferred by transfer of the principal: *Ohio v. Railroad*, 6 O. S. 489, II Longsdorf's Notes, 252.

Unpaid interest can not be the subject of larceny, embezzlement or the obtaining money by false pretenses: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1 [exceptions overruled, *State v. Gibbs*, 82 O. S. 456, exceptions sustained, *State v. Gibbs*, 82 O. S. 462]. See also FALSE PRETENSES.

II. DEFINITION OF USURY.

A contract which is untainted by usury when it is made is not rendered invalid by subsequent receipt and payment of usurious interest thereon: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

A mistake in computation, or a failure to make proper credit of payments without the intention to exact a rate of interest in excess of that fixed by law, does not amount to usury: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

A contract in excess of the rate then allowed by law is usurious, even if by subsequent change of law the rate contracted for is made valid: *Latrobe v. Hulbert*, 6 Fed. 209, 4 O. F. D. 688.

A contract which is not usurious in its inception is not rendered usurious by the subsequent payment and receipt of interest in excess of the rate provided for by law: *Kilgore v. Dempsey*, 25 O. S. 413, III Longsdorf's Notes, 247.

III. CONSTITUTIONALITY OF STATUTORY PROVISIONS.

Statutes on the subject of usury are a valid exercise of the police power; and the legislature has discretion both as to the prohibitions which it may impose upon usury and the exceptions thereto: *Cramer v. Trust Co.*, 72 O. S. 395, IV Longsdorf's Notes, 991;

Building & Loan Association v. Desnoyers, 4 O. C. C. (N.S.) 337, 16 O. C. D. 352.

R. S., § 3836-3 (repealed 99 v. 537, for analogous section see G. C., § 9650), conferring powers on building and loan associations and providing that dues, fines, premiums and other assessments collected shall not be deemed usury, although in excess of the legal rate of interest, is a valid enactment and is not in conflict with Art. II, § 26, nor with Art. I, § 2, of the constitution: *Cramer v. Loan Co.*, 72 O. S. 395, IV Longsdorf's Notes, 991; *Carmichael v. Indemnity Savings Co.*, 15 O. D. (N.P.) 341.

R. S., § 3836-3 (repealed 99 v. 537, for analogous section see G. C., § 9650), exempting building and loan associations from the operation of the usury laws of the state, with respect to loans made to members and depositors, is neither violative of Art. II, § 26, of the constitution which requires all laws of a general nature to have uniform operation throughout the state, nor Art. XIII, § 1, which provides that the general assembly shall pass no special act conferring corporate powers, nor of Art. I, §§ 1 and 2, of the constitution: *Building Association v. Desnoyers*, 4 O. C. C. (N.S.) 337, 16 O. C. D. 352; *Spies v. Loan Co.*, 4 O. C. C. (N.S.) 103, 14 O. C. D. 40 [not following, *Mykrants v. Building Association*, 19 O. C. C. 51, 10 O. C. D. 250].

IV. FORMER LEGISLATION.

For a discussion of the statutes on the subject of interest and usury, which have been in force in Ohio at different times, see *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

If the law of 1795 was lawfully adopted, the English statutes upon the subject of interest and usury were in force here from 1795 to 1799: *Bank v. Swayne*, 8 O. 257, I Longsdorf's Notes, 432.

The general law of Ohio of 1869, allowing a conventional interest of eight per cent. did not enlarge the power of banks restrained to a lower rate by prior special enactments: *Shunk v. Bank*, 22 O. S. 508, III Longsdorf's Notes, 97.

If on a ten per cent. note, under the ten per cent. law, an agent of the payee indorses as credits money in the payee's hands belonging to the payer, the parties on learning this, after the repeal of the law, may substitute a new note in the exact terms of the old, leaving off the credits, and this not being a device the law governing the old note will apply: *Kilgore v. Emmitt*, 33 O. S. 410, III Longsdorf's Notes, 680.

Under the law permitting parties to a writing to stipulate therein for ten per cent. a

separate contract in writing to pay ten per cent. thereafter on certain notes in consideration of forbearance to sue, is valid: *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404 [below, *McGregor v. Mueller*, 13 Dec. Rep. 676, 1 C. S. C. R. 486].

A promise to give time must be so definite as to be enforceable, else the necessary consideration is not shown. Mere payment of ten per cent. for several years, and forbearance to press for payment, does not raise any presumption that the promise was the execution of any contract: *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859.

The written declarations of the payee to the holder, made after he had parted with the note, are not admissible, though he had died, to prove such contract by the maker to pay ten per cent.: *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859.

V. SPECIFIC ITEMS BEARING INTEREST.

A. DEBTS DUE ON DEMAND.

A demand note or accountable receipt is due at delivery or date. Hence interest runs from that time and not from the beginning of action, though there was no other demand: *Darling v. Wooster*, 9 O. S. 517, II Longsdorf's Notes, 395. See also NEGOTIABLE INSTRUMENTS.

Suit was brought on an instrument of the following tenor: "Due H. K., or order, the sum of ninety-two dollars, on demand, value received." There was no averment in the petition, nor proof on the trial, of a demand of payment before suit was brought. It was held that under the statute of 1824, "fixing the rate of interest," the plaintiff was entitled to recover interest from the date of the instrument: *Darling v. Wooster*, 9 O. S. 517, II Longsdorf's Notes, 395.

Recovery of money had and received for plaintiff by defendant bears interest, but if only left with him for safe-keeping, interest does not begin until demand or suit: *Thomas v. Hargrave*, W. 595, I Longsdorf's Notes, 47.

A deposit of money on an express trust to repay it to the owner at the bailee's death does not bear interest meantime: *Kershaw v. Snowden*, 36 O. S. 181, III Longsdorf's Notes, 839.

An attorney who has within a reasonable time duly advised his client of the collection of money is liable for interest only after demand: *State v. Ampt*, 6 Dec. Rep. 699, 7 Am. L. Rec. 469. See also ATTORNEY AND CLIENT.

B. MONEY DUE ON PUBLIC CONTRACTS.

In the absence of a statute requiring it, or a promise to pay it, interest can not be adjudged against the state for delay in the payment of money. The state is not bound by the terms of a general statute, unless it be so expressly enacted: *State, ex rel., v. Board of Public Works*, 36 O. S. 409, III Longsdorf's Notes, 862.

A payment to be made by a municipal corporation to an electric lighting company under a contract bears interest from the time that such payment should have been made by the terms of the contract: *Electric Co. v. Toledo*, 13 O. D. (N.P.) 137, 47 Bull. 820.

When payments are made by the city after default, and such payments are made generally, that is, without any specific application on the principal, and without any receipt for, or discharge of the principal, the company has the right to apply such payments first in discharge of the accrued interest, in the absence of any facts or circumstances showing a waiver by the company of its right to interest. The rule that, where there is no express agreement to pay interest after default and the principal has been paid and accepted in full, interest can not be recovered, does not apply to such a case: *Electric Co. v. Toledo*, 13 O. D. (N.P.) 137, 47 Bull. 820. See also MUNICIPAL CORPORATIONS.

Failure of city officials to make a final estimate on completed work or to take the necessary steps leading up to settlement of the claim of the contractor within a reasonable time, creates liability on the part of the city for interest on the fund so withheld: *Warren Brothers Co. v. Cincinnati*, 7 O. L. R. 542.

Street car license fees imposed by ordinances as a condition on the right to operate, and accepted by the company, are due by contract and not by way of governmental exaction, and hence, if overdue, bear interest: *Cincinnati v. Railway*, 6 O. N. P. 140, 9 O. D. (N.P.) 235.

While a contractor who built sidewalks under a contract with a city under an agreement to accept in payment assessments on the property so improved, is entitled to recover therefor, notwithstanding the assessments are invalid, he can not recover interest thereon during a period in which he neglected to notify the city of the invalidity of the assessments and of his consequent inability to collect thereon: *Burger v. Cincinnati*, 13 O. D. (N.P.) 516. See also ASSESSMENTS.

C. OVERDUE INTEREST.

An action will lie to recover interest due, and in such action interest may be recovered

upon the interest after it becomes due: *Watkinson v. Root*, 4 O. 373, I Longsdorf's Notes, 229.

Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent.: *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285; *Hydraulic Co. v. Chatfield*, 38 O. S. 575, III Longsdorf's Notes, 994.

Unpaid interest can not be the subject of larceny, embezzlement, or the obtaining of money by false pretenses: *State v. Gibbs*, 9 O. N. P. (N.S.) 129, 20 O. D. (N.P.) 1 [see *State v. Gibbs*, 82 O. S. 456].

D. EXECUTORS, GUARDIANS AND RECEIVERS.

A widow or widower is not entitled to interest on the distributive share in personality, because the distributive share can not be known until the amount of personal property subject to distribution has been ascertained and the distributive share computed therefrom: *Hutchings v. Davis*, 68 O. S. 160, IV Longsdorf's Notes, 941 [affirming on this point, *In re Hutchins' Estate*, 21 O. C. C. 720; *sub nomine, In re Davis*, 12 O. C. D. 29].

Money in the hands of an administrator which has yielded him no profit, and which he has not been ordered to pay out, or which is tied up by litigation in good faith, does not bear interest; and this rule is applicable to debts which the administrator owes to the estate, and which is chargeable against him as money in his hands: *James v. West*, 67 O. S. 28, IV Longsdorf's Notes, 923.

If an administrator invests a part of the estate in interest bearing funds or securities, he must account for the interest actually earned: *In re Craig*, 10 O. D. (N.P.) 733.

An administrator will not be charged with interest on money unless he used it or delayed unnecessarily to settle: *Cooch v. Irwin*, 7 O. S. 22, II Longsdorf's Notes, 267.

A guardian is chargeable with interest if he fail to invest the funds productively, for that is an object of his appointment: *Armstrong v. Miller*, 6 O. 118, I Longsdorf's Notes, 327. See also GUARDIAN AND WARD.

The dower of the widow of a decedent includes interest earned by the proceeds of real estate while in the hands of the executor: *Estate of Arnold*, 1 O. N. P. (N.S.) 167, 48 Bull. 929. See also DOWER.

The rule that interest is a compensation allowed by law for delay in payment after the maturity of an obligation, is applicable to legacies, whether vested or contingent; but interest does not accrue on a legacy except from the time it becomes payable under

the will, unless the obligation to pay interest is created by the will, which fact may be shown either by the express terms of the will itself or by implication resulting therefrom: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

An implication that legacies carry interest arises in such cases where the testator stands in *loco parentis*, whereby he is charged with or has taken upon himself the burden of maintenance of the legatee; and in certain cases where the circumstances are such, or it is made necessary by the terms of the will, that a severance of the legacy from the general personal or residuary estate of the testator be had; in the latter cases the legatee is not entitled to the increment or increase that may accrue thereto, after the severance: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

The question of severance of a legacy is to be determined by the intention of the testator as manifested expressly or impliedly in the will, and not by the nature of the estate created, nor by the time of its vesting. The purpose and cause of severance must be considered in determining the question of interest on the legacy, for it is not all cases of severance that will carry interest, even upon express directions to sever: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

If a future or contingent legacy be severed from the rest of the testator's estate merely for the purpose of administration, because the residue is to be paid over at once, it does not change the general rule as to interest on legacies deferred in payment; but if such severance is necessitated by something connected with the legacy itself, this alone is sufficient to make the legacy carry interest from the death of testator or the time of severance. This rule applies as well to a severance made by express direction as to those made by implication: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

Where a legacy is to be divided equally between testator's grandchildren share and share alike, and to be paid to the granddaughter when she is twenty-one and the grandson when he is twenty-four years of age, or if either die before attaining prescribed age, the survivor to take all, or if both die, the legacy shall lapse, the grandson is not entitled to interest on his share from the time that the granddaughter received her share, notwithstanding ten years have intervened between the times of pay-

ment thereof, and notwithstanding all rights of the residuary legatees to the whole fund devised to the grandchildren were gone when the granddaughter became of age. There being no direction to sever this legacy from the residuary estate, nor anything requiring its severance as above stated, interest thereon can not be allowed: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

A legacy is mature in one year, and, hence, bears interest from that time even though the duty to pay is postponed by court: *Webster v. Bible Society*, 50 O. S. 1, IV Longsdorf's Notes, 481. See also WILLS, LEGACIES AND DEVISES.

When it is shown by the evidence that the guardian of an imbecile treated the property of his ward as his own, placed the funds of the ward in bank in his individual name, paid his own debts with said funds and used them in speculation in land, taking the title thereof in his own name, and keeping no account of the trust property as trust property, such guardian will, on accounting in the probate court, be charged with the lawful rate of interest on all the funds which came in his hands from the date of the reception of such funds by said guardian to the date of his accounting: *In re Oliver*, 9 O. N. P. (N.S.) 178, 20 O. D. (N.P.) 64.

Interest should be calculated upon the amount realized by the guardian on the sale of the real estate with annual rests to the date of his death, and thereafter at simple interest without such rests to the rendition of the judgment: *Scissher v. McWhinney*, 64 O. S. 343, IV Longsdorf's Notes, 872.

If all the parties in interest agree to delay the payment of claims by a receiver, pending determination as to what parties are entitled to such payments, interest upon such claims, while in the hands of a receiver, can not be allowed: *Taylor v. Duhme*, 16 O. D. (N.P.) 567, 3 O. L. R. 566.

E. INTEREST ON PUBLIC FUNDS.

Fees, costs and the like collected by a county officer are public funds within the meaning of G. C., § 2977: *State v. Pierson*, 83 O. S. 241.

A public officer who collects interest upon public money which he has deposited unlawfully, and who converts such interest to his own use, is not guilty of embezzlement by reason of the conversion of such interest: *State v. Pierson*, 83 O. S. 241.

A county recorder can not be indicted, under G. C., §§ 12873 and 12875, for embezzlement in converting to his own use interest

received by him on deposits of public money: *State v. Pierson*, 83 O. S. 241.

The treasurer of a school district who, under favor of the proviso of G. C., § 12873, deposits its funds in a bank which allows interest on the average balance of the deposit is required to account to the school district for such interest: *Eshelby v. Board of Education*, 66 O. S. 71, IV Longsdorf's Notes, 897.

Where a treasurer of state loans and deposits the public funds in his custody and receives and converts interest thereon during his official term, a liability for the interest so received is thereby created, enforceable against the obligors upon the official bond: *State v. McKinnon*, 15 O. C. C. (N.S.) 1, 23 O. C. D. 163 [affirmed, without opinion, *McKinnon v. State*, 87 O. S. 474; for opinion below, see *State v. McKinnon*, 9 O. N. P. (N.S.) 513, 20 O. D. (N.P.) 300; and *State v. McKinnon*, 11 O. N. P. (N.S.) 165, 21 O. D. (N.P.) 346].

The settlement with the auditor of state by the treasurer or his legal representative of the amount of the principal fund (not, however, including interest) and the receipt thereof by virtue of said settlement by the successor in the office of treasurer of state do not estop nor prevent the state from recovering the amount of interest received as aforesaid: *State v. McKinnon*, 15 O. C. C. (N.S.) 1, 23 O. C. D. 163 [affirmed, without opinion, *McKinnon v. State*, 87 O. S. 474; for opinion below, see *State v. McKinnon*, 9 O. N. P. (N.S.) 513, 20 O. D. (N.P.) 300; and *State v. McKinnon*, 11 O. N. P. (N.S.) 165, 21 O. D. (N.P.) 346].

A treasurer is as much bound to account for the interest earned by public funds coming into his hands as he is to account for the principal itself: *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320.

Inasmuch as the increment follows the principal, a treasurer is as much bound to account for the interest earned by public funds coming into his hands as he is to account for the principal itself. The fact that such interest was earned by the unlawful deposit of public funds in different banks does not bar recovery on the bond of the treasurer for the amount of interest so received: *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320.

An action by the state on relation of the prosecuting attorney against a county treasurer and his bondsmen, for recovery of interest on public funds illegally deposited by the treasurer in various banks, is subject to the ten years provision of the statute of limitations: *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320.

The fact that the treasurer and some of his bondsmen are deceased, and no claim on account of interest earned by public funds coming into his hands was made to their administrators within eighteen months, is not a bar to recovery on the treasurer's bond: *State, ex rel., v. Schott*, 9 O. N. P. (N.S.) 522, 22 O. D. (N.P.) 320.

Where a county treasurer without authority under the depository law, deposits the public funds with a bank which receives the funds with full knowledge of their character, and loans the same at interest, such bank will be required to account to the public for the interest so received. The prosecuting attorney has authority to bring the action requiring the banks to account for, and restore such interest: *State, ex rel., v. Banks*, 4 O. N. P. (N.S.) 245, 16 O. D. (N.P.) 730.

The plaintiff sued for an accounting for interest on public funds deposited by different county treasurers and used by the bank during the period from and after June 1, 1891. It was held, first, the bank records show payments of interest by the bank on all public funds held by it from and after September, 1906, and no evidence having been offered by the relator to the contrary, there can be no recovery of further interest for that period; and, second, as to deposits held prior to that period, the bar of the six years statute of limitations can not be avoided by the allegation contained in the reply of the relator that possession of public funds by the bank was unknown as a matter of public record or account, or as a fact by any public officer except the several county treasurers: *State, ex rel., v. Bank*, 22 O. D. (N.P.) 113, 7 O. L. R. 432 [affirmed, *State, ex rel., v. Bank*, 13 O. C. C. (N.S.) 543, 22 O. C. D. 496; which was affirmed, without opinion, *State, ex rel., v. Bank*, 86 O. S. 305].

An action may be maintained by the prosecuting attorney for recovery from a bank of interest on public funds deposited therein, whether so deposited lawfully or otherwise: *State, ex rel., v. Bank*, 13 O. C. C. (N.S.) 543, 22 O. C. D. 496 [affirming *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 81, 19 O. D. (N.P.) 837; and *State, ex rel., v. Bank*, 22 O. D. (N.P.) 113, 7 O. L. R. 432; affirmed, without opinion, *State, ex rel., v. Bank*, 86 O. S. 305].

The object of the statute which forbids public officers to lend or invest public funds (see G. C., § 12873), is to safeguard the public money by keeping it in the custody of the public officer; and not to secure for the public any profit or interest which it might derive from the use of it: *State v.*

Newton, 26 O. S. 265, III Longsdorf's Notes, 304; *State v. Pierson*, 83 O. S. 241.

If a judgment has been recovered against a county treasurer for interest unlawfully collected by him personally from a bank in which he had unlawfully deposited funds, and such judgment is satisfied, such judgment is a bar to a subsequent action by the state against the bank by which such interest was paid: *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 81, 19 O. D. (N.P.) 837.

The right of action of the state against a bank to recover interest upon funds unlawfully deposited in such bank by the county treasurer is not barred by the lapse either of one year or of four years: *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 81, 19 O. D. (N.P.) 837.

F. TAXES.

A judgment in a suit brought for the recovery and enforcement of a lien for taxes against real estate bears interest from the time it was rendered until it is paid: *State, ex rel., v. Parker*, 2 O. C. C. (N.S.) 38, 15 O. C. D. 237.

In the absence of a statutory provision, taxes do not bear interest until a judgment thereon has been rendered: *Railway v. Wolfe*, 13 O. C. C. 374, 7 O. C. D. 201.

When the law fixes the rate of interest which is to be charged on the annual installments of a sewer assessment at six per cent., the abutting property owner will not be heard to complain that the city is paying only four per cent. on the bonds issued to pay for the sewer: *Stanley v. Cincinnati*, 13 O. D. (N.P.) 223. See also ASSESSMENTS.

G. PENALTIES.

A statutory penalty does not bear interest until it is reduced to judgment: *Railway v. Furnace Co.*, 49 O. S. 102, IV Longsdorf's Notes, 444.

A penalty imposed upon a national bank for receiving usurious interest does not itself bear interest until it has been reduced to judgment: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

H. ADVANCEMENTS.

Payments or loans which a testator has by his will authorized trustees to make to his sons are in the nature of advancements in anticipation of the final division of the estate, and are not intended to bear interest: *Hosmer v. Sturges*, 31 O. S. 657, III Longsdorf's Notes, 616.

A debtor heir, who makes claim on distribution, is required to account to the estate for the debt he owes, and the amount he is

to receive will depend upon the result of the accounting; if his debt is evidenced by promissory notes, they may in a suit for partition be regarded as advancements, and interest upon them can only be computed up to the date of the death of the ancestor: *Tobias v. Richardson*, 5 O. C. C. (N.S.) 74, 16 O. C. D. 81.

Money was received by two heirs from the ancestor, which was evidenced by the separate note of each; one of the notes became due before, and the other one after the ancestor's death, the former subsequently becoming barred by the statute of limitations; both heirs had the right to have an administrator appointed, to whom they could and should have paid their notes before either became barred, but both failed to discharge these duties; the estate, which consisted entirely of real estate except the two notes in question, was held in common by all heirs for several years. In an action for partition, it was held that the money received by the two heirs would be held to be advancements, and under G. C., § 8587 (there being no personality), would be equalized among all the heirs with reference to the real estate as a fund; and the amount thereof, with interest to the ancestor's death, would be charged against and deducted from their respective interests in the fund which they otherwise would have inherited: *Tobias v. Richardson*, 16 O. C. D. 81. See also ADVANCEMENTS.

I. DAMAGES.

In an action for injury to real property caused by the negligence of a municipal corporation in allowing water to escape from a sewer, and to undermine the plaintiff's property, interest upon the amount of damages from the time of the injury up to the time of the verdict may be allowed: *Toledo v. Grasser*, 12 O. C. C. 520, 6 O. C. D. 782.

Interest may be allowed upon a verdict from the time that it is rendered until the time that judgment is entered: *Griffith v. Railroad Co.*, 44 Fed. 574, 6 O. F. D. 666.

If overdue installments of rent bear interest, such interest is an incident of such rent as damages for delay; and the receipt of the principal without interest operates as a waiver of such interest: *Thomas v. Railcay*, 81 Fed. 911, 10 O. F. D. 544.

It is not competent, in rendering judgment for the value of goods unlawfully seized by an officer, to order that it bear interest after its rendition at a rate exceeding six per centum: *Calahan v. Babcock*, 21 O. S. 281, III Longsdorf's Notes, 28.

In an action to recover injury to land caused by placing slack so that it washes

upon the land of the plaintiff, interest upon the amount of the damages from the date of filing of the petition may be allowed: *Coal & Mining Co. v. Williams*, 7 O. C. C. (N.S.) 293, 18 O. C. D. 388.

Interest may be included in a verdict for damages for a tort: *Railroad Co. v. Cobb*, 35 O. S. 94, III Longsdorf's Notes, 760.

Interest in an action of tort for the destruction of property may be added by the jury to its value: *Hogg v. Canal Co.*, 5 O. 410, I Longsdorf's Notes, 296.

The value of a horse negligently killed having been agreed on, the plaintiff is entitled to interest thereon from the date of killing: *Railroad Co. v. Schultz*, 43 O. S. 270, IV Longsdorf's Notes, 165.

When the breach of a contract consists in the failure to pay money, interest is allowed as compensation because, according to common understanding, it actually represents the value of the use of the money: *Manufacturing Co. v. Iron Works Co.*, 68 O. S. 229, IV Longsdorf's Notes, 942.

In an action against the bailee for illegally selling the property, and if, on the bailor's motion, the bailee pays the proceeds into court, and part is then paid to the bailor, and the balance, by agreement, is left to abide the litigation, the proceeds are treated as in place of the property, and the bailor has waived any damages by the conversion in excess thereof. If the balance is put in the bailee's hands he must pay interest: *Crigler v. Gaff*, 8 Dec. Rep. 278, 7 Bull. 17. See also BAILMENT.

Interest is a necessary incident to compensatory damages for a tort causing loss of property or the use of it: *Cincinnati v. Whetstone*, 47 O. S. 196, IV Longsdorf's Notes, 365.

In deceit for representing valueless bonds to be of a stated value, the jury having found the whole amount without interest for the plaintiff, it is error to require them to add interest, for this is discretionary with the jury in torts: *Floyd v. Paul*, 6 Dec. Rep. 1185, 12 Am. L. Rec. 231, 10 Bull. 14. See also DAMAGES.

J. OTHER ITEMS.

G. C., § 8305, does not control the time at which a legacy will bear interest, but merely the rate; and a legacy bears interest at the expiration of one year from the date of the notice of the appointment of the executor: *Gray v. Case School*, 62 O. S. 1, IV Longsdorf's Notes, 821 [affirming *Case School v. Gray*, 15 O. C. C. 488, 8 O. C. D. 241].

A legacy payable to a grandson of the testator when he shall reach the age of

twenty-four does not bear interest until, by the terms of such will, it is due and payable: *Langhorst v. Ahlers*, 12 O. D. (N.P.) 405 [affirmed, without opinion, *Langhorst v. Ahlers*, 65 O. S. 600].

G. C., § 8305, does not provide for interest which may be charged upon a loan before maturity; and accordingly it does not prevent a national bank from charging interest in excess of six per cent.: *La Dow v. Bank*, 5 O. C. C. 147, 3 O. C. D. 75 [affirmed, *La Dow v. Bank*, 51 O. S. 234, IV Longsdorf's Notes, 540].

A loan company which has entered into an agreement to pay the balance due upon mechanics' liens must pay interest thereon from the time that the holders of such liens were entitled to the payment of their claims: *McMullen v. Griggs*, 3 O. C. C. (N.S.) 504, 13 O. C. D. 417.

Monthly wages, or salary, if payable monthly, may bear interest on each monthly installment: *Coal and Oil Co. v. Verner*, 22 O. S. 372, III Longsdorf's Notes, 82.

A garnishee is not necessarily nor presumptively released from interest on his debt pending the proceedings, but must prove a cause of exemption: *Candee v. Webster*, 9 O. S. 452, II Longsdorf's Notes, 390.

A garnishee is not chargeable with interest on the money garnished if he is holding it for the one entitled without getting any benefit himself: *Railway v. Wood*, 1 O. N. P. 198, 2 O. D. (N.P.) 144.

Where default is made under an order for the payment of money into court, interest will run upon the amount so retained: *Melanpy v. Building Co.*, 13 O. D. (N.P.) 192.

A village interpleading lienholders and claimants on money due for a street-building contract, but not bringing the money into court, is chargeable with interest on it: *Port Clinton v. Stone Co.*, 10 O. C. C. 1, 6 O. C. D. 218.

If the owner, as defendant, interpleads the lienholders, but does not bring in the fund, he is chargeable with interest on it: *Hardware Co. v. Slade*, 3 O. C. C. 67 2 O. C. D. 38. See also INTERPLEADER.

Where a creditor of the assured notified a life insurance company not to pay on a policy, and thereupon the assured and the creditor agree that the company shall hold back part to abide the litigation, the company is not relieved from paying interest thereon: *Bonner v. Insurance Co.*, 8 Dec. Rep. 697, 9 Bull. 219.

Where a purchaser of real estate goes into possession and enjoys the rents and profits during a period of several months while the title is being perfected, he is liable for interest on the purchase money from the time of going into possession until the delivery of

the deed: *Carey v. Taylor*, 8 O. C. C. (N. S.) 198, 18 O. C. D. 667.

Where interest is allowed, not as a part of the contract but as an incident and by way of damages for the default, if the principal has been paid and received in full no action can be maintained to recover the interest: *Electric Co. v. Toledo*, 13 O. D. (N.P.) 137, 47 Bull. 820.

Interest will not be allowed on arrears of alimony if the wife has violated the order of the court and taken the child in disobedience of the order of the court, and her husband has not known of the place to which she has gone; but interest will be allowed only from the entry of the decree in the supreme court: *James v. Tower*, 87 O. S. 462.

VI. SUSPENSION OF INTEREST.

In attachment proceedings, the garnishee is not, during the pendency of the same, thereby necessarily exempted from an existing liability to pay interest upon his indebtedness to the defendant in attachment: *Candee v. Webster*, 9 O. S. 452, II Longsdorf's Notes, 390.

Where the grantee of land holds the purchase money in his hands after it becomes due by agreement with the grantor, to indemnify himself from loss by reason of an incumbrance on the land, and enjoyment of the rents and profits thereof until the incumbrance is removed, he holds the amount due to the grantor as his trustee, and if he uses the money for his own benefit, he is chargeable with interest on the money from the time it becomes due until paid: *McCrea v. Martien*, 32 O. S. 38, III Longsdorf's Notes, 619.

If a vendor who has given a valid option upon certain realty refuses to accept the amount named in such option upon tender thereof, he will not be allowed interest on the purchase price after the time of such tender: *McIlrath v. Zelazny*, 12 O. N. P. (N.S.) 538, 22 O. D. (N.P.) 173.

VII. INTEREST ON JUDGMENTS.

If a judgment was rendered upon a note which bore interest at the rate of ten per cent., when such rate was authorized by law, such judgment would bear interest at the rate of ten per cent.: *Hydraulic Co. v. Chatfield*, 38 O. S. 575, III Longsdorf's Notes, 994.

A judgment upon a note which bears interest at the rate of seven per cent. per annum, payable quarterly, bears interest at the rate of seven per cent, without rests until such judgment is paid: *Iron Works v.*

Lottimer, 25 O. S. 621, III Longsdorf's Notes, 272.

A judgment upon a note which bears interest at four per cent., bears interest itself at such rate of four per cent. until such judgment is paid: *Pugh v. Building Association*, 1 O. N. P. (N.S.) 259, 14 O. D. (N.P.) 32.

Interest on a judgment rendered in this state, on an obligation made and entered into in another state, bears interest according to the law of this state: *Neil v. Bank*, 50 O. S. 193, IV Longsdorf's Notes, 494.

Land was sold by a written contract which provided that the purchase money should bear interest at the rate of five per cent., and that the installments of the purchase money, when paid in, should be applied to a mortgage on such property, which bore interest at the rate of ten per cent. By consent of the parties, judgment was rendered for the amount due on the purchase price with ten per cent. interest. Such decree does not bear interest at any rate exceeding six per cent.; and ten per cent. can not be awarded thereon: *Emmitt v. Penisten*, 33 O. S. 380, III Longsdorf's Notes, 678.

Where a particular fund is paid into court in compliance with its order of interpleader, and various claimants litigate between themselves as to their rights to the fund, a decree distributing the fund will not bear interest, and an intervening claimant who prosecutes error to the decree in good faith, and gives a supersedeas bond to stay execution can not be compelled, in a suit of the bond, to pay interest on the fund or any part of it: *Bank v. Bruns*, 84 O. S. 12.

In an action to recover the amount of a judgment theretofore rendered, the plaintiff is entitled to recover interest upon the costs adjudged to him, from the date of the original judgment to the time of recovery: *Emmitt v. Brophy*, 42 O. S. 82, IV Longsdorf's Notes, 91.

A judgment which has been modified by a reviewing court draws interest on the amount found due as modified from the date of the entry of the original judgment: *Hamilton v. Railroad*, 11 O. N. P. (N.S.) 437, 22 O. D. (N.P.) 80.

A judgment in a suit brought for the recovery and enforcement of a lien for taxes against real estate bears interest from the time it was taken until it is paid: *State v. Parker*, 2 O. C. C. (N.S.) 38, 15 O. C. D. 237.

That a judgment as modified on error bears interest from its rendition, and thus compounds, is no objection to modifying it. That is always the case where affirmed in part: *Railroad Co. v. Furnace Co.*, 37 O. S. 434, III Longsdorf's Notes, 926.

An injunction against collecting more than \$450 of a judgment leaves \$450 of the original judgment to be collected, and interest thereon therefore runs from the date of judgment and not from the injunction: *Copeland v. Reese*, W. 728, I Longsdorf's Notes, 57.

A judgment for the value of goods unlawfully seized can not be rendered to bear interest thereafter in excess of six per cent. But the judgment will not be reversed, but modified only, at costs of the defendant in error: *Calahan v. Babcock*, 21 O. S. 281, III Longsdorf's Notes, 28.

When judgments bore but six per cent., a note for more being reduced to judgment is merged, and in a proceeding thereafter to subject premises mortgaged to secure the notes the decree must be for the amount of the judgment and interest thereon at six per cent. only: *Bank v. Kelley*, 14 O. S. 367, II Longsdorf's Notes, 666; and see *Bank v. Durbin*, 2 Dec. Rep. 372, 2 W. L. M. 543.

Interest on an award or a verdict should be added in making up the judgment if delayed: *Sproat v. Cutler*, W. 157, I Longsdorf's Notes, 15.

A term in a submission to arbitration, that the arbitrator shall compute interest at ten per cent. on whatever is due on a matured ten per cent. note is not usurious, for it is not for the forbearance of money, and the award thereon is valid: *Rice v. Hassenpflug*, 45 O. S. 377, IV Longsdorf's Notes, 282 [affirming *Hassenpflug v. Rice*, 9 Dec. Rep. 206, 11 Bull. 200].

A judgment under the ten per cent. law for principal and ten per cent. accrued interest may provide that the whole shall bear ten per cent. interest, instead of only six per cent. on the accrued interest. But if not, the error is not a clerical one, and can not be corrected after twenty-five years. If subject to proceedings to vacate at a subsequent term, and limitation has not been pleaded, yet the claim is stale and can not be allowed at or after the hearing: *Campbell v. Campbell*, 3 O. C. C. 449, 2 O. C. D. 256 [see supreme court proceedings, *Campbell v. Campbell*, 25 Bull. 283 and 435].

Rests are not allowed in interest on judgments, though payable quarterly in the note: *Stuart v. Day*, 2 Dec. Rep. 477, 3 W. L. M. 214.

If a note bears five per cent. a judgment on it will bear only the same, though *contra*, but for our statute: *Sutton v. Kautzman*, 6 Dec. Rep. 910, 8 Am. L. Rec. 657.

No entry in the journal is necessary to make a judgment bear the interest called for in the note sued on above six per cent. if the record shows that fact: *Fish v. White*, 2 Dec. Rep. 141, 1 W. L. M. 520.

Interest on judgments in actions brought before the term should be counted to the first day of the term, and on confessed judgments and in actions brought during the term up to date of entry, and the judgments carry interest from those dates respectively: *Kimball v. Connally*, 2 Dec. Rep. 113, 1 W. L. M. 402.

Compound interest by allowing interest up to the time of judgment upon a verdict which contains interest must be disallowed and remitted: *Rosenbaum v. Pendleton*, 7 O. N. P. 364, 9 O. D. (N.P.) 642.

When the supreme court modifies the judgment of the circuit court, assessing the liability of a stockholder by finding that he owed fewer shares than assessed for, the trial court, upon ascertaining the proper amount of the judgment by apportioning the original judgment must allow interest on the new amount from the date of the original judgment, like an excessive judgment rendered by mistake or like an aggregate judgment on separate demands: *Hamilton v. Railway*, 7 O. N. P. 566, 9 O. D. (N.P.) 642.

Where a lessor refuses to accept payment tendered to him on a privilege of purchase in the lease, he can not have interest on the court's compelling him to convey, the other party having been at all times willing to perform: *McIlrath v. Zelazny*, 12 O. N. P. (N.S.) 538, 22 O. D. (N.P.) 173.

Judgments did not bear interest at common law; and they bear interest in Ohio only when there is some statutory provision to that effect: *Iron Works Co. v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272; *Neil v. Bank*, 50 O. S. 193, IV Longsdorf's Notes, 494; *Bank v. Brun*, 84 O. S. 12.

Where the defendant garnishee consents that judgment shall be rendered against him without waiting for the discharge of the attachment, judgment will be entered notwithstanding the premature filing of the suit, but will not include interest where the question of the liability of the defendant for interest is controverted: *Bank v. Mining Co.*, 11 O. N. P. (N.S.) 108, 22 O. D. (N.P.) 759.

Where no other error appears, a reviewing court will in such a case modify the judgment as entered by deducting the interest added thereto: *Niebling v. Laidlaw*, 12 O. C. C. (N.S.) 463, 22 O. C. D. 371.

In an action on a judgment the plaintiff is entitled to interest on the costs adjudged to him from the date of the original judgment: *Emmitt v. Brophy*, 42 O. S. 82, IV Longsdorf's Notes, 91. See also *Costs*.

Where damages for a street improvement are assessed after completion of the improvement, the judgment bears interest from its rendition, and if all is paid except inter-

est, a separate action lies for the interest: *Toledo v. Scott*, 23 Bull. 238. See also *MUNICIPAL CORPORATIONS*.

A bond executed under the requirements of G. C., § 12269, providing for the immediate collection of judgments in certain classes of cases, should require payment of interest on the amount it is sought to collect, in the event of its becoming necessary to make restitution: *Haunts v. Lamman Co.*, 2 O. N. P. (N.S.) 405, 15 O. D. (N.P.) 64. See also *ERROR*.

VIII. INTEREST IN ADVANCE.

The receipt by the holder of a promissory note past due, of interest to a date fifteen days subsequent to such payment, and the indorsement of such payment upon the note, is evidence competent to be received in support of a claim of a contract to extend the time of payment of the note, but does not imply such contract as matter of law; and where the person who made the payment testifies at the trial to the transaction of payment, and is silent as to any request for extension and any agreement to extend, and the recipient of the money on the witness stand denies that any such request or agreement was made, a finding by the jury in favor of the claimed extension, should be set aside as not supported by the evidence: *University v. Manning*, 65 O. S. 138, IV Longsdorf's Notes, 883.

A share in a college, "drawing an interest at six per cent.," expresses no time at or for which interest is to be paid before maturity, and none will be implied. If parties wish interest before maturity they must so stipulate: *College v. Rosenthal*, 45 O. S. 183, IV Longsdorf's Notes, 268.

IX. SPECIFIC ILLUSTRATIONS.

A. EXCHANGE.

It is not usury to charge the market rate for exchange: *Creed v. Bank*, 11 O. 489, I Longsdorf's Notes, 588; *Kilgore v. Dempsey*, 25 O. S. 413, III Longsdorf's Notes, 247; *Bank v. Brashears*, 12 Dec. Rep. 578, 1 D. 207.

A borrower here in remitting interest to the lender in another state by purchasing exchange thereon at his option at a premium does not thereby render the contract usurious: *Kilgore v. Dempsey*, 25 O. S. 413, III Longsdorf's Notes, 247.

A deduction of current exchange in addition to interest in the purchase of a draft by a bank is not usury where the draft was not a kite, expected to be paid at the place of discount. Though more than legal interest is thereby secured, yet the allowance

of exchange is for the expense and delay expected to occur. The true test of usury is whether an illegal interest is secured at all events: *Bank v. Brashears*, 12 Dec. Rep. 578, 1 D. 207.

A charge for exchange where such exchange is not in fact contemplated by the parties, but which is simply a device to conceal an exaction of a rate of interest in excess of that allowed by law, is usurious: *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621; *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645; *McLean v. Bank*, 3 McLean, 587, Fed. Cases 8888, 2 O. F. D. 412; *Parrill v. Wood*, 2 Dec. Rep. 381, 2 W. L. M. 555.

B. INTEREST IN ADVANCE.

A contract to pay five hundred dollars, with fifteen dollars interest in advance every thirty days, is valid, and the interest paid on the contract, in advance, can not be held as part payment of the principal. The failure to pay such interest in advance, puts an end to the contract, from which time six per cent. only is recoverable: *Reddish v. Watson*, 6 O. 510, I Longsdorf's Notes, 355.

A mutual life insurance company loaned to B the sum of \$12,000, for which B made his note payable in three years, with interest at the rate of eight per cent. per annum, payable annually in advance. The company retained out of the amount of the loan the sum of \$960, as the interest thereon for the first year in advance, and at the same time took from B, his two notes for \$960 each, payable respectively in one and two years after date, for the interest on said loan for the second and third years thereof respectively. Said interest notes were paid at maturity, at the beginning of said second and third years respectively. It was held that under the act of May 4, 1869 (66 v. 91), the above transaction was usurious: *Insurance Co. v. Carpenter*, 40 O. S. 260, IV Longsdorf's Notes, 22.

C. INTEREST ON INTEREST.

Interest due may, by agreement, be capitalized and united to the principal, thus forming a new interest-bearing principal: *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404.

An agreement, after interest is due, to turn it into principal, is valid: *Watkinson v. Root*, 4 O. 373, I Longsdorf's Notes, 229.

An agreement to pay interest upon interest, after the interest has accrued is not usurious: *Fobes v. Cantfield*, 3 O. 17, I Longsdorf's Notes, 144.

A promissory note bearing interest at the rate of eight per cent., per annum, pay-

able semi-annually, is not usurious, although it stipulates that the semi-annual installments of interest shall bear interest at the same rate if not paid when due: *Taylor v. Hiestand*, 46 O. S. 345, IV Longsdorf's Notes, 328.

Contra: That interest at eight per cent. with a provision for interest at eight per cent. upon unpaid installments of interest is usurious, see *Mortgage Co. v. Saff*, 8 Dec. Rep. 50, 5 Bull. 348.

A promissory note which provides that it shall be payable one year after date with eight per cent. interest to be paid annually, interest and principal after maturity to bear eight per cent. annual interest to be paid semi-annually, is not usurious: *Firestone v. Dellenbaugh*, 10 O. C. C. (N.S.) 153, 20 O. C. D. 1.

On a note calling for a certain amount with interest until paid, the interest can not be capitalized at maturity, but goes on without rest until paid: *Brock v. Becker*, 8 Dec. Rep. 263, 6 Bull. 755.

Overdue interest becomes principal and bears interest, but bears only simple interest, that is, without rests, until paid: *Anketel v. Converse*, 17 O. S. 11, II Longsdorf's Notes, 810; *Iron Works v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272.

Overdue interest bears interest only at the statutory rate of six per cent., though the contract bore a higher or the conventional interest, unless it also especially stipulated for a higher rate on unpaid interest: *Samyn v. Phillips*, 15 O. S. 218, II Longsdorf's Notes, 725; *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285; *Iron Works v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272; *Kilgore v. Emmitt*, 33 O. S. 410, III Longsdorf's Notes, 680; *Cook v. Courtright*, 40 O. S. 248, IV Longsdorf's Notes, 21; *Dunlap v. Wiseman*, 3 Dec. Rep. 57, 13 Dec. Rep. 244, 2 Gaz. 348, 2 D. 398.

If interest at the conventional rate is voluntarily paid on overdue installments, it is not illegal except after the conventional rate is repealed, and, hence, the excess over six per cent. will not be credited on the principal, but, *contra*, after such repeal: *Samyn v. Phillips*, 15 O. S. 218, II Longsdorf's Notes, 725; *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404; *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859.

Compounding by means of rests at settlements, thus, by mutual agreement, turning accrued interest into principal is not illegal: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

In making up an account of unsettled mutual demands it is error to make annual rests and add in the interest thereon

as principal, thus compounding: *Coal and Oil Co. v. Verner*, 22 O. S. 372, III Longsdorf's Notes, 82.

Interest on interest is allowed where an account is settled after interest has become due or after an agreed rest: *Goodhart v. Rastert*, 7 O. N. P. 534, 10 O. D. (N.P.) 40.

D. INTEREST PAYABLE SEMI-ANNUALLY.

Under the act of May 4, 1869 (66 v. 91), a promissory note stipulating for the payment of the principal at a future time "with interest thereon at eight per centum per annum, payable semi-annually until paid," is not usurious: *Cook v. Courtright*, 40 O. S. 248, IV Longsdorf's Notes, 21.

A note which bears interest at the rate of eight per cent. per annum, payable semi-annually, is not usurious: *Hibbs v. Insurance Co.*, 40 O. S. 543, IV Longsdorf's Notes, 41.

Under § 1, of the act of May 4, 1869, a note made payable three years after date, with "interest at the rate of seven per cent. per annum, payable quarterly," is not usurious: *Iron Works v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272.

Power in a corporation to borrow at a rate not exceeding seven per cent., does not compel deferring interest until the loan matures, but making the interest payable semi-annually until the loan matures, is valid: *Coe v. Railroad*, 10 O. S. 372, II Longsdorf's Notes, 442.

A statute allowing ten per cent. interest affects the rate and not the time, and making it payable semi-annually is not usurious: *Monnett v. Sturges*, 25 O. S. 384, III Longsdorf's Notes, 245.

A quarterly interest on an eight per cent. note is not usurious: *Brown v. Haskins*, 4 Bull. 1122; *Mortgage Co. v. Saff*, 8 Dec. Rep. 50, 5 Bull. 348.

A promissory note which provides that it shall be payable one year after date "with eight per cent. interest to be paid annually, interest and principal after maturity to bear eight per cent. annual interest to be paid semi-annually," is not usurious: *Firestone v. Dellenbaugh*, 10 O. C. C. (N.S.) 153, 20 O. C. D. 1.

That the semi-annual interest at eight per cent. shall beat the same interest if not paid when due, does not make the note usurious: *Taylor v. Hiestand*, 46 O. S. 345, IV Longsdorf's Notes, 328.

E. DISCOUNT.

Discount is only a mode of loaning, taking the interest in advance, and is limited in Ohio to those doing a banking business: *In-*

urance Co. v. Carpenter, 40 O. S. 260, IV Longsdorf's Notes, 22.

If discounting a note by a bank at a usurious rate is *ultra vires* it would be void also in the hands of a *bona fide* indorsee, but if the bank had capacity to make the contract, such indorsee would take free from any defect for usury: *Dunkle v. Renick*, 6 O. S. 527, II Longsdorf's Notes, 256.

A charter power to do a "business of banking by discounting" paper is not a power to buy, but to loan on the paper and within the usury laws as to loans. The word discount, though in its general sense applying to sales, yet in banking is only loaning with interest deducted in advance: *Bank v. Baker*, 15 O. S. 68, II Longsdorf's Notes, 706.

A power to loan by a bank is a power to buy or discount paper, hence, a national bank can buy paper: *Smith v. Bank*, 26 O. S. 141, III Longsdorf's Notes, 292.

The fact that a bill discounted by a bank payable in another state is not intended to be paid by the parties thereto, if it is intended to be paid there by a third person, does not make it usurious under the act of 1850: *Marietta v. Haynes*, 23 O. S. 637, III Longsdorf's Notes, 154.

A corporation not for banking loaned B \$12,000, taking an eight per cent. note for three years, and retaining \$960 for the first year and taking two side notes for \$960 for the second and third years for additional interest, which interest notes were paid at maturity. It was held that the transaction was usurious under G. C., § 8303: *Insurance Co. v. Carpenter*, 40 O. S. 260, IV Longsdorf's Notes, 22.

The right of a banking partnership to discount gives it no greater right than any other person to deduct eight per cent. in advance; and after renewals of the unpaid balance from time to time the last renewal is subject to deduction of all payments from the beginning over six per cent.: *Coppock v. Kuhn*, 3 O. C. C. 599, 2 O. C. D. 347.

The usury laws of New York do not apply to the sale of a note for less than par: *Baily v. Smith*, 14 O. S. 396, II Longsdorf's Notes, 668.

Where a bank is forbidden to take more than six per cent. on loans and discounts, and it takes the notice of a third person in payment of a pre-existing debt at a discount of over six per cent., the same being *bona fide* business paper, this is not usurious, for, being taken in payment, it is not a loan or discount: *Dunkle v. Renick*, 6 O. S. 527, II Longsdorf's Notes, 256.

A proposition, in order to raise money, to sell to a bank drafts to be drawn to an accommodation party and by him indorsed and secured by collateral, is *prima facie* a

loan and not a sale. The form of the contract, and what the parties called it, is not decisive; the facts and circumstances determine whether it is business or accommodation paper: *Corcoran v. Powers*, 6 O. S. 19, II Longsdorf's Notes, 215.

There is a difference between the sale of paper valid in its inception at a rate of discount, and the transfer of mere accommodation paper void in its inception and fictitious as between the original parties, and not a cause of action until transferred to a third person: *Corcoran v. Powers*, 6 O. S. 19, II Longsdorf's Notes, 215.

A lender does not avoid the usury laws by having the note and mortgage made to a third person and buying of him: *Wilder v. Huff*, 6 Dec. Rep. 772, 8 Am. L. Rec. 27.

F. OTHER DISGUISED FORMS OF USURY.

Where money is loaned at the highest rate of interest allowed by law, a contract to pay a sum in addition to such rate in consideration of an extension of the time of payment is usurious: *Rosebrough v. Ansley*, 35 O. S. 107, III Longsdorf's Notes, 763.

On the 27th of April, 1872, the plaintiff loaned to defendant the sum of \$2,500 on an agreement for interest at the rate of ten per centum per annum, payable annually, and in pursuance of the agreement took from defendant two promissory notes for \$1,250 each, payable in one and two years, with stipulations therein for interest at the rate of eight per centum per annum, payable annually, secured by mortgage; and at the same time took from defendant two side notes for the additional two per cent. interest agreed upon, which side notes amounting to \$209, were paid. It was held on proceedings to enforce the mortgage, the plaintiff under the statute of May 4, 1869, commonly called the eight per cent. interest statute, was entitled to a decree for \$2,500 with interest at the rate of six per cent. per annum, less the \$209 so paid, and no more: *McClelland v. Sorter*, 39 O. S. 12, III Longsdorf's Notes, 1004.

In 1869, 1870 and 1872, A loaned money to B, taking at each loan a promissory note therefore, the note for the loan of 1870 embracing, also, the amount of the loan of 1869, and the note for the loan of 1872 embracing, also, the amount of the two preceding loans. In each of the notes usurious interest was incorporated. It was held that in an action to foreclose a mortgage given to secure the payment of the note of 1872, and obtain a sale of the mortgaged premises, all the illegal interest should be deducted: *Beals v. Lewis*, 43 O. S. 220, IV Longsdorf's Notes, 161.

The act of March 14, 1850 (2 Curwen, 1569), only authorized parties "to stipulate for interest at any rate not exceeding ten per centum yearly," hence, a contract under this statute, for a rate of interest exceeding this is illegal and void; and the result is the same, whether the illegal rate is contracted for in express terms, or by stipulating for interest at the highest legal rate upon a sum consisting in part of usury: *Bunn v. Kinney*, 15 O. S. 40, II Longsdorf's Notes, 700.

An agreement for paying collection fees whereby the total amount paid for the forbearance of money exceeds the legal rate of interest is usurious: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575.

The exaction of attorneys fees for collection is usurious in legal effect, even if the parties by mistake of law do not think that such act is usurious in character: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

On a loan secured by a mortgage, a further requirement that the borrower shall take out life insurance and pledge it as collateral, with a condition that if any interest is not paid when due the policy may be sold at the company's office in a distant city without notice except by mail, is a mere device to exact usury: *Hilliard v. Sanford*, 4 O. N. P. 363, 6 O. D. (N.P.) 449.

A loan of \$3,300 on condition that the borrower buy a lot of the lender at \$3,300, giving his note for \$6,600, the lot not being worth half the price, is a device to obtain usury, and the lender's claim will be reduced to the money loaned plus the real value of the lot: *Kellogg v. Strong*, 3 Dec. Rep. 339, 1 Gaz. 350.

A stipulation to pay a percentage as collection fees or attorney's fees in addition to interest is usurious, against public policy and void, and a judgment including it on warrant of attorney containing such stipulation, will be set aside: *State v. Taylor*, 10 O. 378, I Longsdorf's Notes, 521; *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575; *Martin v. Trustees*, 13 O. 250, I Longsdorf's Notes, 639.

A stipulation in a mortgage that in case of foreclosure a reasonable attorney's fee shall be paid out of the proceeds is void: *Leavans v. Bank*, 50 O. S. 591, IV Longsdorf's Notes, 516.

Contractors on the public works agreed to pay a bank five per cent. commission if it would loan the state a sum on interest, to be used on such works, and accordingly the bank deducted five per cent. when cashing checks of the state in favor of the contractor. It was held a shift to obtain illegal interest. The commission being thus

paid, the contractor being a *particeps criminis*, and in *pari delicto*, can not recover it: *Spalding v. Bank*, 12 O. 544, I Longsdorf's Notes, 619.

The addition of interest on deferred installments of assessments for paving, increasing the assessments to exceed twenty-five per cent. of the value of the property, is invalid: *In re Assessment Bonds of Salem*, 20 O. C. C. 703, 10 O. C. D. 822; *Salem v. Mulford*, 22 O. C. C. 397, 12 O. C. D. 516.

G. CONTRACTS HELD NOT USURIOUS.

The statute limiting the rate of interest does not apply to an agreement of co-partnership, which provides for allowing a partner, who is to bear his share of the loss, interest on the money he invests in the firm: *Cunningham v. Green*, 23 O. S. 296, III Longsdorf's Notes, 125.

A contract to advance money which is to be used in business and is subject to the risk thereof is not within the usury statutes, whether the party advancing the money is to receive a certain portion of the profits, or a certain per cent. on the money advanced in lieu of the profits, even if such per cent. is in excess of the maximum rate allowed by law: *Boone v. Andrews*, 10 O. C. C. (N. S.) 377, 20 O. C. D. 166.

An agreement whereby the first party thereto advances sums of money to be used by the second party in conducting a business of making usurious loans and purchasing time certificates of wage earners, the profits and losses of such company to be divided and borne equally by such parties, is not usurious and is not made so by subsequent amendment whereby the first party promises to accept a stated per cent. on the moneys so advanced, as liquidated profits or in lieu of profits, the original agreement as to apportionment of losses remaining unchanged: *Boone v. Andrews*, 10 O. C. C. (N. S.) 377, 20 O. C. D. 166.

A contract whereby one person furnishes the money with which to buy a stock of goods to be sold at an advance, and as part of such transaction the borrower agrees to pay to such lender a debt which such lender might have asserted against the owner of such goods by obtaining judgment and issuing execution thereon, is not usurious: *Boyer v. Kintz*, 22 O. C. C. 655, 12 O. C. D. 588.

Where the parties to a submission to arbitration stipulate, as one of its terms, that the arbitrator in calculating whatever may be due on a matured promissory note calling for interest at the rate of ten per cent. shall compute interest thereon at that rate, such submission is not a usurious contract, and an award rendered in pursuance of it

is valid: *Rice v. Hassenpflug*, 45 O. S. 377, IV Longsdorf's Notes, 282.

A contract in writing, made while the statute authorizing contracts for ten per cent. interest was in force, to pay that rate of interest in consideration of forbearance to bring suit for a stated time on notes evidencing the debt forborne, is a valid contract for ten per cent. interest for the time agreed upon: *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404.

Where the payee of a note lawfully carrying interest at the rate of ten per cent., having money in his hands belonging to the payor, and the same is credited on the note by an agent of the payee, without the knowledge of either party, though he might properly do so, they may by agreement after the repeal of the ten per cent. law, substitute a new note in the exact terms of the old note, leaving off the credits so put upon the old note, without affecting the rate of interest, if it clearly appears there was no intention or device used to evade the provisions of the statute regulating the then present rate of interest: *Kilgore v. Emmitt*, 33 O. S. 410, III Longsdorf's Notes, 680.

Shifts or devices not entering into the contract when made, but subsequently, will not make a valid original contract usurious: *Kilgore v. Dempsey*, 25 O. S. 413, III Longsdorf's Notes, 247; and see *Kilbreth v. Wright*, 5 Dec. Rep. 320, 4 Am. L. Rec. 449; 7 Dec. Rep. 1, 1 Bull. 6.

A contract not tainted with usury when made will not be avoided by subsequently taking usury or taking a cognovit after maturity for the debt and collection fees: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

A voluntary payment by the debtor of collection fees, all of which go to the attorney, if not a shift to obtain usurious interest, is valid; and the sureties' note for the balance is not void for usury: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

A partner's agreement to pay the firm on part of his capital withdrawn ten per cent. interest, compounded semi-annually, is not usurious: *Chase v. Chambers*, 7 Dec. Rep. 377, 2 Bull. 263.

A loan by a life insurance company on condition that the borrower takes out life insurance, paying five years' premium in advance, is not necessarily usurious: *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419 [affirmed, without opinion, *Morrow v. Insurance Co.*, 61 O. S. 661].

If the security was ample, and the policy was treated as of no consequence in connection with the loan, it was a device to obtain usury, and its value would be credited on the loan, although usury was not

pleaded: *Insurance Co. v. Morrow*, 7 O. D. (N.P.) 118 [on appeal *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419; affirmed, without opinion, *Morrow v. Insurance Co.*, 61 O. S. 661].

A condition in a life insurance company's loan, that the borrower shall take out a policy on his grandson's life, payable to the grandson and assigned by him to the company as collateral, although the grandson is a minor, does not make the contract usurious: *Insurance Co. v. Hilliard*, 63 O. S. 478, IV Longsdorf's Notes, 861 [reverses, *Insurance Co. v. Hilliard*, 16 O. C. C. 434, 8 O. C. D. 437].

A borrower's agreement to pay a certain commission to the agent of an insurance company, to get him a loan from the company in addition to eight per cent. thereon, is not usurious: *Hall v. Kummero*, 7 O. N. P. 394, 5 O. D. (N.P.) 176.

X. RATE AFTER MATURITY.

Under the act of May 4, 1869, parties may stipulate in a note for any rate of interest not exceeding eight per cent. per annum, and such note, after maturity, without an express agreement to that effect, will continue to bear the stipulated rate until payment: *Iron Works v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272.

Where, upon the loan of money, separate notes are taken, one for the sum loaned and another for the amount of interest to accrue thereon, or, where a single note is taken for the amount of both principal and interest, payable at a future day, and the notes, in either case, contain no stipulation as to a special rate of interest, though the loan was, in fact, made under the ten per cent. law of 1850, at the rate of ten per cent. per annum, yet interest can only be collected on such notes after maturity at the rate of six per cent.: *Samyn v. Phillips*, 15 O. S. 218, II Longsdorf's Notes, 725.

The right of demand, and the obligation to pay, interest at a higher rate than that of six per centum yearly, can only be created under the act of March 14, 1850 (2 Curwen, 1569), by special contract, evidenced in the mode prescribed by the statute; and where money is loaned at interest, in the absence of any valid contract fixing a different rate, the interest is to be computed at the rate of six per cent. per annum, agreeably to the act of January 12, 1824: *Bunn v. Kinney*, 15 O. S. 40, II Longsdorf's Notes, 700.

Under the act of March 14, 1850, allowing parties to contract for any rate of interest, not exceeding ten per cent., a note calling for interest at a rate higher than six per cent. carries the agreed rate after due, and

until paid, as well as during the time it is made to run: *Monnett v. Sturges*, 25 O. S. 384, III Longsdorf's Notes, 245.

A bond which contains a provision for "interest thereon at the rate of ten per cent. per annum, semi-annually," stipulates in legal effect for the payment of interest on the principal sum at the rate of ten per cent., and after such bond becomes due it will bear the agreed rate until paid, or until judgment thereon; and the judgment will under such statute bear the same rate of interest: *Hydraulic Co. v. Chatfield*, 38 O. S. 575, III Longsdorf's Notes, 994 [following and approving *Monnett v. Sturges*, 25 O. S. 384, III Longsdorf's Notes, 245; and *Iron Works v. Lottimer*, 25 O. S. 621, III Longsdorf's Notes, 272; and distinguishing *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404].

A provision that a default in interest shall make the entire principal due, does not reduce the rate of interest upon the principal to six per cent. upon such default in the payment of an installment of interest: *Hotel Co. v. Trust & Safe Deposit Co.*, 11 Dec. Rep. 255, 25 Bull. 375.

Where a note bears interest at the rate of four per cent., that rate only will be allowed after maturity and after judgment: *Pugh v. Building Association*, 1 O. N. P. (N.S.) 259, 14 O. D. (N.P.) 32.

Where a buyer of land who assumed a prior mortgage on it, agreed with the mortgagee in consideration that he would not foreclose for a year, to pay him interest at ten per cent. (the then conventional rate) for one year, and gave separate interest notes for it, and continued to pay ten per cent. for thirteen years, it was held that the agreement was but for one year, and after that the only stipulation was the original rate expressed in the mortgage: *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404 [reversing *McGregor v. Mueller*, 13 Dec. Rep. 676, 1 C. S. C. R. 486].

Notes incorporating by agreement a higher than conventional interest, thus, a note for \$130 in ninety days for \$100 borrowed will only bear six per cent. after maturity: *Brockway v. Clark*, W. 727, I Longsdorf's Notes, 57.

A law that a judgment shall bear the same interest as the instrument given for the forbearance of money does not apply to certificates of deposit. They are not loans. A certificate of deposit at 3 per cent. per annum bears 6 per cent. after default, and a judgment on it bears the same: *Tuffi v. Insurance Co.*, 3 Dec. Rep. 39, 13 Dec. Rep. 75, 2 Gaz. 225, 2 D. 121.

A note bearing five per cent. interest bears only the same rate after maturity: *Sutton*

v. Kautzman, 6 Dec. Rep. 910, 8 Am. L. Rec. 657.

A note made in 1850 with ten per cent. interest notes, only bears six per cent. after maturity: *Burdell v. Reeder*, 13 Dec. Rep. 788, 2 C. S. C. R. 94.

Authority to sell lots in a school section (38 Local Laws, 177), securing the purchase money by a mortgage and bond for five years, with interest payable annually, does not authorize annual rests after maturity, nor does interest at "six per cent. per annum" call for annual payment; hence, after maturity simple interest is to be reckoned until payment: *Hunter v. Hall*, 14 O. C. C. 425, 6 O. C. D. 366.

A mortgage requiring six per cent. interest on the debt to be paid annually for five years, carries after that time only simple interest; that is, without annual rests: *Hunter v. Hall*, 14 O. C. C. 425, 6 O. C. D. 366.

A law fixing the maximum rate of interest on all money after the same shall become due does not permit a greater rate to be stipulated for before it becomes due: *Benefit Society v. Lewis*, 7 O. (pt. 1) 80, 1 Longsdorf's Notes, 363 [overrules *Reddish v. Watson*, 6 O. 510, 1 Longsdorf's Notes, 355]; *Bank v. Swayne*, 8 O. 257, 1 Longsdorf's Notes, 432.

A stipulation in a promissory note for the payment of interest annually extends only to the maturity of the note, and after that time interest must be computed at the rate stipulated without annual rests: *Ingram v. Scattergood*, 15 O. C. C. (N.S.) 93.

XI. CHANGE OF STATUTE.

When payments of interest are made at the rate of ten per cent. upon an ascertained principal, agreed by the parties to be due, such payments will, if made prior to the repeal of the ten per cent. statute, be allowed to stand as payments of interest at that rate, but if made after the repeal of that statute, the amount paid in excess of six per cent. will be credited to the amount of principal: *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404 [following and approving, *Samyn v. Phillips*, 15 O. S. 218, II Longsdorf's Notes, 725].

If an extension of time has been given, but no definite time has been specified, payments of interest at the rate of ten per cent. under such extension, upon a note in which no interest was specified originally, and which accordingly bore interest at the rate of six per cent. are to be regarded as payments of interest up to the repeal of the statute authorizing interest at the rate of ten per cent.; and from that time, such payments are to be credited upon interest com-

puted at the rate of six per cent., and the excess over such rate is to be credited upon the principal: *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859.

Under the act of January 12, 1824, no rate of interest greater than six per cent. per annum, on money loaned, can be charged or collected either before or after the maturity of the note or other evidence of the debt: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

The act of January 12, 1824, regulated the rate of interest allowed on all contracts entered into between April 1, 1859, the date when the repeal of the "ten per cent. law" became effective, and October 1, 1869, when the "eight per cent. law" went into operation: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

A promissory note made in 1867 is governed by the act of January 12, 1824, fixing the legal rate of interest on bills, notes, etc., and is not affected by the act of May 4, 1869, regulating such interest and repealing the act of January 12, 1824: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

The effect of the repealing act of March 14, 1850, was to bring again into force and effect the act of January 12, 1824, of which it was amendatory: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

The act of March 14, 1850, known as the "ten per cent. act" being an act to amend the interest act of January 12, 1824, was repealed by the act of February 25, 1859, except as the latter act was modified by the act of March 31, 1859, saving from its operation all contracts then existing or made before the repealing act took effect, and judgments rendered thereon: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

XII. EXCEPTIONS TO USURY LAWS.

A. TRUST COMPANY.

A trust company which is specially authorized by its charter to lend money at a rate of interest in excess of that then allowed by statute, may recover a judgment upon a loan made at such excessive rate for the amount of such loan, and of such excessive rate of interest, but such judgment after its rendition will bear interest only at the maximum rate allowed by the general statutes: *Bank v. Kelley*, 14 O. S. 367, II Longsdorf's Notes, 666.

B. RAILWAY.

A statute which authorizes a corporation to borrow money on such terms as it may, and to sell its bonds if necessary below par, impliedly repeals the statutes against usury

as far as applicable to such corporation: *Railroad v. Bank*, 79 U. S. (12 Wall.) 226.

G. C., § 8794, which authorizes a railway company to borrow money at a rate not to exceed seven per cent., and G. C., § 8797, which authorizes a railway company to sell its bonds for not less than seventy-five per cent. of their par value, operate to repeal the provisions of Tit. VII, Div. III, Ch. I, as applicable to railway companies: *Trust Co. v. Railway*, 93 Fed. 702, 12 O. F. D. 584.

C. STATE BANKS.

The provisions of the act of the general assembly of this state, passed May 4, 1869 (66 v. 91), viz.: "that the parties to any bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest on the amount of such bond, bill, note, or other such instrument of writing, at any rate not exceeding eight per centum per annum, payable annually," were not intended to embrace banks of issue organized under state laws, whose powers in relation to taking and charging interest on loans and discounts were conferred and limited by prior and special enactments: *Shunk v. Bank*, 22 O. S. 508, III Longsdorf's Notes, 97.

Where a bank charter declares that it shall not take more than six per cent. upon its loans, a contract for a greater rate of interest is totally void: *Bank v. Swayne*, 8 O. 257, I Longsdorf's Notes, 432.

Power to discount negotiable instruments does not confer the right to exact usurious interest thereon: *Coppock v. Kuhn*, 3 O. C. 599, 2 O. C. D. 347.

D. NATIONAL BANKS.

The statute of this state of March 19, 1850, entitled "an act to restrain banks from taking usury," was intended to operate on banking institutions in this state whose authority to discount and purchase notes, etc., is subject to control by the legislation of the state, and has no application to banking institutions existing and exercising their powers under the authority of congress: *Bank v. Garlinghouse*, 22 O. S. 492, III Longsdorf's Notes, 96.

Even under a statute which provided for the forfeiture of the debt, if a bank attempted to exact usury, the provisions of the national banking act must be deemed exclusive in their scope, with reference to national banks; and accordingly only the interest is to be forfeited: *Bank v. Garlinghouse*, 22 O. S. 492, III Longsdorf's Notes, 96.

The discounting of a note in this state, by a national bank, at a usurious rate of in-

terest, does not avoid the note *in toto*, but only to the extent of the interest: *Bank v. Garlinghouse*, 22 O. S. 492, III Longsdorf's Notes, 96.

Under section 30 of the act of congress of June 3, 1864, commonly called the national currency act, national banks, located in a state where, by the laws thereof, a certain rate of interest is limited for banks of issue organized under state laws, are allowed to take, receive, reserve and charge interest at the rate so limited, and no more, although a greater rate is allowed by the laws of such state to parties other than such state banks: *Shunk v. Bank*, 22 O. S. 508, III Longsdorf's Notes, 97.

The provisions of the act of the general assembly of this state, passed May 4, 1869 (66 v. 91), viz.: "that the parties to any bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest on the amount of such bond, bill, note, or other such instrument of writing, at any rate not exceeding eight per centum per annum, payable annually," were not intended to embrace banks of issue organized under state laws, whose powers in relation to taking and charging interest on loans and discounts were conferred and limited by prior and special enactments: *Shunk v. Bank*, 22 O. S. 508, III Longsdorf's Notes, 97.

§ 30 of the national currency act provides that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." It was held that under this provision, such taking or charging a rate of interest greater than six per centum per annum in advance, by a national bank, located in this state, forfeits all interest accruing on such note, bill, or other evidence of debt, after maturity and before judgment thereon, as well as interest accruing before the maturity thereof: *Shunk v. Bank*, 22 O. S. 508, III Longsdorf's Notes, 97.

If individual notes are given by persons who were jointly indebted upon a former note, in payment of such former note, no offset or deduction can be allowed to the maker on account of usurious interest upon such former note, in an action brought by the holder of such note against such maker, after the expiration of two years from the date of such payment, two years being the period limited by the national banking act for recovering back double the amount of usurious interest paid: *Shinkle v. Bank*, 22 O. S. 516, III Longsdorf's Notes, 98.

If a note and mortgage given to a national bank, as renewal of a prior indebtedness, includes usury, such usury avoids the interest only; and the principal of the debt and the mortgage securing the same were valid to such extent: *Allen v. Bank*, 23 O. S. 97, III Longsdorf's Notes, 114.

A penalty imposed upon a national bank for taking usury does not itself bear interest before judgment: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money, does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the national bank act, and can not be controlled by state legislation: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

The fact that a national bank has discounted a note for the holder thereof, at a rate in excess of the maximum amount of interest allowed by law, can not be taken advantage of as a defense by the prior parties on such note; since they are not parties to such usurious transaction: *Smith v. Bank*, 26 O. S. 141, III Longsdorf's Notes, 292.

An action to recover usurious interest paid to a national bank may be brought in the state courts; and such right of action is for a penalty, and is not contractual in its character; and accordingly it can not be used as a set-off; since a set-off must rise on contract or be ascertained by the decision of a court (see G. C., § 11310): *Hade v. McVay*, 31 O. S. 231, III Longsdorf's Notes, 576.

Where a national bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the national banking act, the borrower is not estopped to defend against a recovery of interest: *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

In rendering judgment on a promissory note given to a national bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest on both notes will be disallowed: *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

Payments made generally on a promissory note to a national bank, which note embraces illegal interest, will be applied in satisfaction of the principal: *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

A national bank located in this state may, since the repeal of the statutes fixing the

rate of interest for banks of issue, reserve and charge interest at the rate of eight per cent.: *La Dow v. Bank*, 51 O. S. 234, IV Longsdorf's Notes, 540 [affirming, *La Dow v. Bank*, 5 O. C. C. 147, 3 O. C. D. 75].

The only penalty against a national bank for usury is forfeiture of double the interest and not a complete forfeiture by a state law, for the state courts will follow the United States supreme court in construing a United States statute: *Bank v. Chambers*, 7 Dec. Rep. 53, 1 Bull. 85.

E. BUILDING AND LOAN ASSOCIATIONS.

G. C., § 9650, which authorizes a building and loan association to assess and collect dues, fines, interest, and premiums from its members, and which provides that such dues, fines, premiums and other assessments shall not be deemed usury, though in excess of the legal rate of interest is a valid enactment, and is not in conflict with Art. II, § 26, or Art. I, § 2, of the Ohio constitution: *Cramer v. Trust Co.*, 72 O. S. 395, IV Longsdorf's Notes, 991; *Carmichael v. Loan Co.*, 15 O. D. (N.P.) 341. See to the same effect, *Spies v. Trust Co.*, 4 O. C. C. (N.S.) 103, 14 O. C. D. 40; *Building & Loan Association v. Desmoyers*, 4 O. C. C. (N.S.) 337, 16 O. C. D. 352. *Contra*, *Mykrantz v. Building & Loan Association*, 19 O. C. C. 51, 10 O. C. D. 250.

Under a statute which authorizes a building and loan association to charge an amount in excess of the maximum rate of interest permitted by law in other cases, such excessive rate may be recovered by such association: *Lucas v. Building & Savings Association*, 22 O. S. 339, III Longsdorf's Notes, 79.

A building and loan association, under the act of May 9, 1868 (S. & S. 194), may, by its by-laws, assess and collect a reasonable fine, from a member of the association, for default in the payment of his stated due, but can not assess or collect more than one fine for the nonpayment of the same stated due; and there is no power conferred upon the corporation to levy, assess, or collect a fine for any default in the payment of interest on loans advanced: *Hagerman v. Savings Association*, 25 O. S. 186, III Longsdorf's Notes, 217.

Building associations were not authorized to charge interest on the premiums allowed for precedence in taking loans. The money actually advanced was the basis for the computation of interest: *Building Association v. Gallagher*, 25 O. S. 208, III Longsdorf's Notes, 220.

Fines could not be imposed for default in the payment of interest on loans; nor could more than one fine be assessed in re-

spect to the same installment of stated dues: *Building Association v. Gallagher*, 25 O. S. 208, III Longsdorf's Notes, 220.

In an action brought by a building association against a member, on a mortgage given to secure the payment of weekly dues, and the installments of interest on an advanced loan, the taking of the account, preliminary to an order of sale, should be limited to the amount of dues and interest that had accrued at the time of rendering the decree: *Risk v. Building & Savings Association*, 31 O. S. 517, III Longsdorf's Notes, 601 [approving and following, *Hagerman v. Building & Savings Association*, 25 O. S. 186, III Longsdorf's Notes, 217, and *Land & Building Association v. Gallagher*, 25 O. S. 208, III Longsdorf's Notes, 220].

A provision in a mortgage to a building and loan association whereby the mortgagor agrees to pay eight per cent. interest together with counsel fees and the expenses of a foreclosure suit, in case of a foreclosure, is invalid: *Building Association v. McCaffery*, 12 O. C. D. 685, 39 Bull. 75.

A borrowing member of a building and loan association who becomes a member after the passage of a statute which authorizes building associations to amend their constitutions (83 v. 116; compare G. C., § 9666), and who gives a mortgage containing a provision "that he will comply with the constitution and by-laws of the said company, and all amendments thereto," is bound by a subsequent amendment which provides that interest should be charged only on the amount remaining due at the beginning of each year; and that dividends should be paid only on the amount paid in during the current year: *Metz v. Loan & Building Co.*, 19 O. D. (N. P.) 161, 6 O. L. R. 418.

A premium of 16 2-3 cents per month on each \$100 share, and fines of ten cents per month during default of dues of fifty cents per month on each such share, imposed by a building and loan association upon a borrowing member, in addition to six per cent. interest upon his loan, are not in the nature of usury or unreasonable in amount: *Spies v. Loan Co.*, 4 O. C. C. (N.S.) 103, 14 O. C. D. 40. See also BUILDING AND LOAN ASSOCIATIONS.

XIII. ESTOPPEL.

A. ASSUMPTION OF DEBT.

A grantee who assumes and agrees to pay a specific mortgage debt can not interpose the defense of usury in an action to foreclose such mortgage: *Jones v. Insurance Co.*, 40 O. S. 583, IV Longsdorf's Notes, 43.

Where one purchases land subject to a mortgage lien, and, as part of the considera-

tion, agrees to pay the mortgage debt, he can not defend against the mortgage on the ground of usury: *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285.

One who buys an equity of redemption and abates from the purchase price agreed upon the face of an outstanding mortgage debt, is understood to assume and pay such price; and he can not interpose the defense of usury in a proceeding by the mortgagee to foreclose: *Butler v. Oreager*, 2 O. C. C. 542, 1 O. C. D. 632.

A, B, and C, partners, having executed a promissory note to D embracing usurious interest, and having also executed to him a mortgage on real estate to secure the note, A conveyed to B and C his interest in the partnership property, including the real estate mortgaged, B and C agreeing, in consideration thereof, to pay the firm debts, including the debt to D. It was held that B and C were not estopped to assert such usury, in an action by D for the sale of the mortgaged premises; nor is the assignee in bankruptcy of B and C precluded from making such defense, although B and C, in the bankrupt proceeding, reported D's debt at the full amount claimed by him: *Beals v. Lewis*, 43 O. S. 220, IV Longsdorf's Notes, 161.

A made notes and mortgage to B, and as B's agent procured C to get a purchaser for them, which C did on A's assurances that they were not usurious. The buyer gave full value. It was held that A and also his vendee of the land were estopped to set up usury, not only against the notes but also against the mortgage: *Dickson v. Vail*, 13 Dec. Rep. 794, 2 C. S. C. R. 103. See also MORTGAGES.

B. JUDGMENT AS ESTOPPEL.

A note or other obligation taken by a bank limited by its charter to six per centum interest upon its loans is void if more than that is reserved or paid, for want of corporate power to enter into such contract. Such defense may be made to a suit brought to enforce such contract in equity, as well as at law. But when the contract has been merged in a judgment, and a creditor's bill brought to obtain satisfaction, the parties to it are estopped, while it remains in force, from averring or proving such illegality to have existed in the obligation upon which it was founded, for the purpose of impeaching the judgment. The remedy in such case can be had in a direct proceeding brought to set aside or impeach the judgment by motion in the same court to set it aside and let the party in to defend; or, under the circumstances of this case, by original or cross bill in chancery, filed for that purpose:

Wooster v. Stevens, 1 O. S. 233, I Longsdorf's Notes, 966.

XIV. CONFLICT OF LAWS.

The place of payment controls if the contract is entered into in good faith, and not primarily for the intention of evading the usury laws of one state by making the contract ostensibly payable at another: *Miller v. Tiffany*, 68 U. S. (1 Wall.) 298; *Railroad v. Bank*, 79 U. S. (12 Wall.) 226.

Where a loan was negotiated in the state of New York, the money advanced, note taken, and mortgage made with a stipulation to be repaid there, the laws of the state of New York relating to usury, are applicable to the contract, although the loan was secured by mortgage upon lands in Ohio: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

Three persons executed a promissory note in New Mexico bearing ten per cent. interest. After a partial payment thereon, two of such makers assumed, in the absence of the third maker, to renew such note for the balance still due thereon; and accordingly they signed a new note at Santa Fe, bearing ten per cent. interest, and forwarded such note to the remaining obligor who signed it in Missouri. Such note was to be regarded as made in New Mexico with respect to the rate of interest, and to the legal effect of the stipulation for interest contained in such note: *Findlay v. Hall*, 12 O. S. 610, II Longsdorf's Notes, 586.

The usury laws of the state of New York extend only to the loan or forbearance of money, and have no application to the sale of a promissory note for less than its par value. To entitle a holder of negotiable paper to the benefit of the rule which protects such a holder from the equities of third persons, it is not necessary that he should have paid the face of the paper. It seems, however, that he must have paid its fair and reasonable value. The transfer of a negotiable promissory note, secured by mortgage on real estate, to a *bona fide* indorsee, does not entitle the holder to foreclose the mortgage, when it appears that both note and mortgage were obtained by fraud: *Baily v. Smith*, 14 O. S. 396, II Longsdorf's Notes, 668.

The existence, construction, and legal effect of foreign statutes, are rather matters of fact than of law, and when they have received an authoritative construction where they are enacted, no inquiry into the correctness of such construction is allowable: *Bank v. Baker*, 15 O. S. 68, II Longsdorf's Notes, 706.

A power given to a corporation by a statute of the state of New York, "to carry

on the business of banking by discounting bills, notes and other evidences of debt," is not a power to buy promissory notes, but to loan money upon the paper described; and a transaction of that character is within the usury laws of that state: *Bank v. Baker*, 15 O. S. 68, II Longsdorf's Notes, 706.

A transaction whereby a person sold drafts drawn by himself upon the postoffice department for the aggregate amount of twenty thousand dollars, and payable in six, nine, and twelve months, respectively, for sixteen thousand dollars, was *prima facie* a loan; and was governed by the laws of the place in which such transaction took place. Such transaction having taken place in Washington, the statute of Maryland in force there made it void for usury, and rendered collateral securities taken under such contract also invalid: *Corcoran v. Powers*, 6 O. S. 19, II Longsdorf's Notes, 215.

If the law of the place where the contract is made and the law of the place where it is to be performed alike declare that such contract is usurious, the law of the place where the contract is made is to control as to the consequences of usury: *Kelsey v. Skidmore*, 2 O. C. C. 219, 1 O. C. D. 453.

Where the borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent., and the lender resided in Pennsylvania, where six per cent. was the legal rate of interest; on a loan of money made in Ohio, the parties had a right to stipulate in the note, for interest at ten per cent. per annum, payable semi-annually, and make the note payable in Pennsylvania, without thereby rendering the contract usurious: *Kilgore v. Dempsey*, 25 O. S. 413, III Longsdorf's Notes, 247.

A citizen of another state may contract in this state for a loan of money to be used in the state of his residence, and agree to pay interest therefor, lawful by the laws of the latter state, although the rate exceeds that allowed by the laws of this state. In such case the contract is not rendered usurious by the fact that the note is executed in Ohio, if the parties without intending to evade our usury laws, contract with reference to the laws of the state where the debtor resides. It is not essential to the validity of such contract as to the interest, that the note should be made payable, in express terms, in the state where the maker resides. To ascertain whether the parties intended, in good faith, to contract with reference to the laws of such state, all the circumstances surrounding the transaction will be examined: *Scott v. Perlee*, 39 O. S. 63, III Longsdorf's Notes, 1007.

A savings association incorporated under the laws of Ohio, which is authorized to contract for interest which is allowed by the laws of Ohio, and is subject for the violation thereof, to the same penalties as natural persons, can not enforce in Ohio a contract for interest in excess of the rate then allowed by the laws of this state, although such contract was made in another state where the laws authorized contracts for interest at the rate stipulated for in such contract; but in such cases the sanction prescribed by the statute is exclusive; and the rule, that such a contract made by a corporation is invalid for want of power to make it, does not apply: *Evins v. Bank*, 43 O. S. 31, IV Longsdorf's Notes, 143.

If a foreign corporation is authorized to sell its own bonds as a commodity, at any price and bearing any rate of interest, but our corporations can sell their own bonds bearing only a limited rate of interest, there is no such plain and substantial repugnancy to our policy as to render the sale here void: *Bank v. Jones*, 16 O. S. 145, II Longsdorf's Notes, 764. See also CONFLICT OF LAWS.

XV. RIGHTS ARISING ON USURIOUS TRANSACTION.

A. VALIDITY.

1. In General.

A contract to pay more than six per cent. per annum interest, can not be enforced in the courts of law of Ohio, under the laws in force in November, 1832: *Benefit Society v. Lewis*, 7 O. (pt. 1) 80, I Longsdorf's Notes, 363.

Usury does not make a contract void; but only avoids the contract as to the interest, or as to the excess over the legal rate, according to the terms of the statute in question: *Morgan v. England*, W. 112, I Longsdorf's Notes, 9; *Bank v. Swayne*, 8 O. 257, I Longsdorf's Notes, 432; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626; *Selsor v. Brock*, 3 O. S. 302, II Longsdorf's Notes, 29.

As to a surety, usury is void only to the same extent as to the principal: *Selsor v. Brock*, 3 O. S. 302, II Longsdorf's Notes, 29.

If a corporation receives a conveyance to secure several debts, some legal and some *ultra vires* for usury, it will be held valid as to the legal debts and void only as to the rest: *Morris v. Way*, 16 O. 469, I Longsdorf's Notes, 776.

A mortgage to a national bank to secure a renewal at a usurious interest of a valid debt is valid to the extent of the debt and legal interest: *Allen v. Bank*, 23 O. S. 97, III Longsdorf's Notes, 114.

Collateral securities on a contract void for usury are also void in the usurer's hands. On an absolute sale of such securities by the borrower to a third person, who had notice of the lender's claim, the third person may set up the defense of usury against the lender, though the borrower after suit brought file a waiver of the usury: *Corcoran v. Powers*, 6 O. S. 19, II Longsdorf's Notes, 215.

If the note is void the mortgage securing it is also void: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645.

It is the settled law of this state that stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void: *Miller v. Kyle*, 85 O. S. 186.

G. C., §§ 8106 and 8107, do not give validity to stipulations in negotiable instruments which provide for the payment of attorney fees if principal and interest are not paid at maturity, but provide only that they shall not destroy the negotiable character of instruments in which they are incorporated: *Miller v. Kyle*, 85 O. S. 186.

2. Under Contract *Ultra Vires*.

Where a bank or other corporation is forbidden to charge more than a certain per cent. on its loans or discounts, a loan or discount at a higher rate is *ultra vires*, and, hence, no recovery can be had on the paper for any amount either principal or interest: *Bank v. Swayne*, 8 O. 257, I Longsdorf's Notes, 432; *Creed v. Bank*, 11 O. 489, I Longsdorf's Notes, 588; *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621; *Bank v. Stevens*, 1 O. S. 233, I Longsdorf's Notes, 966; *Bank v. Russell*, 1 O. S. 313, I Longsdorf's Notes, 984; *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645; *Kilbrith v. Bates*, 38 O. S. 187, III Longsdorf's Notes, 964.

A bank charter not expressly limiting the rate, but empowering it to discount on "banking principles and usages," limits it to six per cent. under the above rule: *Creed v. Bank*, 11 O. 489, I Longsdorf's Notes, 588.

If the charter is silent as to the rate a corporation may charge, usury will not invalidate a note for a loan, but the principal and legal interest is collectible: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49.

If the charter is silent as to the rate a corporation may charge, such corporation having made a loan at legal rates can recover the amount thereof, though renewals were at an illegal rate: *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621; *Morris v. Way*, 16 O. 469, I Longsdorf's Notes, 776.

If the first paper was usurious no recovery at all can be had on renewals thereof, though the latter bore the legal rate: *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621.

A mistake of law would not exempt a bank from the consequences of taking usury; but an error in calculation, an accidental omission of a credit, or the transfer of an item by mistake from one account to another, will not make a security void: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

A valid contract by a bank will not become void by subsequently receiving usury or taking a cognovit after maturity for the amount and collection fees: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

An enabling clause in a charter, as to the rate of interest, will not render a loan in excess thereof *ultra vires*. Thus, a mining corporation having power, under the act of 1875, to borrow at a rate not exceeding that allowed for natural persons, borrowed at over eight per cent. giving an eight per cent. note with sureties, which note the lender discounted. It was held that the mining company was put on the same footing as natural persons, and only the excess of interest over the legal rate was void. The sureties were not released as to the amount actually advanced and six per cent. thereon: *Larwell v. Savings Fund Society*, 40 O. S. 274, IV Longsdorf's Notes, 23.

The savings bank act of 1875, authorizing loans at the rate allowed by Ohio laws and making them liable for violation thereof to the same penalties as individuals, fixes an exclusive sanction; the forfeiture of the usury is a penalty; the common-law rule that the contract is void *in toto*, because *ultra vires*, does not apply: *Ewing v. Bank*, 43 O. S. 31, IV Longsdorf's Notes, 143.

An Ohio railroad was authorized to borrow at not exceeding 7 per cent. interest. A later special statute authorized a city to loan \$100,000 to such railroad at such terms as might be agreed on. It was held that the general statutes did not apply, and the city could make the loan at over six per cent., it being less than seven. Making the interest payable in New York does not invalidate it: *Railroad v. Vincinnati*, 5 Dec. Rep. 122, 2 Am. L. Rec. 724.

A clause in a charter forbidding a concern (The Ohio L. Ins. and Tr. Co.) to loan at over six per cent. and declaring a forfeiture of the charter for so doing, did not by the latter clause validate the void loan, but only enforced an additional motive for obedience: *Kilbreth v. Bates*, 38 O. S. 187, III Longsdorf's Notes, 964.

Where the laws of another state simply forfeit the excess of interest and not the loan by a corporation of that state lending at a higher rate than its charter allows, the principal and interest at the rate allowed by its charter is recoverable here: *Larwell v. Savings Fund Society*, 40 O. S. 274, IV Longsdorf's Notes, 23.

A corporation can not do an act under the laws of another state which is forbidden by its own. Thus, a savings bank incorporated under our law of 1875 can not enforce in this a usurious contract to the extent of the usury, though the contract was made in a state authorizing contracts at the rate stipulated for: *Ewing v. Bank*, 43 O. S. 31, IV Longsdorf's Notes, 143.

Payment of legal interest in advance is not a violation of charter: *Bank v. Findlay*, 1 Dec. Rep. 49, 1 W. L. J. 321.

Taking interest for ninety-nine days on a ninety-five-day note, thus including days of grace and the day of lending is not a violation of the charter: *Bank v. Findlay*, 1 Dec. Rep. 49, 1 W. L. J. 321.

Computing interest for part of a year as if the year had only 360 days, or thirty days to the month for convenience and not as a device, is not a violation of a charter: *Bank v. Findlay*, 1 Dec. Rep. 49, 1 W. L. J. 321.

If the security is void it does not follow that the amount paid can not be recovered: *Kilbreth v. Bates*, 38 O. S. 187, III Longsdorf's Notes, 964, and *West v. Allison*, 7 Dec. Rep. 428, 2 Bull. (Supp.) 8.

Such recovery was had of the original loan when legal, only subsequent renewals being *ultra vires* for usury: *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621; *Morris v. Way*, 16 O. 469, I Longsdorf's Notes, 776.

Where a corporation, empowered only to loan at seven per cent. takes a note calling for ten per cent. after maturity, this is a penalty and it alone, but not the note apart from it, is void: *Kilbreth v. Wright*, 5 Dec. Rep. 320, 4 Am. L. Rec. 449, 7 Dec. Rep. 1, 1 Bull. 6.

A sale of its bonds by a board for less than par in the face of a statute forbidding this will not invalidate them after passing to *bona fide* buyers, though the latter paid less than par, and though they were buying from the board. The fact and not their belief control: *State, ex rel., v. Board of Education*, 27 O. S. 96, III Longsdorf's Notes, 346.

A sale by a corporation of its own bonds is a loan, and if sold below par and bear a legal interest, the contract is usurious: *McGregor v. Railroad Co.*, 12 Dec. Rep. 763, 1 D. 509.

A sale by a corporation of its own bonds when a statute of the state creating it author-

izes such sale is not a loan, and, hence, not subject to our usury laws if the sale is made here. The fact that the directors personally guarantee the payment does not necessarily make the sale a cover for a loan: *Bank v. Jones*, 16 O. S. 145, II Longsdorf's Notes, 764.

B. LEGAL RATE ONLY ALLOWED.

If a note is given in advance for twenty-four per cent. interest on a loan, at a time at which ten per cent. is the maximum rate, only six per cent. upon the amount of the loan can be recovered on such note: *Claypool v. Sturges*, 10 O. S. 440, II Longsdorf's Notes, 451.

The charter being silent as to the rate of interest to be charged by the company on its loans, a stipulation for a rate higher than the maximum fixed by the usury laws of this state did not invalidate the note. The principal and interest thereon, at the legal rate, may be collected: *Bank v. Insurance Co.*, 41 O. S. 1, IV Longsdorf's Notes, 49 [distinguishing *Chillicothe v. Swayne*, 8 O. S. 57 and like cases, I Longsdorf's Notes, 432].

The discounting of a note in this state, by a national bank, at a usurious rate of interest, does not avoid the note *in toto*, but only to the extent of the interest: *Bank v. Garlinghouse*, 22 O. S. 492, III Longsdorf's Notes, 96.

The statute of this state of March 19, 1850, entitled an act to restrain banks from taking usury, was intended to operate on banking institutions in this state whose authority to discount and purchase notes, etc., is subject to control by the legislation of this state, and has no application to banking institutions existing and exercising their powers under the authority of congress: *Bank v. Garlinghouse*, 22 O. S. 492, III Longsdorf's Notes, 96.

National banks are authorized to take mortgages on real estate in good faith to secure debts previously contracted. A national bank extended the time of payment of indebtedness at a usurious rate of interest, and took therefore notes and a mortgage made by the debtor to a third person, the notes being indorsed by the latter. It was held that the usury only avoided the interest, and that to the extent the debt was valid the mortgage was a *bona fide* security, and that the bank, by becoming the owner of the notes, acquired the equity in the mortgage: *Allen v. Bank*, 23 O. S. 97, III Longsdorf's Notes, 114.

On the 27th of April, 1872, the plaintiff loaned to the defendant the sum of \$2,500 on an agreement for interest at the rate of ten per centum per annum, payable annu-

ally, and, in pursuance of the agreement, took from defendant two promissory notes for \$1,250 each, payable in one and two years, with stipulations therein for interest at the rate of eight per centum per annum, payable annually, secured by mortgage; and at the same time took from defendant two side notes for the additional two per cent. interest agreed upon, which side notes, amounting to \$209, were paid. It was held on proceedings to enforce the mortgage, the plaintiff, under the statute of May 4, 1869, commonly called the eight per cent. interest statute, was entitled to a decree for \$2,500 with interest at the rate of six per cent. per annum, less the \$209 so paid, and no more: *McClelland v. Sorter*, 39 O. S. 12, III Longsdorf's Notes, 1004. See to the same effect, *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125.

In an action upon a renewed note, into which illegal interest has been incorporated, the consideration may be inquired into, and the illegal interest deducted: *Baggs v. Loudenback*, 12 O. 153, I Longsdorf's Notes, 601.

In every case the consideration may be inquired into for the purpose of detecting illegal interest, and disallowing it, unless there has been a voluntary and full liquidation and payment of interest between the parties: *Baggs v. Loudenback*, 12 O. 153, I Longsdorf's Notes, 601.

Under the first section of the act of February 18, 1848 (S. & C. 744), where the petition upon its face showed that the action had been brought upon an instrument for the payment of money, upon which the maker had agreed to pay usurious interest at a stipulated rate, and that usurious interest had been paid and credited thereon at the rate stipulated; and the defense of usury had not been set up by the maker, by answer or otherwise; it was held that the court might, of its own motion, refuse to enter judgment for "more than the balance found due after deducting the excess of interest so paid;" or if the usurious interest so stipulated for had not been paid, then, in like manner, refuse to enter judgment for more than the amount found to be due by computing interest at the rate allowed by law: *Goode v. Sutton*, 29 O. S. 587, III Longsdorf's Notes, 501.

A judgment which includes usurious interest is erroneous: *Bates v. Savings & Loan Association*, 42 O. S. 655, IV Longsdorf's Notes, 138.

If the petition shows on its face that usurious interest had been received and credited as interest, the court may of its own motion refuse to enter judgment for more than the balance found due after deducting the excess of the interest thus paid; or if

the usurious interest which is stipulated for has not been paid then the court may refuse to enter judgment for more than the amount found to be due by computing interest at the rate allowed by law: *Goode v. Sutton*, 29 O. S. 587, III Longsdorf's Notes, 501.

In a joint action on a joint and several promissory note, one of the makers who fails to answer, may, upon a judgment by default after trial, have the benefit of a successful defense of usury set up by his co-defendant: *Baker v. Jerome*, 50 O. S. 682, IV Longsdorf's Notes, 522.

If a percentage for collection fees is included in an instrument, the interest will be allowed at six per cent. only, though conventional interest is stipulated for: *State v. Taylor*, 10 O. 378, I Longsdorf's Notes, 521.

Where interest not exceeding ten per cent. could be stipulated for by special contract, a note consisting in part of usury and bearing ten per cent. on the aggregate is in excess of the legal rate, and only the amount loaned, with six per cent., is recoverable: *Bunn v. Kinney*, 15 O. S. 40, II Longsdorf's Notes, 700.

If a person takes a note for usurious interest he can only recover the principal and six per cent. So held under the ten per cent. law: *West v. Meddock*, 16 O. S. 417, II Longsdorf's Notes, 786.

On a ten per cent. loan evidenced by a note for the principal, and side notes for eight per cent. interest, and other side notes for two per cent., the recovery was reduced to six per cent.: *Kelsey v. Skidmore*, 2 O. C. C. 219, 1 O. C. D. 453.

If on a note bearing eight per cent., two per cent. additional is deducted in advance, only the actual amount advanced with six per cent. is recoverable: *Metzger v. Meekers*, 6 Dec. Rep. 780, 8 Am. L. Rec. 98; *sub nomine Metzger v. Wiechers*, 7 Dec. Rep. 642, 4 Bull. 549.

If legal interest is stipulated for and the creditor afterwards exacts more, the court can only deduct the usury and not reduce to six per cent., which would be making a new contract: *Clearwater v. Cloon*, 12 Dec. Rep. 347, 2 H. 94.

If side notes are taken for interest at eight per cent., but two per cent. was deducted from the principal, the illegality which reduces the interest to six per cent. does not annul the agreement to pay in installments, and a recovery of the proper amount can be had on the side notes as they mature: *West v. Allison*, 7 Dec. Rep. 428, 2 Bull. (Supp.) 8.

Where under authority to issue eight per cent. bonds a board of education agrees to

borrow at fifteen per cent., the bonds to call for eight per cent. and the excess to be represented by separate orders, but the bondholder offered to surrender these at maturity, the bonds are not made void; for the excess over the statutory power, being clearly distinguishable, alone is void: *State, ex rel., v. Board of Education*, 35 O. S. 519, III Longsdorf's Notes, 804. See also BONDS, NEGOTIABLE.

Contracts not *ultra vires* have never been avoided for usury in Ohio. Only the illegal interest is avoided: *Morgan v. England*, W. 112, I Longsdorf's Notes, 9; *Benefit Society v. Lewis*, 7 O. (pt. 1) 80, I Longsdorf's Notes, 363.

C. RECOVERY OF USURIOUS PAYMENT.

Usurious interest paid voluntarily can not be recovered: *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626; *Williamson v. Cole*, 26 O. S. 207, III Longsdorf's Notes, 300.

Illegal interest having been paid can not be recovered back: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575; *Spalding v. Bank*, 12 O. 544, I Longsdorf's Notes, 619; *Graham v. Cooper*, 17 O. 605, I Longsdorf's Notes, 831.

Usurious interest which had been paid voluntarily could not be allowed as a set-off in an action upon the debt: *Graham v. Cooper*, 17 O. 605, I Longsdorf's Notes, 831.

The fact that a borrower pays usurious interest to obtain a reconveyance of land, which he has conveyed to the lender as security for the loan, and which the lender refuses to reconvey unless such usurious interest is paid, does not make such payment one under compulsion: *Williamson v. Cole*, 26 O. S. 207, III Longsdorf's Notes, 300.

As between natural persons, the payment of usurious interest is a voluntary payment upon an executed contract. The property rights are changed by such payment, and the law does not expressly authorize a recovery: *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

If usurious interest has been paid to a corporation which is forbidden to receive it, it is said that both parties are *in pari delicto*; and that for that additional reason such payment can not be recovered: *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

One who has paid usurious interest by mistake of fact may recover the payment thus made: *West v. Meddock*, 16 O. S. 417, II Longsdorf's Notes, 786.

Payments of interest in excess of the rate allowed by statute may be applied on the principal: *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859 [following *Williamson v. Cole*, 26 O. S. 207, III Longsdorf's Notes, 300].

dorf's Notes, 300; *Mallon v. Munson*, 12 Dec. Rep. 348, 2 H. 97; *Mueller v. McGregor*, 28 O. S. 265, III Longsdorf's Notes, 404.

While a payment in excess of the legal rate of interest is to be applied on the principal, such excess can not be recovered unless made under a mistake of fact. The fact that it was made under mistake of law as to the legal rights of the parties does not justify its recovery: *Colston v. Hastings*, 8 O. N. P. 154, 11 O. D. (N.P.) 125 [distinguishing *Samyn v. Phillips*, 15 O. S. 218, II Longsdorf's Notes, 725].

Creditors at large of a person who pays a usurious loan can not recover the usury from the lender: *Conant v. Bank*, 1 O. S. 298, I Longsdorf's Notes, 982.

Sureties on a renewal note having been compelled to pay to a *bona fide* indorsee can recover the usury from the payee under G. C., § 8307: *Koch v. Bloch*, 29 O. S. 565, III Longsdorf's Notes, 498 [affirming *Bloch v. Koch*, 7 Dec. Rep. 54, 1 Bull. 91].

The right to recover from a national bank twice the amount of usurious interest paid is in the nature of a penalty, and interest on it before judgment is not recoverable, not being expressly given by statute: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

The amount of recovery is twice the whole interest and not twice the usurious part of it: *Bank v. Trimble*, 40 O. S. 629, IV Longsdorf's Notes, 44.

A surety paying a judgment on cognovit containing usury after notice by the debtor's administrator not to pay the usury, can not recover the usury from the estate, because by the code he could have avoided the usury: *Davis v. Kelley*, 5 Dec. Rep. 30, 1 Am. L. Rec. 479. See also SURETY.

If any right of action exists against a bank to recover interest upon unlawful deposits made therein by the county treasurer, such right of action is barred in six years if it does not appear from the petition that the state has any substantial interest in the amount to be recovered: *State, ex rel., v. Bank*, 7 O. N. P. (N.S.) 43, 19 O. D. (N.P.) 82; *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 81, 19 O. D. (N.P.) 837.

D. USURY AS PENALTY.

Where a money lender takes from the borrower an obligation for a greater amount than the money lent and the stipulated interest, with an understanding on his part, to receive a less sum in discharge of the obligation if punctually paid, chancery may relieve against the excess as a penalty:

Brockway v. Clark, 6 O. 45, I Longsdorf's Notes, 321.

E. RELIEF IN EQUITY.

A court of equity will not relieve against a judgment, on the ground that it has been taken for a greater rate of interest than six per cent., where the defense might have been made at law. Nor will equity aid, unless the debtor tender the amount justly due for principal, and legal interest, or show a sufficient reason for not making such tender: *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626. See also *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575.

The doctrine that a party seeking affirmative relief in a court of equity against a usurious contract, either by way of original or cross-petition, must first do equity by tendering the amount due exclusive of the usury, does not apply to a defendant acting strictly on the defensive: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645.

Failure to interpose the defense of usury in an action at law is not ground for relief in equity: *Morgan v. England*, W. 112, I Longsdorf's Notes, 9.

Equity will not give relief to sureties in such cases, if relief would not have been given to the principal: *Bank v. Stevens*, 6 O. S. 262, II Longsdorf's Notes, 236.

Chancery will not relieve against usurious contracts unless the law declares them void or unless they contain a penalty. The remedy is at law: *Brockway v. Clark*, 6 O. 45, I Longsdorf's Notes, 321; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

A note for a debt and over 100 per cent. interest, with a condition that it could be discharged for a less sum if punctually paid, will be relieved against as containing a penalty: *Brockway v. Clark*, 6 O. 45, I Longsdorf's Notes, 321.

The amount equitably due must be tendered to enjoin a judgment at law for usury: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

The complainant should have tendered the amount justly due, but the objection not being made until after hearing will not be considered: *Brockway v. Clark*, 6 O. 45, I Longsdorf's Notes, 321.

Though the right to have usury credited on the debt may be a personal privilege, yet where equity is subjecting a mortgagor's equity of redemption to pay a judgment it can not decree a payment of the mortgage, disregarding usury: *Mattocks v. Humphrey*, 17 O. 336, I Longsdorf's Notes, 811. See also CREDITOR'S BILL.

F. SPECIAL CASES IN WHICH USURY NOT AVAILABLE AS DEFENSE.

Where one purchases land subject to a mortgage lien, and, as part of the consideration, agrees to pay the mortgage debt, he can not defend against the mortgage on the ground of usury: *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285.

G. C., § 8794, which authorizes a railway company to borrow money at a rate not to exceed seven per cent., and G. C., § 8797, which authorizes a railway company to sell its bonds for not less than seventy-five per cent. of their par value, operate to repeal the provisions of this chapter, as applicable to railway companies: *Trust Co. v. Railway*, 93 Fed. 702, 12 O. F. D. 584.

If a railway company enters into an equipment contract, whereby it agrees to pay an amount greater than the agreed value of the equipment with eight per cent. interest thereon, but less than the amount which would have been due if such contract had borne seven per cent. interest and had been discounted at seventy-five per cent., such contract is not usurious by virtue of G. C., §§ 8794 and 8797: *Trust Co. v. Railway*, 93 Fed. 702, 12 O. F. D. 584.

The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money, does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the national bank act, and can not be controlled by state legislation: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

The discount by a state bank of a bill of exchange payable without the State of Ohio, with knowledge that the parties thereto do not expect to pay the same at the place of payment named, but with the *bona fide* expectation that a third person, for whose accommodation it was drawn, will thus pay it for the drawer, is not usurious within the meaning of § 5 of the act of March 19, 1860 (S. & C. 150): *Bank v. Haynes*, 23 O. S. 637, III Longsdorf's Notes, 154.

An answer stating a defense under the 5th section of the act to restrain banks from taking usury, which omits to disclose the facts and circumstances showing a reason to believe that the drawers of a bill of exchange discounted would not be prepared to pay the same at the time of payment, is not defective upon general demurrer. If the purpose of justice should so require, the court would have a discretion, upon a motion for the

purpose, to require the facts and circumstances relied on to be disclosed in the pleading: *Gebhart v. Sorrels*, 9 O. S. 461, II Longsdorf's Notes, 390.

Where the owner of bonds lends them, the borrower to pay him the coupons, some of which are five and some six per cent. and also three per cent. on the par value, and this makes as near eight per cent. as is practicable, though a fraction over, the loan is not usurious: *Mossman v. Schuller*, 5 Dec. Rep. 404, 5 Am. L. Rec. 425.

A debtor of an estate allowed usury to the executors, and in payment gave his notes to a legatee, who took them in part payment of his legacy. It was held that the debtor could not plead usury, although the legatee was one of the executors: *McCoy v. Stranathan*, 24 O. S. 486, III Longsdorf's Notes, 188.

If the maker of a usurious note and mortgage induces a third person to pay them in full and allow them to stand as security to him, this is a payment and he can not plead usury: *Hulbert v. Cist*, 4 Dec. Rep. 328, 1 Clev. L. Rep. 315, 7 Dec. Rep. 545, 3 Bull. 868.

G. RENEWAL AS PAYMENT.

A renewal of a former note is not a payment thereof. A payment of usurious interest upon a prior note may be applied to the principal of one of the subsequent notes: *Widdifield v. Insurance Co.*, 2 O. N. P. 167, 3 O. D. (N.P.) 276.

If usurious interest has been paid, and subsequently a new note made by the same maker and payable to the same payee as the original note is delivered and accepted "in payment of said former notes and not in renewal thereof," this is an attempt to evade the usury laws; and in an action upon such new note, payment in excess of the legal rate on the former note may be applied to the payment of such new note: *Hardman v. Wilson*, 40 O. S. 630, IV Longsdorf's Notes, 45.

In 1869, 1870 and 1872, A loaned money to B, taking at each loan a promissory note therefor, the note for the loan of 1870 embracing also, the amount of the loan of 1869, and the note for the loan of 1872 embracing, also, the amount of the two preceding loans. In each of the notes usurious interest was incorporated. It was held that in an action to foreclose a mortgage given to secure the payment of the note of 1872, and obtain a sale of the mortgaged premises, all the illegal interest should be deducted: *Beals v. Lewis*, 43 O. S. 220, IV Longsdorf's Notes, 161.

A mortgage which was given to secure prior indebtedness, part of which is lawful and part of which consists of notes which

bear usurious interest, was held to be valid as to such debts as were valid; and invalid only as to such debts which were void for want of capacity on the part of the bank to enter into such transactions: *Morris v. Way*, 16 O. 469, I Longsdorf's Notes, 776.

If a note upon which usurious interest was due was renewed by a note, the principal of which included the usurious interest due upon the former note, such consideration might be inquired into, in an action upon such second note; and the usurious interest could not be the basis of recovery: *Baggs v. Loudenback*, 12 O. 153, I Longsdorf's Notes, 601; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626; *Exporting Co. v. Clark*, 13 O. 1, I Longsdorf's Notes, 621; *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704; *Baker v. Jerome*, 50 O. S. 682, IV Longsdorf's Notes, 522; *Bottenhorn v. Grotenkemper*, 8 Dec. Rep. 387, 7 Bull. 271.

A debtor of an estate, in settling with the executors, allowed usurious interest on his indebtedness. In payment of the amount found due, he gave his notes to a legatee, who accepted them in part payment of his legacy. In an action on the notes thus given, the debtor can not, by way of defense, set up the usurious interest allowed the estate, although the legatee was one of the executors with whom the settlement was made, since such note is given on a new consideration and to a new party: *McCoy v. Stranathan*, 24 O. S. 486, III Longsdorf's Notes, 188.

If a maker give a new note and take up his former usurious note it is a renewal and not a payment, though the payee refuses to renew and only agrees to a loan. The facts, and not what the parties call it, determines: *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

A payment and reloan, if a device, will not relieve the reloan of prior set-off for prior usury: *Mallon v. Munson*, 12 Dec. Rep. 348, 2 H. 97.

Where the owner of a usurious note dies leaving his widow as sole heir, and she settles the estate without an administrator, and procures the debtor to give her new note for his debt and usurious debt due thereon as a renewal, she giving no new consideration, the defense of usury is maintainable. Had an administrator receipted to the maker for the amount of the debt and taken the widow's receipt for the proceeds as part of her distributive share while the notes were drawn to her the debt to the estate would have been extinguished. But as she acted for the estate, taking the notes in renewal, the maker has the right against her that he would have against the intestate or his representative: *Van Ausdal v. Potterf*, 41 O. S. 677, IV Longsdorf's Notes, 82.

After a loan of money on open account at usurious interest by a treasurer of a church a succeeding treasurer took notes at eight per cent. for the principal and interest. It was held to be not a new transaction, but a renewal, and the usury must be deducted, and only six per cent. allowed: *Bottenhorn v. Grotenkemper*, 8 Dec. Rep. 387, 7 Bull. 271.

Where interest is paid at the rate of sixty per cent., and then at the lender's request the borrower renews the note and mortgage, but to another person, and after paying the latter at the rate of sixty per cent. again renews to a third person, but at the former lender's request, the court will deem the lenders to be co-conspirators, and the transaction as a single one, and, the defendants being nonresident or insolvent, will enjoin collection: *Conover v. LeRoy*, 5 O. D. (N.P.) 102, 32 Bull. 157.

A renewal by note of a different maker, as where a surety gives his own note to obtain time, is not payment, but still open to the defense of usury. So where the surety takes a mortgage from the debtor and assumes the usurious debts: *Riddle v. Canby*, 2 Dec. Rep. 586, 4 W. L. M. 124.

Where a firm of four persons owed two usurious debts to one bank and one to another bank, and by agreement of all the notes were all cancelled and the debts divided up among the debtors, so that each should owe a certain amount in severalty, and each gave his separate note and mortgage for his part, bearing six per cent. interest. It was held to be not a renewal of the usurious debt but a payment of it, and the original usury did not affect the new notes and mortgages: *Shinkle v. Bank*, 22 O. S. 516, III Longsdorf's Notes, 98.

Where on maturity of a usurious note a new note was given, and this was done for several years, the lender giving his check on each occasion a day or two after the new note, and never using the borrower's check until he had given the borrower a check for a like amount, and no maturing note was paid until a new note was given and the lender's check delivered, it was held that the series were all renewals, and the usury from the beginning could be credited on the last note: *Widdifield v. Insurance Co.*, 2 O. N. P. 167, 3 O. D. (N.P.) 276.

H. COMPUTATION OF INTEREST.

If a partial payment is made on an interest-bearing debt, it is to be applied first to the discharge of the interest. If the payment exceeds the amount of interest then due, the excess over such interest is to be applied to the reduction of the principal:

Hammer v. Nevill, W. 169, I Longsdorf's Notes, 16.

A partial payment upon a note which is to be paid on or before a certain day, which payment is made before the day thus designated, is to be applied first to discharge the interest; and any excess over the interest due at the date of payment is to be applied to the reduction of the principal: *Exporting Co. v. Bank*, 5 O. 260, I Longsdorf's Notes, 279.

Where interest is payable annually, or at other stated periods, it bears simple interest from the time it falls due till paid; and payments are to be applied, first, in satisfaction of the interest due upon interest; secondly, in satisfaction of interest due upon the principal; and, thirdly, in satisfaction of the principal; but in no case will the interest upon interest be made to bear interest: *Anketel v. Converse*, 17 O. S. 11, II Longsdorf's Notes, 810.

Unless an instrument provides for the payment of interest annually, interest can not be computed with annual rests: *Hunter v. Hall*, 14 O. C. C. 425, 6 O. C. D. 366.

An agreement to pay interest upon interest, after the interest has accrued is not usurious: *Fobes v. Cantfield*, 3 O. 17, I Longsdorf's Notes, 144.

An agreement, after interest is due, to turn it into principal, is valid: *Watkinson v. Root*, 4 O. 373, I Longsdorf's Notes, 229.

An action will lie to recover interest due, and in such action interest may be recovered upon the interest after it becomes due: *Watkinson v. Root*, 4 O. 373, I Longsdorf's Notes, 229.

Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent: *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285.

Interest from and after maturity may be allowed on items of wages or salary, payable monthly. But in computing interest on unsettled demands, it is error to make annual rests, and having found the balance (including interest) then due, to carry the same principal into subsequent statements, and allow interest thereon to the party in whose favor such balance was found: *Coal & Oil Co., v. Verner*, 22 O. S. 372, III Longsdorf's Notes, 82.

A bequest to one not a blood relative of the decedent of the income from certain securities for life, constitutes a life estate in said securities; and the amount of collateral inheritance tax due on such a bequest is determinable by the actuaries' combined experience tables and five per cent. compound

interest: *In re Estate of Wolf*, 48 Bull. 211. See also TAXATION.

A note for a year "at ten per cent. annually" does not mean annual interest, but only states the rate; hence, inserting the word "paid" before "annually" is a material alteration, and releases a surety if done without his assent and with the holder's assent: *Patterson v. McNeely*, 16 O. S. 348, II Longsdorf's Notes, 781. See also ALTERATION OF INSTRUMENTS.

A subsequent buyer of land is not released from a mortgage on it by an increase of the rate of interest: *Stanbery v. O'Neil*, 9 Dec. Rep. 238, 11 Bull. 260.

A stipulation in a corporation mortgage securing its bonds, that, on default of one, all should fall due, is valid to authorize immediate foreclosure. Interest after such precipitated maturity runs at the contract rate, and is not cut down to six per cent: *Hotel Co. v. Trust Co.*, 11 Dec. Rep. 255, 25 Bull. 375 [affirmed, without opinion, by supreme court, *Hotel Co. v. Trust Co.*, 25 Bull. 295]. See also NEGOTIABLE INSTRUMENTS.

Where a guardian has sold real estate and defaulted as to the proceeds and died, in an action against his bondsmen, interest should be calculated upon the amount realized on the sale with annual rests to his death and thereafter at simple interest without such rests to the date of the judgment: *Swisher v. McWhinney*, 64 O. S. 344, IV Longsdorf's Notes, 872. See also GUARDIAN AND WARD.

Interest payable out of net earnings is cumulative, and the deficiency of one year is to be made up out of future surplus net earnings. This right is enforceable by injunction against diversion of the surplus, and some bondholders may sue for all: *Railroad Co. v. Shoemaker*, 3 O. C. C. 473, 2 O. C. D. 270 [affirming, *Shoemaker v. Railroad Co.*, 10 Dec. Rep. 12, 18 Bull. 43].

The bonds are to be construed in connection with the trust deed securing them: *Railroad Co. v. Shoemaker*, 3 O. C. C. 473, 2 O. C. D. 270 [affirming, *Shoemaker v. Railroad Co.*, 10 Dec. Rep. 12, 18 Bull. 43]. See also BONDS, NEGOTIABLE.

I. APPLICATION OF PAYMENTS.

Where interest is payable annually, or at other stated periods, it bears simple interest from the time it falls due till paid; and payments are to be applied, first, in satisfaction of the interest due upon interest; secondly, in satisfaction of interest due upon the principal; and, thirdly, in satisfaction of the principal; but in no case will the interest upon interest be made to bear interest: *Anketel v. Converse*, 17 O. S. 11, II Longsdorf's Notes, 810.

Interest from and after maturity may be allowed on items of wages or salary, payable monthly. But in computing interest on unsettled demands, it is error to make annual rests, and having found the balance (including interest) then due, to carry the same as principal in subsequent statements, and allow interest thereon to the party in whose favor such balance was found: *Coal & Oil Co. v. Verner*, 22 O. S. 372, III Longsdorf's Notes, 82.

Interest is not to be compounded in the absence of specific agreement therefor: *Miami Exporting Co. v. Bank*, 5 O. 260, I Longsdorf's Notes, 279.

Payments made upon a debt which is not due and payable should be applied to discharge the principal, and such proportion of interest as has accrued upon the principal thus extinguished: *Miami Exporting Co. v. Bank*, 5 O. 260, I Longsdorf's Notes, 279.

An agreement to pay interest upon interest, after the interest has accrued is not usurious: *Fobes v. Cantfield*, 3 O. 17, I Longsdorf's Notes, 144.

If usurious interest has been paid, the excess over the legal rate of interest is to be applied on the principal: *Metzger v. Wiechers*, 7 Dec. Rep. 642 (Ham. Dist. Court), 4 Bull. 549.

If interest has been paid in excess of the legal rate, such excess is to be applied on the principal: *Widdifield v. Insurance Co.*, 2 O. N. P. 167, 3 O. D. (N.P.) 276.

If notes on their face draw eight per cent. interest only, but by a collateral agreement ten per cent. interest is to be paid, and such rate of interest is in fact paid, the excess over eight per cent. is to be applied to the principal: *Baker v. Jerome*, 50 O. S. 682, IV Longsdorf's Notes, 522.

Where a loan is usurious the borrower may waive the forfeiture and insist upon the excess of interest being applied to the payment of the lawful interest: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

If a note is allowed to run after maturity, but no binding agreement for an extension of time is given, the payments thereon at the rate of ten per cent. in pursuance of such contract are proper, while the statute in force permits interest at the rate of ten per cent.; but on the repeal of such statute, such payments made thereafter are to be applied to the interest computed at the rate of six per cent.; and the excess thereover to the principal: *Andrews v. Campbell*, 36 O. S. 361, III Longsdorf's Notes, 859.

The legal way is to apply payments first to interest to that date and the balance to the principal, or if not enough to pay interest due to apply it to the interest *pro tanto*;

otherwise a compounding of interest might result: *Hammer v. Nevill*, W. 169, I Longsdorf's Notes, 16.

Payments on a usurious note to a national bank must be credited on the principal: *Bank v. Slemmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

J. BONA FIDE INDORSEE.

Where a note or bill is an existing security in the hands of the holder, the usury exacted by the bank in its acquisition, is not available, by way of defense, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate. The party with whom the bank had the usurious transaction is the party to whom, under the national banking act, the forfeiture of interest is to be adjudged; and who, in case the interest has been paid, is authorized to recover back twice the amount: *Smith v. Bank*, 26 O. S. 141, III Longsdorf's Notes, 292.

A *bona fide* holder of a negotiable instrument who acquired the same before maturity, without notice of usury, can not be affected by the fact that such contract is usurious: *Dunkle v. Renick*, 6 O. S. 527, II Longsdorf's Notes, 256.

In an action by the maker of a negotiable promissory note against the payee, under the statute of January 12, 1844 (S. & C. 744), to recover the amount of usurious interest thereon paid to an indorsee, it must be averred in the plaintiff's petition that the holder was a "*bona fide* indorsee," and that the note was "purchased" for a valuable consideration, and it is not sufficient merely to aver that the note was indorsed before due and without notice of the usury: *Dunn v. Moore*, 26 O. S. 641, III Longsdorf's Notes, 336.

Under the act of February 18, 1848 (S. & C. 744), all payments of usurious interest are to be taken as payments on account of the principal; and where the sureties on a negotiable promissory note, given by way of renewal for money previously loaned, have been compelled to pay such note to an indorsee, who purchased the same *bona fide* before due, they may, under the statute, recover from the payee the amount of usury, exacted by him from their principal, which they have been so compelled to pay to the holder by reason of the indorsement of the note: *Koch v. Block*, 29 O. S. 565, III Longsdorf's Notes, 498.

A board of education, under the provisions of the act of March 13, 1868 (S. & S. 710), authorizing it to borrow money to pay existing indebtedness, by the issue and sale

of bonds bearing interest at a rate not exceeding eight per cent. per annum payable semi-annually, agreed to borrow a sum of money at an aggregate rate of interest of fifteen per cent. in manner following: For the amount so to be borrowed bonds were to be issued, bearing the authorized rate of interest, and for the excess of interest orders on the treasury were to be issued payable at the same time as the legal interest. The bonds were regularly issued, bearing eight per cent. interest, and sold at par, and the money was received and used as authorized. For the excess of interest orders on the treasury were at the same time issued and delivered to the purchaser, as agreed to by the parties, but were never presented for payment, and after their maturity he offered to return them for cancellation. It was held that this agreement to pay excess of interest is void, and having never been executed in whole or in part, will not avoid a recovery on the bonds. The fact that such agreement for unlawful interest was made, does not make the purchaser chargeable with notice of prior fraudulent practices of members of the board in incurring the debt for the payment of which the money was borrowed, which had no connection with the sale of the bonds, and of which the purchaser had no knowledge: *State, ex rel., v. Board of Education*, 35 O. S. 519; III Longsdorf's Notes, 804.

The *bona fide* holder of a negotiable instrument takes such note free from defense of usury; but such defense may be interposed as against a chattel mortgage which is given to secure such note: *Gates v. Banking & Storage Co.*, 22 O. C. C. 724, 11 O. C. D. 721.

K. RIGHTS UNDER FORMER STATUTE.

Prior to the enactment of a statute which provided specifically for the recovery of usurious interest (act of February 18, 1848; 46 v. 55), payment of usurious interest was regarded as *prima facie* at least voluntary; hence recovery thereof was not allowed: *Shelton v. Gill*, 11 O. 417, I Longsdorf's Notes, 575; *Bank v. Reed*, 11 O. 498, I Longsdorf's Notes, 589; *Spalding v. Bank*, 12 O. 54, I Longsdorf's Notes, 619; *Rains v. Scott*, 13 O. 107, I Longsdorf's Notes, 626.

The 9th section of the act of February 24, 1848 (46 v. 91), suspended the right to make the defense, of usury; but allowed an action against the bank to recover the money for the use of schools. The repeal of this law in 1850 restored the right to defend. The law of 1848 only operated upon the remedy, still leaving the contract void and expressly forfeited; and consequently its subsequent repeal, and the revival of the right to defend did not in any manner affect or

impair any provision of a valid contract: *Bank v. Russell*, 1 O. S. 313, I Longsdorf's Notes, 984.

A former act passed March 19, 1850, restrained banks from taking usury: *State v. Gibbs*, 7 O. N. P. (N.S.) 345, 18 O. D. (N. P.) 694.

XVI. PARTIES.

The assignee in bankruptcy of the payer of usurious interest to a national bank is his "legal representative," entitled to bring the action to recover twice the interest: *Bank v. Trimble*, 40 O. S. 629, IV Longsdorf's Notes, 44.

A receiver of a payee of usurious interest to a national bank is his "legal representative," entitled to bring the action to recover twice the interest: *Barbour v. Bank*, 45 O. S. 133, IV Longsdorf's Notes, 263.

(N. B. The supreme court in 1882 in *Bar-net v. First National Bank*, 8 Bull. 221, had held that an assignee for creditors was not such "legal representation," but the case never was put in the reports.)

A person taking the benefit of a trust can not deny the legality of its other objects. Thus, if a debtor mortgages property to a trustee to secure a creditor and sureties on the debt, and the sureties buy the property from the trustee, they can not set up usury against the creditor: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 902.

A purchaser of land assuming a mortgage as part of the consideration can not set up usury in it: *Cramer v. Lepper*, 26 O. S. 59, III Longsdorf's Notes, 285.

An assignee of the equity of redemption *eo nomine*, can not set up usury in it, for this is equivalent to assuming the mortgage: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645.

Contra of a buyer who only agreed to pay what was due on it: *Dickson v. Vail*, 13 Dec. Rep. 794, 2 C. S. C. R. 103.

A joint debtor assuming his codebtor's share of the debt may set up usury. Thus, where A, B and C, partners, gave a usurious note secured by mortgage, and A conveyed to B and C, who assumed the debts. It was held that B and C could plead usury in a foreclosure of the mortgage, and so could their assignee in bankruptcy, though they reported the debt at its full amount: *Beals v. Lewis*, 43 O. S. 220, IV Longsdorf's Notes, 161.

As a firm succeeding another firm and assuming its debts, including a mortgage, can not set up usury in the mortgage, neither can its assignee for creditors: *More v. Felds-wich*, 7 Dec. Rep. 501, 3 Bull. 557.

A buyer of land which is subject to a mortgage can set up usury to defeat fore-

closure of the mortgage, and so can the beneficiaries of an assignment for creditors by the mortgagor if the assignee has failed to do so for them, and it is not a misjoinder to let them in as defendants in foreclosure, joining in an answer of such defense: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645.

Usury in a judgment on a note and decree of foreclosure of the mortgage may be set up in the distribution by one who got judgment *pendente lite*, and became party on his own motion. His judgment is a lien, though *pendente lite*, and the doctrine of *res judicata* is not violated. The former decree is not touched, but only the application of the fund to it affected: *Brooke v. Morris*, 13 Dec. Rep. 1050, 2 C. S. C. R. 528.

Where a bank discounts negotiable papers at a usurious rate, such usury will not avail the antecedent parties. Only the party with whom the transaction was can claim forfeiture of interest or recover double interest: *Smith v. Bank*, 26 O. S. 141, III Longsdorf's Notes, 292.

But seemle not if the antecedent parties were the real borrowers and the last party merely an accommodation party: *Hade v. McVay*, 31 O. S. 231, III Longsdorf's Notes, 576.

A mortgagee not made party to a foreclosure, but consenting to judgment and sale to save the delay of making him a party on condition the sale is delayed three months, can not come in after sale and set up usury: *Riggs v. Hulbert*, 7 Dec. Rep. 306, 2 Bull. 95.

One made party to a foreclosure as having an interest, who lets judgment go by default, can not file a petition in error on the ground of usury, for his default admits he has no interest; hence, he appears as a mere volunteer: *Hubbell v. Mansfield*, 5 Dec. Rep. 329, 4 Am. L. Rec. 619.

A prosecuting attorney has a right to bring an action in the name of the state against a bank to recover interest due upon money which was illegally deposited in such bank by the county treasurer, assuming that such right of action existed in any person: *State, ex rel., v. Kilgour*, 8 O. N. P. (N.S.) 81, 19 O. D. (N.P.) 837.

A chattel mortgage is a chose in action and is not negotiable paper, and does not so adhere to the notes which it secures as to become transferred with them so as to cut off equities of the mortgagor. Therefore the mortgagor has the right to set up usury against the assignee of a chattel mortgage, the notes not being sued upon, notwithstanding the mortgage was transferred before due and without notice of usury: *Gates v. Banking Co.*, 22 O. C. C. 724, 11 O. C. D. 721. See also CHATTEL MORTGAGES.

An insane mortgagor is not bound by an agreement made for him by unauthorized persons before decree of foreclosure, that the buyer shall hold the land in trust to sell and pay off the debt. Nor is he bound by the decree which formed part of it. The decree may be operative as to third persons, but the buyer's title is in trust: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309. See also INSANE, IMBECILES AND IDIOTS.

XVII. PLEADING.

Citizens of different states may contract with reference to the interest laws of either. If they make no selection in express terms the court will determine from the evidence and circumstances which code of laws was intended: *Demland v. Savings & Loan Co.*, 20 O. C. C. 223, 11 O. C. D. 249.

An averment that the original loan was renewed several times, and after payments of usury a final settlement and payment was agreed on, but the debtor not being ready to pay, gave the note in payment and not as a renewal, is demurrable. It shows no complete settlement, barring a deduction of usury, but a mere evasion of the law: *Hardman v. Wilson*, 40 O. S. 630, IV Longsdorf's Notes, 45.

Voluntary payment of the balance found due, after exhausting mortgage security, does not waive the right to open the judgment because rendered on service by publication only, G. C., § 11632, although the defense is usury in the debt, for that part of the payment made by sale was not voluntary: *Roberts v. Price*, 2 Dec. Rep. 681, 4 W. L. M. 581.

Interest can not be recovered where the petition does not pray for it: *Berger v. Bank*, 5 O. N. P. 176, 5 O. D. (N.P.) 277.

Usury must be pleaded unless it appears in the contract sued on: *Insurance Co. v. Morrow*, 16 O. C. C. 351, 8 O. C. D. 419 [appeal from *Insurance Co. v. Morrow*, 7 O. D. (N.P.) 118; affirmed, without opinion, *Morrow v. Insurance Co.*, 61 O. S. 661].

A petition by the maker of a negotiable note to recover from the payee usury paid to an indorsee under G. C., § 8307, must aver that the holder was a "bona fide" indorsee and "purchased" the note for a valuable consideration, merely stating that it was indorsed before due and without notice of the usury is not sufficient: *Dunn v. Moore*, 26 O. S. 641, III Longsdorf's Notes, 336.

The two years within which an action for double the interest paid to a national bank can be brought (R. S. of U. S., § 5198), begins to run from the day on which the interest that included usury was actually paid:

Bank v. Trimble, 40 O. S. 629, IV Longsdorf's Notes, 44.

If a demand is barred by limitations it is also barred as a set-off. Thus the right to recover usury paid to a national bank within two years being barred can not be offset against the bank's claim on a new loan after payment of the usurious loan: *Shinkle v. Bank*, 22 O. S. 516, III Longsdorf's Notes, 98.

A borrower from a national bank who pays usurious interest can not, after two years, have the payment credited on the principal. Nor even the excess over six per cent., for congress having prescribed the rule, the state can not legislate on the subject: *Higley v. Bank*, 26 O. S. 75, III Longsdorf's Notes, 287.

Usury can only be the subject of a separate action as distinguished from set-off where the debtor has been compelled to pay a *bona fide* holder of the usurious paper: *Mallon v. Munson*, 12 Dec. Rep. 348, 2 H. 97.

W borrowed money, gave an eight per cent. note secured by mortgage and side notes for usurious interest. W then sold to B, who agreed to pay the notes and mortgage as part of the consideration, and gave a mortgage on the same property to secure the agreement. B then sold to J and agreed to pay off the incumbrances. It was held on foreclosure of the mortgage J could not plead usury: *Jones v. Insurance Co.*, 40 O. S. 583, IV Longsdorf's Notes, 43.

A having made a note and mortgage to B to secure usurious debts, sold the land to C, who agreed with A and C to pay the mortgage. A then filed suit against B and C to have the usury deducted and charged in his favor against the land. It was held that a vendor's lien could not exist because the conduct of the parties showed a contrary intention, C's promise to settle with B having been accepted by A, and B having acquired a right to assert his claim in full by C's promise, and A could not revoke his arrangement with C and make him a trustee: *Butler v. Creager*, 2 O. C. C. 542, 1 O. C. D. 632 [affirmed, without opinion, *Butler v. Creager*, 24 Bull. 370].

An answer in foreclosure of one averred to have an interest, merely setting up usury in the plaintiff's demand, without showing any interest in himself, is demurrable: *Strass v. Binder*, 4 Dec. Rep. 216, 1 Clev. L. Rep. 123.

A director who borrows of a national bank a greater amount and at greater interest than the law allows is not estopped to set up usury: *Bank v. Stemmmons*, 34 O. S. 142, III Longsdorf's Notes, 704.

Although a sale of a note at a low price is not usury, yet on a note given as accom-

modation for a usurious loan to another, any party to the note or to renewals of it can plead usury, and the court will credit all excess over legal interest upon the principal: *Parvin v. McBride*, 3 Dec. Rep. 174, 4 Gaz. 148, 12 Dec. Rep. 800, 1 D. 566.

If a petition shows on its face that the contract sued on is usurious, and that usury has been paid, the court may, of its own motion, credit the excess of interest on the principal and allow only statutory interest, though the maker has not set up usury by defense or otherwise. This does no violence to G. C., § 11329, that allegations not controverted are deemed admitted: *Goode v. Sutton*, 29 O. S. 587, III Longsdorf's Notes, 501.

In an action on notes an answer claiming recoupment of usury in other transactions, not stating any amount, is not good as a set-off, because it does not arise on contract. Nor a counterclaim because not arising out of nor connected with the subject of the action and too uncertain: *Smead v. Chrisfield*, 12 Dec. Rep. 460, 1 D. 18.

Sureties against whom a judgment was taken by a bank on a bond wholly void for usury, on warrant of attorney without notice, can not impeach the judgment for usury without tendering the amount justly due either by original bill or by cross bill when the bank seeks to subject securities: *Bank v. Stevens*, 1 O. S. 233, I Longsdorf's Notes, 966, 6 O. S. 262, II Longsdorf's Notes, 236.

The doctrine that the party seeking affirmative relief in equity against a usurious contract must do equity by tendering the just amount does not apply to parties strictly on the defensive, as other lienholders resisting foreclosure of a mortgage, as being wholly void for usury: *Bank v. Bell*, 14 O. S. 200, II Longsdorf's Notes, 645.

There can be no collateral impeachment of a judgment on a usurious contract; and if made, the consideration of another contract is not a void consideration, and while the judgment stands the parties can not dispute the legality of the consideration: *Busby v. Finn*, 1 O. S. 409, I Longsdorf's Notes, 992.

Where a written contract purports on its face to be usurious, allegations and proof that it is not so must be explicit and clear of all doubt: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

A petition, in an action by a municipal corporation against a bank to recover interest upon municipal funds unlawfully deposited by the treasurer of such municipality in a bank, which omits the averment of knowledge on the part of the bank of the true ownership of the funds so deposited is open to demurrer: *Newark v. Bank*, 15 O. C. C. (N.S.) 276.

An action brought by a municipality against a bank for recovery of interest received by said bank on funds belonging to the municipality and alleged to have been deposited without its knowledge or knowledge on the part of the bondsmen of the treasurer who made the deposit, but with knowledge on the part of the bank as to the ownership and trust character of said funds, is not open to demurrer, and an accounting of profits so received may be required of said bank: *Newark v. Bank*, 15 O. C. C. (N. S.) 276.

One of joint and several makers in default may on judgment by default after answer have the benefit of a successful defense of usury set up by his co-defendant: *Baker v. Jerome*, 50 O. S. 682, IV Longsdorf's Notes, 522. See also PLEADINGS.

XVIII. EVIDENCE.

Where usury is pleaded as a defense to a written instrument in contradiction to the terms of such instrument, the burden is on the party so asserting it, and the plea must be supported by clear and satisfactory evidence: *Boone v. Andrews*, 10 O. C. C. (N.S.) 377, 20 O. C. D. 166.

Where a written contract on its face purports to be usurious, allegations and proof that the contract was not usurious must be explicit and clear of all doubt: *Lockwood v. Mitchell*, 7 O. S. 387, II Longsdorf's Notes, 309.

If the usury proved is substantially the same as that averred in the pleading, it is sufficient: *Corcoran v. Powers*, 6 O. S. 19, II Longsdorf's Notes, 215.

A note made and payable in New York, where usury avoids it *in toto*, not usurious on its face, may be shown by an accommodation party who indorsed before negotiation to be void by reason of a deduction of more interest in advance: *Hayden v. Miller*, 4 Dec. Rep. 201, 1 Olev. L. Rep. 114.

A plea of *non assumpsit* will sustain evidence that a note is wholly void for usury by the law of the state where it was made: *Palmer v. Yarrington*, 1 O. S. 253, I Longsdorf's Notes, 971.

Where a note bears on its face eight per cent. interest and the whole amount was advanced, and the borrower paid ten per cent., parol evidence that the original agreement was for ten per cent. is admissible, and all over six per cent. will be credited: *Baker v. Jerome*, 50 O. S. 682, IV Longsdorf's Notes, 522; *Insurance Co. v. Shotts*, 6 Dec. Rep. 813, 8 Am. L. Rec. 321.

The receipt by the holder of a promissory note past due, of interest to a date fifteen days subsequent to such payment and the

indorsement of such payment on the note, is evidence competent to be received in support of a claim of a contract to extend the time of payment of the note, but does not imply such contract as matter of law; and where the person who made the payment testifies at the trial to the transaction of payment, and is silent as to any request for extension and any agreement to extend, and the recipient of the money on the witness stand denies that any such request or agreement was made, a finding by the jury in favor of the claimed extension should be set aside as not supported by the evidence: *University v. Manning*, 65 O. S. 139, IV Longsdorf's Notes, 883. See also NEGOTIABLE INSTRUMENTS.

XIX. REVIEW.

In an action for an account of the amount due on a mortgage of real estate and a sale of the mortgaged premises, the only question was whether usurious interest was embraced in the mortgage. The court found that the mortgage did embrace \$1,553.30 illegal interest, and found the amount due to the plaintiff to be as claimed by him, less such illegal interest, rendered judgment accordingly, and ordered a sale of the property to satisfy such judgment. The plaintiff received and receipted for the full amount of the judgment so rendered. It was held that the plaintiff did not thereby waive the right to appeal to the district court with respect to such alleged usurious interest: *Beals v. Lewis*, 43 O. S. 220, IV Longsdorf's Notes, 161 [distinguishing, *Tabler v. Wiseman*, 2 O. S. 207, I Longsdorf's Notes, 1040].

On August 1, 1854, a promissory note was given under the act of March 14, 1850, which authorized the interest at the rate of ten per cent., due one day after date, and bearing interest at the rate of ten per cent. from date, until such note was paid. Action was brought on such note in 1859 and judgment by default was taken on the 29th of October, 1859; and such judgment contained a provision that it should bear ten per cent. interest per annum until paid. Payments were made upon such judgment during the next fifteen years, and in 1885 such judgment was revived, having become dormant, and the judgment debtor having died. Under a statute corresponding to G. C., § 8304, it was held that it was proper in rendering such judgment to include interest upon the unpaid interest at the rate of ten per cent. without rests down to the date of the judgment; but that if such construction of the statute was wrong, that such judgment was at most erroneous, and should have been reversed by a proceeding in error;

and that the allowance of such additional rate of interest over six per cent. was not a clerical error which could be corrected by a *nunc pro tunc* order later: *Campbell v. Campbell*, 3 O. C. C. 449, 2 O. C. D. 256.

INTEREST, CONCERN OR SHARE.

"Interest" in a controversy within the meaning of G. C., §§ 11046 and 11255, must be an interest in the subject-matter of the litigation. It means more than mere concern or motive; it is an interest or share in the subject of the action: *Telephone Co. v. Telephone Co.*, 11 O. N. P. (N.S.) 424, 21 O. D. (N.P.) 241.

It is said that devisees under a will prior to the death of testator have interest in expectancy in the property devised to them: *Baker v. McGrew*, 41 O. S. 113, IV Longsdorf's Notes, 53.

The fact that a county commissioner owns land upon or adjacent to a ditch improvement, subject to assessment is not sufficient ground for a court to interfere with the improvement or disturb the assessment: *Mason v. Commissioners*, 10 O. C. C. (N.S.) 201, 20 O. C. D. 49. See also DITCHES.

INTERESTED PARTIES.

See JURY; WITNESSES.

INTEREST IN CONTRACTS.

See CONTRACTS; ASSIGNMENTS.

INTEREST IN LANDS.

See FRAUDS, STATUTE OF; REAL PROPERTY, and cross-references thereunder.

INTERFERENCE WITH BUSINESS.

See BOYCOTTS AND STRIKES; TRADE-MARKS AND TRADE NAMES.

For the validity and effect of contracts not to compete in business, see CONTRACTS.

For monopolies, see MONOPOLIES AND UNLAWFUL COMBINATIONS.

An injunction against the stationing of police about a place of business in such a manner as to interfere with the business carried on therein will be refused, where the court has reasonable ground for the belief that things of a forbidden character, such as gambling, are being carried on in connection with such business, and the plaintiff

in his testimony exhibits a lack of candor and a willingness to suppress the facts, and otherwise by his conduct forfeits his claim on a court of equity: *Hirsch v. Hunt*, 13 O. N. P. (N.S.) 137.

INTERFERENCE WITH CONTRACT.

See CONTRACTS.

INTERFERENCE WITH JUSTICE.

See BRIBERY; PERJURY; JURY; TRIAL.

INTERFERENCE WITH OFFICER.

For interfering with officer, see CONTEMPT; EXECUTION, WRIT OF.

INTERLINEATION.

See ALTERATION OF INSTRUMENTS; AMENDMENT; PLEADINGS.

An interlineation in the bill of exceptions from the court of a justice of the peace, purporting to overrule the motion to discharge the attachment and extending the time for filing the bill of exceptions, together with the pasting on the bill of a piece of paper on which is written the apparent indorsement and allowance of the bill by the justice, will be presumed by a reviewing court to have been placed there in good faith and at the time stated as against hints by counsel that these additions were made at a later date: *Speaks v. Lisey*, 7 O. N. P. (N.S.) 389, 19 O. D. (N.P.) 282. See also COURTS.

Where the petition in an action in mandamus against a municipal officer is defective in that the action is brought simply in the name of a taxpayer without any averment that it is on behalf of the city, the plaintiff, upon hearing of the demurrer, will be granted leave to amend by interlineation of the necessary averment: *State v. Hinkle*, 13 O. D. (N. P.) 165. See also AMENDMENT.

INTERLOCKING DEVICES.

For interlocking devices, see RAILROADS.

INTERLOCUTORY COSTS.

See COSTS.

INTERLOCUTORY DECREES AND JUDGMENTS.

See JUDGMENT; ERROR.

An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for final determination: *Teaff v. Hewitt*, 1 O. S. 511, I Longsdorf's Notes, 1002; *Evans v. Dunn*, 26 O. S. 439, III Longsdorf's Notes, 318.

In an action for royalties agreed to be paid if defendant used plaintiff's device in making machines, a finding that defendant had used the device without accounting, and referring the case to a master is interlocutory, to the extent that an appeal from a judgment on his report of the amount due carries up all the merits for rehearing. The reference was in execution of the final decree but preparatory to it: *Clarke v. Bentel*, 6 Dec. Rep. 1205, 12 Am. L. Rec. 534, 11 Bull. 105. See also APPEALS.

A final order is not made interlocutory by the fact that there is a pending motion to vacate it: *Henry v. Jeans*, 48 O. S. 443, IV Longsdorf's Notes, 423. See also ERROR.

An interlocutory order may be altered or amended in the final order: *McConville v. Lee*, 31 O. S. 447, III Longsdorf's Notes, 596. See also JUDGMENT.

An interlocutory decree in a bill to compel a conveyance being suffered to lie dormant and unexecuted for twelve years is not a *lis pendens*: *Trimble v. Boothby*, 14 O. 109, I Longsdorf's Notes, 658. See also LIS PENDENS.

An interlocutory decree may on motion be set aside at any time before final order: *Kelley v. Stanbery*, 13 O. 408, I Longsdorf's Notes, 644.

Before final judgment no writ of error will be allowed, hence, submitting to final judgment before attempting to reverse interlocutory orders does not waive: *Herf v. Schulze*, 10 O. 263, I Longsdorf's Notes, 509.

Mere preliminary or interlocutory orders are not reviewable on error: *Cameron v. Workman*, 30 O. S. 58, III Longsdorf's Notes, 516.

INTERLOCUTORY INJUNCTION.

See INJUNCTION.

INTERMENT.

See CORPSE.

INTERMIXTURE OF GOODS.

See CONFUSION OF GOODS.

INTERNAL REVENUE.

For internal revenue, see UNITED STATES.

INTERNAL REVENUE CERTIFICATES.

A receipt from the United States Government for the tax levied upon the retailer of intoxicating liquors does not authorize the owner to violate any of the laws of the state where issued, nor to sell intoxicating liquors at retail in any county where the sale is prohibited by law: *State v. Kendle*, 8 O. N. P. (N.S.) 109, 19 O. D. (N.P.) 721 [affirmed, without opinion, by circuit court, see *State v. Kendle*, 8 O. N. P. (N.S.) 109, 19 O. D. (N.P.) 721]. See also INTOXICATING LIQUOR.

INTERNATIONAL EXTRADITION.

See EXTRADITION.

INTERNATIONAL LAW.

See TREATIES.

INTERPLEADER.

Scope Note.—Includes statutory provisions, nature, who may have, effect, service and jurisdiction, parties, pleading and interest on the fund. Excludes interpleader incident to other remedies and substitution of parties in actions in general.

Cross References.

For questions arising under mechanics' liens, see MECHANIC'S LIEN.

For rights under policies of insurance, see also INSURANCE.

For questions of exemption from execution, see EXECUTION.

For questions of appeal, see APPEALS.

For interpleader as relating to the settlement of estates, see EXECUTORS, ADMINISTRATORS AND ADMINISTRATION OF ESTATES.

For interpleader in case of intervention by one claiming an interest, see **INTERVENOR**.
 For joinder of actions, see **PLEADINGS**.
 For joinder of parties, see **PARTIES**.
 For new parties, see **PARTIES**.

ANALYTICAL OUTLINE.

- I. Definition, 9487.
- II. Scope and Effect of Statutory Provisions, 9487.
- III. Nature, 9489.
- IV. Who May Have Interpleader, 9491.
- V. Discharge of Original Party, 9494.
- VI. Service and Jurisdiction, 9495.
- VII. Parties, 9495.
- VIII. Pleading, 9496.
- IX. Interest on Fund, 9499.
- X. Appeal, 9499.

I. DEFINITION.

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

Interpleader is the remedy resorted to "where two or more persons severally claim the same thing under different titles or in separate interests from another person, who not claiming any title or interest therein himself, and not knowing to which of the claimants he ought to render the debt or duty claimed, or deliver the property, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties": *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

II. SCOPE AND EFFECT OF STATUTORY PROVISIONS.

The statute on the subject of interpleader (G. C., §§ 11265, *et seq.*), is not exclusive, but is auxiliary to the practice in chancery with reference to interpleader: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694; and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

The purpose of G. C., § 11265, was intended as auxiliary to the practice in chancery respecting interpleader and to direct the practice in the particular classes of cases named, and was not intended to regulate the entire

subject of interpleader: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

Interpleader was recognized in courts of equity prior to G. C., § 11265, but since the passage of this statute by the legislature, it supersedes the equity practice and gives the form which should be followed: *Mill Co. v. Accident and Guaranty Co.*, 11 O. C. C. (N.S.) 443, 21 O. C. D. 4.

The issues made between the several claimants are made triable by jury and are not appealable: *Pratt v. Insurance Co.*, 5 O. C. C. 587, 3 O. C. D. 287; *Warner v. Jaeger*, 5 O. C. C. 16, 3 O. C. D. 9.

No appeal lies under G. C., § 11265: *Lumber Co. v. Marsh*, 16 O. C. C. 432, 8 O. C. D. 624 [affirmed, without opinion, *Lumber Co. v. Marsh*, 62 O. S. 632].

The bringing of an action in interpleader by the stakeholder is not contemplated, but the provision applies to cases where stakeholders have been sued by one of the parties claiming the money so held, and before answer are permitted to ask that the various claimants be ordered to interplead. This provision, however, is not exclusive and in no way curtails the right to settle disputed claims by a bill in interpleader in equity: *Insurance Co. v. Berman*, 7 O. N. P. (N.S.) 145, 18 O. D. (N.P.) 772.

G. C., § 11292, providing for service by publication in certain cases, does not apply to an action in interpleader where brought by the stakeholder, and constructive service can not be made on a nonresident defendant in such an action: *Insurance Co. v. Berman*, 7 O. N. P. (N.S.) 145, 18 O. D. (N.P.) 772.

In an action against a municipal corporation and its contractors by an assignee of the contract where the city has filed an affi-

davit under G. C., §11265, averring that the subject of the action was money in its hands, and praying that the claimants named therein may interplead and be ordered to settle their claims among themselves, and an order made for the deposit of the money in court, and requiring such claimants to appear before the court on a day named and maintain their claims to such money, a demurrer will not lie to the original petition by one of such claimants on the ground that it does not state facts sufficient to constitute a cause of action against him, nor to require him to interplead to the petition: *Bank v. Cincinnati*, 8 O. N. P. 517, 10 O. D. (N.P.) 545.

The code interpleader under § 42, G. C., § 11265, can only apply when the whole controversy turns upon the right of property or right to the contract in dispute; that is, whether plaintiff or interpleading defendant is the true owner, and not where plaintiff relies on an independent promise: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

The code interpleader may apply whether the adversary claim of the third party is at law or in chancery: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

By virtue of G. C., § 10490, a defendant sued before a justice of the peace may file an affidavit for interpleader under G. C., § 11265: *Geller v. Puchta*, 1 O. C. C. 30, 1 O. C. D. 18, 13 Bull. 361.

The court of common pleas on appeal from a justice of the peace may allow interpleader under G. C., § 11265, before answer, on proper terms as to costs: *Geller v. Puchta*, 1 O. C. C. 30, 1 O. C. D. 18, 13 Bull. 361.

An action to compel a corporation to transfer a certificate of its stock to the name of the plaintiff, is an action for the specific performance of an equitable duty, and G. C., § 11265, relating to interpleader, does not apply thereto: *Lahman v. Light Co.*, 8 O. N. P. 211, 11 O. D. (N.P.) 215. See also CORPORATIONS.

Denial of interest or ownership by the judgment debtor in the choses in action sought to be subjected raises no issue, and it is error to so find. The person claiming to own them can raise such issue, and the court can, under G. C., §§ 11255 and 11267, and should make him a party: *Krebs v. Forbriger*, 10 Dec. Rep. 506, 21 Bull. 313. See also CREDITOR'S BILL.

III. NATURE.

At common law, there was a remedy by interpleader in law courts, extending only to joint bailments by both claimants, to cases where finder of a chattel was sued in detinue by different claimants, to cases of bailment by one party to rebail to another, and where

the depository was sued in detinue by both: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

Interpleader at common law and in chancery contrasted, etc., see *Bridge v. Martin*, 3 W. L. M. 20.

Remedy by way of common law or chancery interpleader yet exists concurrently with the code interpleader: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

The remedy by chancery interpleader extends to all cases where one or both of the adverse claimants assert a title either at law or in equity and to cases in which one asserts a claim at law and the other in equity, unless both claims are legal and the common law gives relief: *Bridge v. Martin*, 2 Dec. Rep. 410, 3 W. L. M. 20.

A case in interpleader is not ripe for decision where the facts on which the claims of the defendants rest are in contestation: *Goddard v. Leech*, W. 476, 1 Longsdorf's Notes, 38.

In an action for interpleader the court may find the facts for itself, make up an issue, and call a jury under the statute, send the issue to be tried on the law side of the court, or refer the matter to a master: *Goddard v. Leech*, W. 476, 1 Longsdorf's Notes, 38.

An interpleader suit is not in its nature a proceeding *in rem*: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

A bill of interpleader must show that there are proper persons capable of interpleading and setting up opposite claims and that the petition is entitled to maintain the interpleader. It must state distinctly the nature and character of the conflicting claims. It must admit or at least not deny title in either of the claimants. It must show that the plaintiff is ignorant of the rights of the parties who are called upon to interplead, or that there is some doubt in point of law or fact to which claimant the debt or duty belongs. It must show that the plaintiff disclaims any personal interest in the thing in controversy, by citing his own rights so as to negative any such interest. The party interpleading must bring or offer to bring the thing claimed into court, so that he can not be benefited by delay in payment: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369; which was affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

A petition in the nature of an equitable interpleader should set forth generally the nature of the claims that have been made to the fund, so that the court can determine from the petition itself whether an inter-

pleader is proper: *Insurance Co. v. Lea*, 7 O. N. P. 399, 10 O. D. (N.P.) 39.

A case is not changed to a "special proceeding" by bringing in and making a new party in lieu of the original defendant: *Maginnis v. Schwab*, 24 O. S. 336, III Longsdorf's Notes, 176.

The question whether the plaintiff in an interpleader does not owe more than he has admitted can not be raised in the interpleader suit: *Hamilton v. Stilwaugh*, 11 O. C. C. 182, 5 O. C. D. 324.

A motion to quash service on the part of the claimant under a will, based upon the ground that the court has no jurisdiction because the case is not one for interpleader, will be overruled: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

As to interpleader in an action to enjoin the collection of a judgment, see *Liniman v. Dunnick*, 1 O. C. C. 563, 1 O. C. D. 314.

A supplemental answer alleging the necessity of making assignees of claim parties, without a tender of the amount due is not in the nature of an interpleader: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, which was affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

A suit by the assignee to compel the debtor and a creditor to interplead and ascertain the amount due, is equivalent to averring rejection of the claim so that the creditor may ask judgment against the assignee: *Bettman v. Hunt*, 9 Dec. Rep. 396, 12 Bull. 286. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS.

IV. WHO MAY HAVE INTERPLEADER.

Where two or more persons are severally claiming the same debt or property, and the party who is to pay the debt or deliver the property makes no claim of title or interest therein, and does not know to which of the claimants he should pay the debt or deliver the property, he is entitled to the protection of a court of equity: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369, [affirming, *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694, and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

When the plaintiff alleges in his petition the whole amount due on a contract, and prays judgment for a part of it, and there are conflicting claims to the whole amount due, the defendant may, under G. C., § 11265, pay such amount into court, and obtain an order requiring the claimants to interplead in the action and set up their different claims

thereto: *Bank v. Cincinnati*, 8 O. N. P. 517, 10 O. D. (N.P.) 545.

Where a trust is created for the benefit of an incorporated religious society, and there are two bodies, each claiming to be such society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary without compelling either party to establish its corporate rights at law: *Presbyterian Society v. Presbyterian Society*, 25 O. S. 128, III Longsdorf's Notes, 214.

An action to compel a corporation to transfer a certificate of its stock to the name of the plaintiff is an action for the specific performance of an equitable duty and the provisions of G. C., § 11265, do not apply thereto; but the corporation is entitled to have made parties to the petition all persons who have any interest, either present or remote, in the stock question, and where an affidavit for interpleader is filed, which, by the admission of a demurrer, conclusively shows that the ownership of the stock and the right of transfer can not be determined without the presence of such parties, an order will be granted bringing them in: *Lahman v. Gas Light & Coke Co.*, 8 O. N. P. 211, 11 O. D. (N.P.) 215.

The defendants to an action in the nature of an equitable interpleader have the right to insist that the whole fund shall be brought into court and that the petition shall so show, and a motion will not lie to strike from their answers matter which raises an issue with the plaintiff as to whether there is not a larger fund in his hands than he has admitted in his petition: *Board of Education v. Coulter*, 7 O. L. R. 572.

Where a judgment creditor of one who is a legatee or distributee under a will, begins a suit in the nature of a creditor's bill, making the debtor and the administrator with the will annexed parties, it is proper practice for such administrator to interpose, before answer, an affidavit setting forth the grounds for interpleader, and praying that a claimant other than the plaintiff be brought in and required to litigate with the plaintiff as to their respective rights to the fund: *Bank v. Beebe*, 62 O. S. 41, IV Longsdorf's Notes, 823.

Parties interested in a fund may be brought in: *Kloepfinger v. Grasser*, 1 O. C. C. (N.S.) 457, 15 O. C. D. 90.

A defendant in a justice's court against whom an attachment was issued and judgment rendered, the garnishee in the attachment being ordered to pay the amount of judgment into court, has a right to claim exemption in an action of interpleader filed by garnishee, although the defendant in the justice's court did not claim the exemption

allowed by law at any stage of the proceedings in the justice's court: *Rempe v. Ravens*, 8 O. N. P. 513, 11 O. D. (N.P.) 684.

Defendant can not both answer and claim interpleader. An answer waives an interpleader: *Johnston v. Oliver*, 51 O. S. 6, IV Longsdorf's Notes, 527.

A cross-petition may be stricken out when it appears that intervening creditors have no interest in a note, and no defense other than relates to such interpleading parties is made by the payor of the note: *Bank v. Martin*, 1 Hosea, 100.

A defendant ready to pay but not knowing whether to pay plaintiff or another, and asking the protection of equity, is entitled to an order requiring plaintiff to bring in such other claimant, though a nonresident; and plaintiff is thereby required to make a *bona fide* effort to secure the attendance of the nonresident, and if this fails the case must be dismissed without prejudice: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694, affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

Although a defendant has answered to the merits, and thus can not thereafter come under our interpleader statute, yet when the fund is claimed by another and defendant makes no claim and does not know to which claimant to pay, he is entitled to the protection of a court of equity. Our interpleader statute is not exclusive, but only auxiliary: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694; affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

An attorney who has collected a note for a client, if a rival claim is made to the fund, may come into equity by bill of interpleader, pay the money into court and be discharged: *Goddard v. Leech*, W. 476, I Longsdorf's Notes, 38.

A lessee with privilege of purchase, electing to purchase after his lessor has assigned for the benefit of creditors is entitled to a judgment quieting his title, upon paying the money into court, leaving the assignee and an attaching creditor to contend for the money: *Bank v. Werk*, 9 Dec. Rep. 770, 17 Bull. 174.

In an action on a bond discharging an attachment of money in the hands of a garnishee, an interpleader between plaintiff and a third person claiming to have been the owner of the attached money at the time of the attachment should not be ordered or allowed: *Johnston v. Oliver*, 51 O. S. 6, IV Longsdorf's Notes, 527.

K owning a judgment against L, assigned all his property for benefit of creditors, and then again assigned the judgment to D, who got a judgment by default against L. The latter not knowing of the assignment, now seeks to enjoin, it was held that his remedy was to pay into court and interplead all the parties. But an amendment making the petition an interpleader would be allowed: *Linsman v. Dunnick*, 1 O. C. C. 563, 1 O. C. D. 314.

A sheriff sued by a judgment creditor for a share in a fund obtained by executions on other judgments can interplead and have the other judgment creditors substituted in his place as defendants: *McAlpin Co. v. Finsterwald*, 57 O. S. 524, IV Longsdorf's Notes, 727.

V. DISCHARGE OF ORIGINAL PARTY.

A stakeholder with whom money or property has been deposited, may bring it into court and be discharged: *Goddard v. Leech*, W. 476, I Longsdorf's Notes, 38.

Where a party files an interpleader but fails to pay the money into court, he is charged interest up to the time of payment: *Hall Co. v. Lloyd Brothers Co.*, 14 O. C. C. 30, 7 O. C. D. 203.

When parties interpleaded come in and are made parties defendant, the original defendant is discharged: *Cozad v. Shannon*, 7 Dec. Rep. 542, 3 Bull. 865.

The fact that a defendant has demurred to the petition before the affidavit and other proceedings in interpleader, does not authorize a judgment against him personally: *Cozad v. Shannon*, 7 Dec. Rep. 542, 3 Bull. 865.

In an action brought by a mechanic's lienholder against the owner to enforce his lien, the head contractor owing the account may be substituted as defendant, under G. C., § 11265: *Geller v. Puchta*, 1 O. C. C. 30, 1 O. C. D. 18.

A sheriff sued by a judgment creditor for a share in a fund obtained by executions on other judgments can interplead, and have the other judgment creditors substituted in his place as defendants: *McAlpin Co. v. Finsterwald*, 57 O. S. 524, IV Longsdorf's Notes, 727.

Where substitution of parties has been ordered and such parties, before pleading, file a motion for it, a cause may be removed to a federal court before answer: *Hodson v. Railway*, 5 O. F. D. 24, Fed. Cases 6571a.

A case is not changed to a "special proceeding" by bringing in and making a new party in lieu of the original defendant: *Maginnis v. Schwab*, 24 O. S. 336, III Longsdorf's Notes, 176.

VI. SERVICE AND JURISDICTION.

G. C., § 11292, providing for service by publication in certain cases, does not apply to an action in interpleader where brought by the stakeholder, and constructive service can not be made on a non-resident defendant in such an action: *Insurance Co. v. Beraman*, 7 O. N. P. (N.S.) 145, 18 O. D. (N. P.) 772.

In a suit brought against a life insurance company, by the widow of the insured named as the beneficiary in the policy, in the state where the company is located, in which, the company brings into court a sum of money sufficient to satisfy the amount due on the policy and obtains an order requiring the administrator, resident of Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of copy of such order and of citation upon such administrator does not give the court jurisdiction of his person and (their being no appearance or other service on him) a judgment purporting to debar him from any claim or right as against such widow is, as to him, void: *Cross v. Armstrong*, 44 O. S. 613, IV Longsdorf's Notes, 238.

Where a policy of life insurance was issued in Michigan, the residence at that time of both the assured and his wife who was made beneficiary, and an assignment of the policy was afterward made in Michigan to a resident of Michigan, and the assured died in Michigan, and the policy is still held there, and suit has been brought upon it by the assignee in the federal court in that state, an action brought in this state by the beneficiary, who is now a resident here, will be dismissed without prejudice for failure to make a *bona fide* effort to bring in the assignee of the policy as a party to the action, and she will be remanded to the Michigan forum for a determination of her rights: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694; and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

Though mandamus to compel a probate judge to pay over money to parties is not a proper remedy, yet if he answers that he is unable to determine to which party it belongs, and brings the fund into court, this gives jurisdiction to distribute it in the mandamus proceeding: *State v. Irvin*, 1 Dayton Term Rep. (Iddings) 23. See also **MANDAMUS**.

VII. PARTIES.

In a proceeding in equity which involves an accounting and the distribution of a

fund, the court may dismiss the proceeding unless there is a *bona fide* effort made to bring in all the parties who are entitled to a hearing upon the question of distribution: *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369 [affirming *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694; and affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

One having no interest in the subject of a pending action may not become a party for the sole purpose of asserting title to property attached: *Boyer v. Maginnis*, 10 Dec. Rep. 378, 20 Bull. 471.

One not a party in an attachment can not intervene to assert ownership of the property attached: *Gates v. Land Co.*, 9 O. C. C. 378, 6 O. C. D. 163.

Notice to the other parties of an application to be made a party to a case is not required: *Fertel v. Sampliner*, 18 O. C. C. 740, 4 O. C. D. 166.

Where, without formal leave, a person interested comes into the case, and his application is entertained by the court, and his claim heard and determined on the merits, such action of the court is equivalent to a leave to come into the case, notwithstanding such informality: *Weber v. Naltner*, 8 O. N. P. 324, 11 O. D. (N.P.) 401.

Mortgagees of chattels may properly be made parties and resist a replevin brought against an assignee for creditors, even if he represents them, and their interests have passed to him: *Fertel v. Sampliner*, 18 O. C. C. 740, 4 O. C. D. 166.

If a creditor causes the property to be seized and the mortgagee replevies such property from the officer, the creditor may be made a party: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

VIII. PLEADING.

In an action for interpleader it is not necessary to compel one of the defendants to file a formal bill and the other to answer: *Godard v. Leech*, W. 476, I Longsdorf's Notes, 38.

A petition in interpleader should set forth generally the nature of the claims that have been asserted to the fund, so that the court can determine from the petition whether an interpleader is proper. Thus a petition by a life insurance company, averring that two independent persons claim to own the policy and the fund due thereon, should set out the name of the beneficiary and the nature and foundation of the antagonistic claims: *Insurance Co. v. Lea*, 7 O. N. P. 399, 10 O. D. (N.P.) 39.

A bill of interpleader must show: That there are proper persons capable of inter-

pleading and setting up opposite claims and that the petitioner is entitled to maintain the interpleader. It must state distinctly the nature and character of the conflicting claims. It must admit or at least not deny title in either of the claimants. It must show that the plaintiff is ignorant of the rights of the parties who are called upon to interplead, or that there is some doubt in point of law or fact to which claimant the debt or duty belongs. It must show that the plaintiff disclaims any personal interest in the thing in controversy, by citing his own rights so as to negative any such interest. The party interpleading must bring or offer to bring the thing claimed into court, so that he can not be benefited by delay in payment: *Swett v. Insurance Co.*, 8 O. N. P. (N.S.) 569, 20 O. D. (N.P.) 694 [affirmed, *Swett v. Insurance Co.*, 14 O. C. C. (N.S.) 100, 23 O. C. D. 369; affirmed, without opinion, *Swett v. Insurance Co.*, 83 O. S. 470].

A substituted defendant may bring forward any matter material to the assertion of his rights and pertinent to the cause and his pleadings should be construed in the same way and issue joined in the same manner as if he had originally been made a party: *McAlpin Co. v. Finsterwald*, 57 O. S. 524, IV Longsdorf's Notes, 727.

When the subject of the plaintiff's action, as shown by his petition, is different from the subject of the action, as shown by the answer and cross-petition, of a party brought in to interplead, no interpleader should be allowed; and such answer and cross-petition should be stricken from the files, and the action should proceed between the original parties: *Johnston v. Oliver*, 51 O. S. 6, IV Longsdorf's Notes, 527.

Where it appears on the face of the pleadings that interpleading creditors have no interest in a note and no defense other than relates to such interpleading parties is made by the payor of the note, the interpleading cross-petitions may be stricken from the files and judgment rendered on the pleadings: *Bank v. Martin*, 1 Hosea, 100.

In an action on a contract against a municipal corporation and its contractors by an assignee of the contract, where the city has filed an affidavit under G. C., § 11265, averring that the subject of the action was money in its hands and praying that the claimants named therein may interplead and be ordered to settle their claims among themselves, an order made for the deposit of the money in court and requiring such claimants to appear before the court on a day named and maintain their claims to such money, a demurrer will not lie to the original petition, by one of such claimants, on the ground

that it does not state facts sufficient to constitute a cause of action against him, nor entitle plaintiff to the relief sought against him, nor to require him to interplead to the petition: *Bank v. Cincinnati*, 8 O. N. P. 517, 10 O. D. (N.P.) 545.

A judgment on pleadings when all parties are not in court in suit involving ownership of fund is erroneous: *Hadley v. Ellis*, 7 O. C. C. (N.S.) 313, 18 O. C. D. 122 [affirmed, without opinion, *Ellis v. Hadley*, 77 O. S. 623].

It is error to regard a defendant impleading others as being in the case and to grant to him relief personally or to enter up any judgment against him in favor of other parties to the suit or fund unless where he may have been brought into the case again by answer and cross-petition: *Cozad v. Shannon*, 7 Dec. Rep. 542, 3 Bull. 865.

When a party is ordered by the court to interplead in an action, and the subject of the action is not claimed by him, his proper course is to answer, disclaim, or not to plead at all, and is not by a motion to modify the entry of the order of interpleader: *Bank v. Cincinnati*, 8 O. N. P. 517, 10 O. D. (N.P.) 545.

The defendants to an action in the nature of an equitable interpleader have the right to insist that the whole fund shall be brought into court and that the petition shall so show, and a motion will not lie to strike from their answers matter which raises an issue with the plaintiff as to whether there is not a larger fund in his hands than he has admitted in his petition: *Board of Education v. Coulter*, 7 O. L. R. 572 [for decision on exceptions to master's report, see *Board of Education v. Coulter*, 10 O. N. P. (N.S.) 123].

Where a life insurance company makes no defense and pays the amount of its policy into court to abide the judgment of the court as between conflicting claimants, parties claiming an interest in the fund will not be allowed to object that the beneficiary named in the policy has no insurable interest: *Keckley v. Glass Co.*, 86 O. S. 213.

It is not too late for a defendant to file the affidavit for interpleader after he has demurred to the petition. G. C., § 11265, merely requires it to be before answer: *Cozad v. Shannon*, 7 Dec. Rep. 542, 3 Bull. 865.

The petition in an action by a sub-contractor against the owner, to enforce his lien upon money due the head contractor, is not defective in that it fails to aver that there are no other claims on the fund; such fact may be interposed as a defense or by requiring an interpleader to bring in all parties having an interest in the fund: *Kloepfing*

v. *Grasser*, 1 O. C. C. (N.S.) 457, 15 O. C. D. 90. See also *MECHANIC'S LIEN*.

The filing of a motion by a defendant for an interpleader does not amount to the entering of an appearance: *Squire v. Railway Co.*, 1 O. C. C. (N.S.) 354, 15 O. C. D. 30. See also *APPEARANCE*.

IX. INTEREST ON FUND.

Where a particular fund is paid into court in compliance with its order of interpleader, and various claimants litigate between themselves as to their rights to the fund, a decree distributing the fund will not bear interest, and an intervening claimant who prosecutes error to that decree in good faith, and give a *supersedeas* bond to stay execution can not be compelled, in a suit on the bond, to pay interest on the fund or any part of it: *Bank v. Bruns*, 84 O. S. 12.

Where default is made under an order for the payment of money into court, interest will run upon the amount so retained: *Melanpy v. Building and Loan Co.*, 13 O. D. (N.P.) 192.

Failure to pay the fund into court by the party filing the interpleader renders him liable for interest thereon up to the time of payment: *Catholic Knights of America v. Lloyd Bros.*, 14 O. C. C. 30, 7 O. C. D. 203.

An order of the court distributing a fund, paid into court on its order of interpleader, among the contesting claimants, is not a judgment order or decree which will bear interest under G. C., § 8305, and an intervening claimant who in good faith, but unsuccessfully prosecutes error, is not liable for interest to the other claimants whose money was thereby held up: *Bank v. Bruns*, 84 O. S. 12.

A fund brought into court on an order of interpleader can be ordered to be invested on motion of any of the lienholders: *Bank v. Bruns*, 84 O. S. 12, 20.

An owner made party to a suit by sub-contractors against the contractor must, to relieve himself from interest, pay the amount into court. Merely expressing a willingness so to do in his answer will not relieve him: *Hardware Co. v. Slade*, 3 O. C. C. 67, 2 O. C. D. 38.

If the owner is plaintiff and interpleads without bringing in the money, interest should be added to the fund: *Port Clinton v. Stone Co.*, 10 O. C. C. 1, 6 O. C. D. 218. See also *MECHANIC'S LIEN*.

X. APPEAL.

In an action of interpleader by mortgagors against conflicting claimants of the

notes, in order to ascertain to whom to pay, the issues between the defendants are for money only, and triable by jury, hence they are not appealable: *Warner v. Jaeger*, 5 O. C. C. 16, 3 O. C. D. 9.

If a defendant, sued for money (on a life insurance policy), interpleads adverse claimants, and pays the fund into court, the contest between these claimants is not appealable: *Pratt v. Insurance Co.*, 5 O. C. C. 587, 3 O. C. D. 287.

Where a sheriff holding the proceeds of an execution sale on several judgments is sued by a judgment creditor, whom he had refused participation, for his share, and the other execution creditors are substituted as defendants, and by cross-petition attack plaintiff's judgment as unauthorized and void, the issue thereby made is equitable, and there is no right to a jury, and appeal therefore lies: *McAlpin Co. v. Finsterwald*, 57 O. S. 524, IV Longsdorf's Notes, 727.

If a sub-contractor sues the owner before a justice, on a claim under the mechanic's lien law, and the case is appealed to the common pleas, where the owner by cross-petition avers that he holds a fund on which there are several claimants, and interpleads them, it was held that the case on the cross-petition was an equity case, with all the incidents of an original jurisdiction, including a right of appeal to the district court: *Foeller v. Voight*, 5 Dec. Rep. 336, 4 Am. L. Rec. 671.

Where L asked a money judgment and foreclosure of a mechanic's lien against M, who interpleaded other parties and paid the money into court, no appeal can be taken by L as against the other claimants, for none could be taken against M; and as she was a necessary party to the appeal, the same rule applies to the others: *Lumber Co. v. Marsh*, 16 O. C. C. 432, 8 O. C. D. 624 [affirmed, without opinion, *Lumber Co. v. Marsh*, 63 O. S. 632].

Substitution of a third person as defendant by interpleader under G. C., § 11265, does not convert the action into a special proceeding, but it remains a civil action, and to be proceeded with as such. Hence, if a money demand, there is no appeal, but a right to a jury: *Maginnis v. Schwab*, 24 O. S. 336, III Longsdorf's Notes, 176. See also *APPEALS*.

INTERPOLATION.

See *ALTERATION OF INSTRUMENTS; AMENDMENT*.

INTERPRETATION.

For the interpretation of contracts, see **CONTRACTS**; **PUBLIC CONTRACTS**.

For the interpretation of instruments in writing, see **CONTRACTS**; **DEEDS**; **LEASE**; **MORTGAGES**; **INSTRUMENT IN WRITING**.

For the interpretation of statutes, see **STATUTES**.

For the interpretation of wills, see **WILLS**, **LEGACIES AND DEVISES**.

INTERPRETER.

The qualifications of an interpreter in a court proceeding is a matter within the sound discretion of the court: *Fennel v. State*, 1 O. C. C. (N.S.) 32, 14 O. C. D. 583.

INTERROGATORIES.

For interrogatories annexed to pleadings, see **DISCOVERY**, **BILLS OF DISCOVERY AND INTERROGATORIES**.

For interrogatories to jury, see **VERDICT**.

INTERRUPTION.

See **TRIAL**.

For interruption of the period of limitations, see **LIMITATIONS**, **STATUTE OF**.

INTERSTATE BOUNDARIES.

See **STATE**.

INTERSTATE BRIDGE.

See **BRIDGES**.

INTERSTATE COMITY.

For interstate comity, see **COMITY**.

INTERSTATE COMMERCE.

For interstate commerce, see also **CONFLICT OF LAWS**.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made is interstate commerce: *In re Julius*, 4 O. C. C. (N.S.) 604, 16 O. C. D. 423.

Interstate commerce is not subject to state taxation, even though there be no discrimination between it and domestic commerce. The sale in one state of goods manufactured in another state is interstate commerce and

not subject to state taxation: *In re Julius*, 4 O. C. C. (N.S.) 604, 16 O. C. D. 423.

A manufacturer of goods which are legitimate subjects of commerce, who carries on his business of manufacturing in one state, can send an agent into another state to solicit orders for the products of his factory without paying to the latter state or a municipality within such state a license for the privilege of such soliciting to sell his goods: *In re Julius*, 4 O. C. C. (N.S.) 604, 16 O. C. D. 423.

A license tax imposed by a municipal corporation within one state upon an agent of a citizen of another state, for the privilege of selling or seeking to sell his goods in the former state, is a direct burden on interstate commerce, and, therefore, beyond the power of the state and of the municipality thereof: *In re Julius*, 4 O. C. C. (N.S.) 604, 16 O. C. D. 423.

An ordinance of a municipality of this state, under which a license fee is required from the agent of a portrait company residing in another state for the privilege of canvassing for orders for the copying or enlarging of pictures to be manufactured by said company in said foreign state and delivered to customers in said municipality, is in conflict with Art. I, § 8, of the constitution of the United States, and, therefore, void: *In re Julius*, 4 O. C. C. (N.S.) 604, 16 O. C. D. 423.

The general rule that no action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of Ohio, is so modified by the federal employers' liability act, of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, as to permit the maintenance of such action by the proper representative of a deceased employe of an interstate railway carrier, though said employe was not a citizen of Ohio and was killed in some other state: *Waring v. Railroad*, 15 O. C. C. (N.S.) 33, 23 O. C. D. 194.

The common law rule that a shipper is bound by the valuation of goods, which is given by him for the purpose of fixing the rate to be charged for the transportation of such goods, is not abrogated by the interstate commerce act: *Cohn-Goodman Co. v. Express Co.*, 13 O. C. C. (N.S.) 467, 22 O. C. D. 190 [affirmed, without opinion, *Cohn-Goodman Co. v. Express Co.*, 87 O. S. 458].

The seizure under writ of attachment of a Pullman sleeping car, occupied by interstate passengers and en route from Columbus, Ohio, to Washington, D. C., requiring

the trans-shipment of passengers and enforcing the detention of said car for a considerable period, render liable as for conversion the sheriff who made the seizure and the attaching creditor and his attorney who actively assisted in said seizure: *Pullman Co. v. Linke*, 11 O. L. R. 63.

A foreign corporation whose business is furnishing refrigerator cars and ice therefor, for transportation purposes, partly within this state, and partly without and across this state, is a "transportation or other corporation engaged in Ohio in interstate commerce business" within the meaning of G. C., § 188: *Fruit Co. v. Car Lines*, 74 O. S. 168, IV Longsdorf's Notes, 1008 [reversing *Car Lines v. Fruit Co.*, 5 O. C. C. (N.S.) 161, 16 O. C. D. 496]. See also CORPORATIONS.

The ownership of game animals and birds is in the state in its sovereign capacity, and the question of possession or ownership by an individual is one not of public right but of public policy, and may be regulated and restrained by legislation enacted for the common good: *Fitton v. State*, 1 O. N. P. (N. S.) 133, 14 O. D. (N.P.) 156. See also GAME-LAWS.

INTERSTATE COUNTY DITCH.

See DITCHES.

INTERSTATE EXTRADITION.

See EXTRADITION.

INTERSTATE RAILROAD.

See CARRIERS; RAILROADS; INTERSTATE COMMERCE.

INTERURBAN RAILROADS.

See STREET RAILWAYS AND INTERURBAN RAILWAYS.

INTERVENING CAUSE.

See NEGLIGENCE; TORTS, and cross references thereunder.

INTERVENOR.

A bank holding a warehouse receipt for the property as security is a proper defendant in *replevin* by the consignor and owner

against the warehouseman holding under the consignee: *Cleveland v. Shoeman*, 40 O. S. 176, IV Longsdorf's Notes, 16. See also REPLEVIN.

A mortgage of a curtesy being void by statute the beneficiaries of the statute, namely, the children, should be held sufficiently interested to be heard to resist an attempt to enforce it: *Robert v. Sliffe*, 41 O. S. 225, IV Longsdorf's Notes, 58.

Where an indorsee of a note sues on it an equitable owner by prior transfer made by a separate instrument may though not a party to it intervene by cross-petition and set up his title: *Kernohan v. Durham*, 48 O. S. 1, IV Longsdorf's Notes, 399.

An indorsee in possession under a blank indorsement is *prima facie* owner and entitled to sue, but this presumption may be rebutted and the rights of the real owner established: *Osborn v. McClelland*, 43 O. S. 284, IV Longsdorf's Notes, 166.

The real owner may intervene and by cross-petition obtain the relief to which he is entitled as against the indorsee or holder suing as apparent owner: *Osborn v. McClelland*, 43 O. S. 284, IV Longsdorf's Notes, 166.

A cross-petition by a stranger not a necessary party to settle the controversy in the original case, can not be injected by him into the case as where in an action by the holder of a note against the maker a third person seeks to come in and contest the plaintiff's right and assert a right in himself. Only a defendant can interplead another person: *Hillier v. Stewart*, 26 O. S. 652, III Longsdorf's Notes, 337.

If a reply is filed to the cross-petition a demurrer to the reply will react back to the right to file such cross-petition: *Hillier v. Stewart*, 26 O. S. 652, III Longsdorf's Notes, 337.

Trustees or mortgagees of a railroad under a trust deed may be let in under G. C., § 11255, to resist an action for money against the road: *Carey v. Railroad Co.*, 2 Dec. Rep. 85, 1 W. L. M. 338.

If sureties on a third bond of an executor are liable for the entire deficit, judgment will be rendered without delaying the case to ascertain whether other sureties made parties are liable to contribute, there being no priority between the parties: *Foster v. Wise*, 46 O. S. 20, IV Longsdorf's Notes, 308.

Where a contractor to build a railroad, in order to raise funds mortgaged property to the president of the road, who now seeks to foreclose, unpaid contractors, who claim that the contractor was not, in fact, such, but was only agent of the road, and re-

ceived the mortgaged property from the road in fraud of creditors, and that they are, in fact, the chief contractors, may come into the suit to deny the *bona fides* of the mortgage, they having a lien by attachment: *Bartlett v. Patterson*, 9 Dec. Rep. 73, 10 Bull. 367.

Subsequent attaching creditors in an action after judgment to determine priorities may attack and defeat the lien of a prior attachment on the ground not of mere irregularity or informality, but that it was issued without authority of law: *Seibert v. Switzer*, 35 O. S. 661, III Longsdorf's Notes, 818.

Other attaching creditors may attack an attachment but have not the same latitude as the debtor has, since he may waive informalities not going to the jurisdiction: *Ward v. Howard*, 12 O. S. 158, II Longsdorf's Notes, 553.

Irregularities in omitting requirements designed for the debtor's protection, as the attachment bond or defects in the affidavit, do not affect the validity as to other creditors or buyers. The debtor himself must object, or they are waived. *Contra* of provisions requiring notoriety as the presence of two freeholders in attaching and taking the property into custody, for these are for the protection of third persons, and they may dispute the validity if omitted: *Root v. Railroad Co.*, 45 O. S. 222, IV Longsdorf's Notes, 270.

A mortgagee of land is not a proper party to an action for money only, in which an attachment on the land is levied, for the plaintiff can not have relief in equity to reach the equity of redemption until after judgment and execution. Hence, if the attachment is void a decree of foreclosure without independent service falls with it: *Endel v. Leibrock*, 33 O. S. 254, III Longsdorf's Notes, 672.

A subsequent attaching creditor can raise questions of priority by motion, but not by answer, and is not a proper party to the action: *Harrison v. King*, 9 O. S. 388, II Longsdorf's Notes, 383.

In an attachment case it is error to allow other attaching parties to come in as parties. They may attack the attachment on the ground of want of jurisdiction, though not for informalities, but they must do so on distribution, or in some other suit: *Ward v. Howard*, 12 O. S. 158, II Longsdorf's Notes, 553.

A third person such as the debtor's wife claiming attached real estate, by having an interest in the attachment, does not have an interest in the action or defense, and, hence, can not intervene, for this would be combining two lawsuits: *Boyer v. Maginnis*,

10 Dec. Rep. 378, 20 Bull. 471. See also ATTACHMENT.

A bond by the continuing partner to the retiring partner to settle all the debts is not a mere indemnity which can not be sued on until damage has occurred, but is a contract to pay, and the retiring partner may before paying any debts get judgment on it, and the court may have the creditors made parties and permit the obligors to pay them and credit the amounts on the judgment: *Wilson v. Stillwell*, 9 O. S. 467, II Longsdorf's Notes, 390. See also BONDS, SURETY.

The lien of the partners for just distribution will be available to creditors in a suit by a member of an insolvent firm for dissolution, receiver and winding up, and an unsecured creditor can intervene to contest preferences: *Bell v. Miller*, 11 Dec. Rep. 163, 25 Bull. 126. See also PARTNERSHIP.

If the husband, at her instance, recovers judgment in his own name for the loss of her trunk and contents, and his creditor garnishes the fund, she can come into the case by counterclaim and obtain an injunction, treating the husband as a trustee: *Pierson v. Smith*, 9 O. S. 554, II Longsdorf's Notes, 398 [affirming *Pierson v. Smith*, 13 Dec. Rep. 637, 2 Gaz. 104, 1 D. 305]. See also HUSBAND AND WIFE.

All the obligors on a bond must join in asking relief against a judgment on it: *Pollard v. Collier*, 8 O. 43, I Longsdorf's Notes, 412. See also PARTIES.

Under publication for unknown owners, a person claiming the entire title is not a mere volunteer, but may come in and set up a title by occupancy to prevent partition: *Harman v. Kelley*, 14 O. 502, I Longsdorf's Notes, 683. See also PARTITION.

The attaching creditors may equally come in and set up their rights for themselves, and may also come in after appeal to the district court. The right of possession having been determined as between the mortgagee and the officer, the court must retain the case to adjudicate on the counterclaim: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

In replevin by a mortgagee a prior mortgagee can not by cross-petition claim that he allowed the plaintiff to sell and is entitled to the proceeds, and such claim amounts to a charge that plaintiff is trustee of the proceeds for the cross-petitioner, and such claim can not be intruded into the case: *Colwell v. Aitchison*, 7 Dec. Rep. 101, 1 Bull. 111.

Whether a third person can become a party to the replevin, and by cross-petition claim the property, was queried but not decided: *Parkinson v. Bank*, 5 Dec. Rep. 317, 4 Am. L. Rec. 401. See also CHATTEL MORTGAGES.

Unsecured creditors of an insolvent may intervene and contest the right of chattel mortgages to be paid out of the proceeds of sale: *Saylor v. Simpson*, 45 O. S. 141, IV Longsdorf's Notes, 264 [affirming *Simpson v. Saylor*, 2 O. C. C. 73, 1 O. C. D. 370; *In re Manufacturing Co.*, Goebel 256; reversing *In re Manufacturing Co.*, 9 Dec. Rep. 637, 16 Bull. 38]. See also COURTS.

INTERVENTION.

For intervention, see also INTERPLEADER; PARTIES.

To an action of replevin by a mortgagee of personal property against an officer holding the property by virtue of legal process for the satisfaction of a debt of the mortgagor, the creditor may cause himself to be made a party defendant and, by counter claim therein may set up and enforce his right to relief: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

After an action in replevin by a mortgagee of personal property against an officer holding the property by virtue of legal process for the satisfaction of a debt of the mortgagor, has been appealed to the district court, it is not too late for the creditor to come in as a party defendant and set up his claim, provided the fact of seizure has been set up as a defense by the officer in the court below: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

Where a creditor of the mortgagor of personal property causes the same to be seized by legal process for the satisfaction of his debt, he acquires thereby a lien upon the property, subject to the rights of the mortgagor, and may sustain an action against the latter to redeem the property, or for other proper equitable relief: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

Where creditors of a mortgagor have intervened in an action in replevin by a mortgagee of personal property against the officer holding such property by virtue of legal process on behalf of such creditors, it is the duty of the court when the issues between the mortgagee and the officer as to right of property and possessions have been determined by the verdict of the jury and judgment entered, to retain the cause for further adjudication, so far as regards the counter claims of the creditors: *Morgan v. Spangler*, 20 O. S. 38, II Longsdorf's Notes, 978.

A subsequent attaching creditor can raise questions of priority by motion, but not by answer, and is not a proper party to the action: *Harrison v. King*, 9 O. S. 388, II Longsdorf's Notes, 383.

In an attachment case it is error to allow other attaching parties to come in as parties. They may attack the attachment on the ground of want of jurisdiction, though not for informalities, but they must do so on distribution, or in some other suit: *Ward v. Howard*, 12 O. S. 158, II Longsdorf's Notes, 553.

An assignee for benefit of the creditors of an attachment debtor has no standing in court to move to set aside the attachment levied before the assignment, for creditors themselves could not intervene. The assignee can sell, and liens attach, to the fund, and must be worked out in the probate court: *Stichtenoth v. Lumber Co.*, 7 O. N. P. 235, 1 O. D. (N.P.) 352.

In attachment proceedings where it is sought through the answer to a garnishee process to hold the funds of one who is a stranger of the action, pending the obtaining of jurisdiction over the defendant by publication, the owner of the fund is "interested" in the proceedings within the meaning of G. C., § 11370, and upon intervening by motion to discharge the attachment he has the right to be heard: *Soap Co. v. Brankamp*, 5 O. N. P. (N.S.) 252, 18 O. D. (N.P.) 92.

In an attachment, as in execution, one claiming to be the real owner of the property can not intervene in order to contest the debtor's right to the property. He must resort to an independent action, as replevin. *Gates v. Land Co.*, 9 O. C. C. 378, 6 O. C. D. 163.

A mortgagee of land is not a proper party to an action for money only, in which an attachment on the land is levied, for the plaintiff can not have relief in equity to reach the equity of redemption until after judgment and execution. Hence, if the attachment is void a decree of foreclosure without independent service falls with it: *Endel v. Leibbrook*, 33 O. S. 254, III Longsdorf's Notes, 672. See also ATTACHMENT.

If the husband, at her instance, recovers judgment in his own name for the loss of her trunk and contents, and his creditor garnishes the fund, she can come into the case by counter-claim and obtain an injunction, treating the husband as the trustee: *Pierson v. Smith*, 9 O. S. 554, II Longsdorf's Notes, 398 [affirming *Pierson v. Smith*, 12 Dec. Rep. 637, 2 Gaz. 104, 1 D. 305]. See also HUSBAND AND WIFE.

A creditor who by garnishment becomes assignee of his debtor's rights in an estate is entitled to come into his debtor's litigation in another court against such estate in order to protect his interest: *Keuhler v. Temmen*, 8 O. N. P. 21, 8 O. D. (N.P.) 584.

Third persons claiming interests in the property can not contest plaintiff's cause of action. The debtor alone can do that. Questions as to the rights of third persons collateral to any issue, can not be tried in the original case: *Vallette v. Bank*, 12 Dec. Rep. 299, 2 H. 1.

A third person—as here, the debtor's wife claiming attached real estate—by having an interest in the attachment, does not have an interest in the action or defense, and, hence, can not intervene, for this would be combining two lawsuits: *Boyer v. Maginnis*, 10 Dec. Rep. 378, 20 Bull. 471.

A guaranty to save another from "liability" on debts—as here to an outgoing partner—unlike saving harmless or from damages, may be sued upon when judgment has been had against the indemnified party on a liability, though he has not paid it, and the creditor may intervene in the action so as to obtain the fruits of the action: *Pratt v. Walworth*, 15 O. C. C. 412, 8 O. C. D. 472 [affirmed, without opinion, *Walworth v. Pratt*, 62 O. S. 639]. See also SURETY.

In an action on an account, an intervening pleading claiming ownership as against plaintiff may be filed by a receiver, showing that the ownership was adjudicated to him in a former suit to which plaintiff was a party: *Stewart v. Rouzer*, 1 Dayton Term Rep. (Iddings) 83. See also PARTIES.

A petition by partners for a receiver averring that the withdrawal of a partner six months before had crippled the firm's resources and rendered it unable to meet the obligations shows that it had no reasonable expectation of paying for goods thereafter bought, and the seller intervening is entitled to the proceeds of the sale of his goods: *Gobrecht v. McDonald*, 5 O. N. P. 427, 8 O. D. (N.P.) 526. See also SALES.

Unsecured creditors of an insolvent may intervene and contest the right of chattel mortgages to be paid out of the proceeds of sale: *Saylor v. Simpson*, 45 O. S. 141, IV Longsdorf's Notes, 264 [affirming *Simpson v. Saylor*, 2 O. C. C. 73, 1 O. C. D. 370; *In re Manufacturing Co.*, Goebel 256; reversing *In re Manufacturing Co.*, 9 Dec. Rep. 637, 16 Bull. 38]. See also COURTS.

INTER VIVOS.

For gifts *inter vivos*, see GIFTS.

INTESTACY.

See INTESTATE.

INTESTATE.

See DESCENT AND DISTRIBUTION; WILLS, LEGACIES AND DEVISES; DOWER.

"Intestate" means without having made a will: *Goff v. Moore*, 11 O. N. P. (N.S.) 543.

Where A died testate as to part of his property, and intestate as to the residue, leaving a widow who elected to take under his will, it was held that such election did not bar the right of such widow to her distributive share of the personal estate not disposed of by the will: *Bane v. Wick*, 14 O. S. 505, II Longsdorf's Notes, 681.

After a widow has elected to take under her husband's will, she is not entitled to dower in the real property of her deceased husband of which he died intestate: *Swihart v. Swihart*, 7 O. C. C. 338, 4 O. C. D. 624.

A widow, by electing to take under her deceased husband's will, is not barred of dower in the realty of which he died intestate unless the will expressly stipulates that such provision shall be in lieu of dower: *In re McDonald*, 2 O. N. P. 232, 4 O. D. (N. P.) 396.

Election by a widow to take under the will of her deceased husband does not preclude her inheritance of lands as to which her husband died intestate and to which no reference was made in his will: *Bowers v. McGill*, 12 O. N. P. (N.S.) 124, 22 O. D. (N.P.) 407.

One who leaves a will which bequeaths a life estate only in realty inherited from a deceased spouse, permitting the fee to go where the statute sends it, does not die intestate as to said fee, and in consequence the fee passes under the provisions of G. C., § 8574, rather than § 8577: *Goff v. Moore*, 11 O. N. P. (N.S.) 543.

INTESTATE SUCCESSION.

See DESCENT AND DISTRIBUTION.

INTIMIDATION.

A display of force, though none is actually used, such as where groups of members of a labor union visit non-union workmen at their homes or places of work in pursuance of an unlawful purpose against the employer, is "intimidation," and unlawful: *Hillenbrand v. Trades Council*, 14 O. D. (N.P.) 628. See also BOYCOTTS AND STRIKES; LABOR.

The mere relation of employer and employe does not create a presumption of intimidation in the case of employes whose signatures to a local option petition were solicited by superintendents under whom they were employed: *In re Local Option*, 5 O. L. R. 517, 53 Bull. 9. See also INTOXICATING LIQUOR.

INTOXICATED PERSON.

See INTOXICATION.

